THE INDIAN DECISIONS, NEW SERIES.

MADRAS, VOL. IV.

THE

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PANICKER & PANICKER
ADVOCATES
ERNAKULAM.

EDITED BY

THE LAWYER'S COMPANION OFFICE

TRICHINOPOLY AND MADRAS

MADRAS, VOL. IV

(1888—1890)

I.L.R., 11 to 13 MADRAS

PUBLISHED BY

T. A. VENKASAWMY ROW

AND

T. S. KRISHNASAWMY ROW

Proprietors, The Law Printing House and The Lawyer's Companion Office, Trichinopoly and Madras

1914

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SB
450.70
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v. 4

PRINTED AT
THE LAW PRINTING HOUSE
MOUNT ROAD, MADRAS.

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INDIAN DECISIONS

NEW SERIES.

MADRAS—VOL. IV.

I.L.R., 11 MADRAS.

11 M. 1.

1887
APRIL 15.
APPELLATE CIVIL.
11 M. 1.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Kernan.

LAKSHMANAN (*Petitioner*), *Appellant v.* MUTTIA AND OTHERS (*Defendants*), *Respondents.** [15th April, 1887.]

Civil Procedure Code, Sections 345, 352—*Insolvency—Procedure on claim made by creditor—Proof of debt.*

It is open to a creditor, at any time while the assets of an insolvent are undistributed, to produce evidence of his debt and to apply to be admitted on the schedule under Section 352 of the Code of Civil Procedure.

APPEAL against the order of T. Weir, District Judge of Madura, on civil miscellaneous petition No. 441 of 1886.

This was an application in the insolvency of one Lakshmanan Chetti by a scheduled creditor, who had been *ex parte* throughout the proceedings and had not up to the date of the present application taken any steps to prove his debt.

Bhashyam Ayyangar, for appellant.

Respondents were not represented.

The further facts of this case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and KERNAN, J.).

JUDGMENT.

In this case the appellant is stated in the application of the insolvent, under Section 345, to be a creditor, and [2] the amount due to him is stated in that application. A receiver was appointed, and there are assets to divide. The appellant applied to be paid, either by dividend or in full, which is not stated, but it is not material. The Judge held that the appellant is out of Court, because he did not prove his debt. No doubt

* Appeal against Order 10 of 1887.

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Section 352 requires creditors to "produce evidence of the amount and particulars of their pecuniary claims." But the Act does not fix any special time for making such affidavit. Section 352 says the creditors shall then, that is, after, but not necessarily immediately after, the Court declares the applicant insolvent, produce such evidence. The Court does not appear to have fixed any time to determine under Section 352 who the creditors are, nor does it appear that any schedule was framed under that such section. But if such schedule was framed, it is still open to the creditor at any time while the assets are undistributed, to produce the evidence of his debt and apply to be admitted on the schedule under Section 352. This is the course in all bankruptcy and insolvency proceedings. Section 356 of course is to be read with the other sections. The Judge should have, on the appellant's application, directed him to produce evidence of the particulars and amount of his debt within a reasonable time. If the appellant did not do so, then he need not be named as a creditor on the schedule under Section 352. The appellant is an admitted creditor. We reverse the order of the District Judge and direct him to proceed on the application of the creditor according to the above directions. Appellant should apply, as soon as possible, to the District Judge for liberty to produce his evidence on a day to be fixed, and that his name be placed on the schedule, and for payment.

No costs of this application are granted.

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11 M. 3.

[3] APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

QUEEN-EMPRESS *v.* SUBBA AND OTHERS.* [22nd August, 1884.]

Criminal Procedure Code, Section 195—*Sanction to prosecute—Registration Act,* 1877—*Act III of* 1877, *Section* 34—*Forged document registered by Sub-Registrar.*

A Sub-Registrar acting under Section 34 of the Registration Act, 1877, is not a "Court" within the meaning of Section 195 of the Code of Criminal Procedure.

[F., 4 M.L.J. 189 (192); R., 12 M. 201 (202).]

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by the Acting Sessions Judge of Coimbatore.

The case was stated as follows:—

"The complaint was one of forgery under Section 467 of the Indian Penal Code. The document had been duly registered by the Sub-Registrar of Kangayam, but had not been filed in any Civil, Criminal, or Revenue Court. The Acting Joint Magistrate held that he had no jurisdiction to entertain the complaint since sanction had not been granted by the Sub-Registrar under Section 195 of the Code of Criminal Procedure.

"Section 195, Clause (*c*) of the Code of Criminal Procedure, provides that no Court shall take cognizance of such offence without previous sanction, 'when such offence has been committed by a party to any proceedings in any Court in respect of a document given in evidence in such proceedings.' The questions, therefore, are (1) whether the Sub-Registrar

* Criminal Revision Case 362 of 1884.

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is a Court? (2) and whether the document was given in evidence in any proceeding?

"The Acting Joint Magistrate points out that, under the old Procedure Code (Act X of 1872), Section 469, the offence must have been committed in a Civil or Criminal Court, whereas the wording of Section 195 of the present Code 'any Court' is much wider. Taking the definition of the word 'Code' as defined in [4] Section 3 of the Evidence Act, he holds that the Sub-Registrar is a 'Court,' being a person legally authorized to take evidence.

"In High Court Proceedings of 12th May 1881, No. 962 (*vide* Weir's Criminal Rulings, page 400), it was held that a Registrar acting under Sections 73, 74 and 75 of the Registration Act was a 'Court' within the meaning of Section 469 of the old Criminal Procedure Code, but that the Sub-Registrar was not. The Indian Evidence Act was in force at the date of that ruling, and it must be supposed that the Judges had in view the definiton of 'Court' in Section 3 of that Act. The Judges there point out that the Registrar is a Judge, because he determines a question between the parties and the document is given in evidence before him as to its being executed.

"The duties of a registering officer are defined in Section 34 of the Indian Registration Act. Even supposing a Sub-Registrar to be a 'Court' within the meaning of Section 3 of the Evidence Act, I doubt if the document can be said to be 'given in evidence in any proceeding before him.' The Sub-Registrar has only to inquire upon certain points. If execution be denied, he cannot register and has no power to take evidence whether or not the document was really executed, but he may examine witnesses (Section 35) as to the identity of the parties before him, but on no other point. He cannot, therefore, take any evidence with respect to the document itself, and I doubt, therefore, whether the document can be said to be 'given in evidence in a proceeding before him.'

"On these grounds it appears to me that the sanction of the Sub-Registrar was not necessary for the entertainment of the complaint, and as the point is one of importance, I refer the matter for the orders of the High Court."

Rama Rau, for the accused.

The Court (TURNER, C.J., and HUTCHINS, J.) delivered the following

JUDGMENT.

The Sub-Registrar is not a Court.

For certain purpose it has been declared that the term "Judicial proceedings" shall include proceedings before Registering officers, namely, in order to bring those proceedings within the purview of Section 228, Indian Penal Code; and for other similar purposes it has been declared that Registrars are and that Sub-Registrars are not to be deemed a Court, namely, to extend to the Registrar the power of punishing for contempt. These provisions [5] do not constitute Registering officers "Courts" generally, and, on the other hand, they would be unnecessary if the legislature regarded such officers as "Courts." The Joint Magistrate's order is set aside and he is directed to proceed with the inquiry.

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APRIL 29.

FULL BENCH.

11 M. 5 (F.B.) = 11 Ind. Jur. 409.

11 M. 5 (F.B.) = 11 Ind. Jur. 409.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt and Mr. Justice Parker.

GOVINDAYYAR (*Plaintiff No.* 2), *Appellant v.* DORASAMI AND OTHERS (*Defendants*), *Respondents.** [9th October, 1884. and 29th April, 1887.]

Hindu Law—Adoption among Brahmans—Datta Homam, when it may be dispensed with.

The ceremony of Datta Homam is not essential to a valid adoption among Brahmans in Southern India, when the adoptive father and son belong to the same gotra. *Singamma* v. *Ramanuja Charlu* (1) approved and followed. *Shoshinath Ghose* v. *Krishnasunderi Dasi* (2) considered.

[**Appr.**, 24 B. 218 (223); **R.**, 24 B. 473 (480); 13 M. 214 (219); 27 M. 538 (539) = 14 M.L.J. 340; **D.**, 15 Ind. Cas. 184 = 11 M.L.T. 187 = (1912) M.W.N. 173.]

SECOND appeal from the decree of H. Wigram, District Judge of Coimbatore, in Appeal Suit No. 279 of 1883, affirming the decree of T. Ramasami Ayyangar, District Munsif of Coimbatore, in Original Suit No. 579 of 1882.

This was a suit by the plaintiffs for the recovery of certain lands conveyed to them by defendant No. 4, the widow of one Sulur Subba Ayyar, deceased. Defendant No. 1 contended that he was the heir of the deceased Sulur Subba Ayyar, being his son by adoption. The parties were Brahmans; and defendant No. 1 belonged previously to his adoption to the same gotra as the late Sulur Subba Ayyar.

The Lower Courts found that the adoption of defendant No. 1 was valid, although the ceremony of Datta Homam had not been performed.

The plaintiffs preferred this second appeal.

This second appeal came on for hearing before Collins, C. J., and Kernan, J., who referred to the Full Bench the question of the validity of the adoption of defendant No. 1.

[6] *Bhashyam Ayyangar* and *Desika Charyar*, for appellant.

The Acting Advocate-General (Hon. Mr. *J. H. Spring Branson*) and *Rama Rau*, for respondents.

The arguments adduced on the second appeal appear sufficiently for the purposes of this report from the judgment of the Court.

The Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT and PARKER, JJ.) delivered the following

JUDGMENT.

The question which is referred to the Full Bench in this second appeal is whether Datta Homam is an imperative part of a valid adoption in Southern India. That ceremonial adoption is not indispensable among Sudras may now be taken to be concluded by authority. So it was held by the Privy Council in 1879 in regard to Bengal, in *Indromoni Chowdhrani* v. *Behari Lal Mullick* (3) and by the late Supreme Court of Madras in the case of *Veeraperumall Pillay* v. *Narain Pillay* (4); *Singamma* v. *Ramanuja Charlu* (1), decided by the High Court of Madras in 1868, is also an

* Second Appeal No. 405 of 1884.

(1) 4 M.H.C.R. 165.
(2) 6 C. 381.
(3) 7 I.A. 24.
(4) Strange's Notes of Cases, 117.

authority, and in *Chandramala* v. *Muktamala* (1), the only doubt appeared to be if it was correct law in regard to the three higher classes only. In support of the course of decisions, there is also the fact that Sudras are incompetent to recite Vedic texts and that such texts are prescribed for the performance of Datta Homam.]

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FULL BENCH.

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Thus, giving and taking, evidenced by an overt act, are the only elements of a legal adoption among Sudras, but it must be observed that any overt act is not sufficient. In *Shoshinath Ghose* v. *Krishnasunderi Dasi* (2), the Judicial Committee observed as follows :—"All that has been "decided is that among Sudras no ceremonies are necessary in addition to "the giving and taking a child in adoption.The mode of giving and taking "a child in adoption continues to stand on Hindu law and on Hindu "usage, and it is perfectly clear that amongst the twice-born classes, there "could be no such adoption by deed, because certain religious ceremonies, "the Datta Homam in particular, are in their case requisite. The system "of adoption seems to have been borrowed by the Sudras from these "twice-born classes, whom in practice, as appears by several of the cases, "they imitate as much as they can, adopting those purely ceremonial "[7] and religious services which, it is now decided, are not essential "for them in addition to the giving and taking in adoption." "It would "seem, therefore, that according to Hindu usage which the Courts should "accept as governing the law, the giving and taking in adoption ought to "take place by the father handing over the child to the adoptive mother "and the adoptive mother declaring that she accepts the child in adoption." The contest in that case was whether a mere execution of deeds was an overt act sufficient to constitute an adoption, and the decision is an authority for the proposition that any overt act is not sufficient, but that there must be corporeal delivery of the child by a person competent to give, to a person competent to take, accompanied by the declaration on the one side, I give the child in adoption, and on the other, I take the child in adoption.

Although the parties to the case before the Privy Council were Sudras, whilst the parties to the case before us are Brahmans, the rule as laid down by the Privy Council in 1880 clears a good deal of the way to a correct decision, and so far as it goes, it is equally applicable to Brahmans. It shows further that in laying down the rules, the Judicial Committee had before them what actually takes place when a formal adoption is made with ceremonies, and that they rejected as superfluous the merely ceremonial observances as contra-distinguished from the specific secular act and declaration which constitute the form in which the intention to give and to take is manifested during the ceremonial. The matter in contest then with special reference to Brahmans is this, *viz.*, whether the omission to perform Datta Homam invalidates an adoption which is good in other respects.

The first question for consideration is whether we should now depart from the decision in *Singamma* v. *Ramanuja Charlu* which was passed in 1868. Adoption, it is conceded, is a religious act at least among Brahmans, and the object with which it is made is in part to secure a son in order to prevent the extinction of the spiritual benefit which is believed to arise from the performance by a son of funeral and

(1) 6 M. 20. (2) 6 C. 381 (388-389).

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annual obsequies. It is desirable in a matter like this that there should be no divergence between the custom obtaining in the country and the law laid down by Courts of Justice. Again, some doubt has been thrown upon the case cited, by the observation of the Judicial Committee in their latest decision, that Datta Homam is requisite in the case of Brahmans. [8] Further, in *Venkata* v. *Subhadra* (1) decided by a Division Bench of this Court in 1883, it was considered that among Brahmans Datta Homam was essential and that the decision of the High Court at Calcutta (2) on the point was probably right. It should be remembered that in *Singamma* v. *Ramanuja Charlu* the point was not argued on both sides, and that Jagannada who was cited in that case is no authority in Southern India. Adverting to his opinion as to whether an adoption by purchase is valid, Colebrooke observed as follows :—"The Pundits in Southern "India, I perceive, make great use of the authority of Jagannada, the "compiler of the digest which was translated by me. We have not here "the same veneration when he speaks in his own name or steps beyond "the strict limits of the compiler's duty, and as his doctrines which are "commonly taken from the Bengal School or sometimes originate with "himself differ very frequently from the authorities which heretofore pre-"vailed in the South of India, I am sorry that the Pundits should have "been furnished with means of adopting in their answers whatever doc-"trines may happen to be best accommodated to the bias they may have "contracted; and I should regret that Jagannada's authority should super-"sede that of the much abler authors of the Mitakshara, Smriti Chandrika "and Madhavya." (See Strange's Hindu Law of the edition of 1830, page 178). As to early English writers on Sanskrit law they were guarded in the expression of an opinion as to whether Datta Homam was necessary among Brahmans. Sir Thomas Strange said that, even with regard to the sacrifice by fire, important as it may be deemed in a spiritual point of view, it is so with regard to the Brahmans only. (Strange's Hindu Law, Vol. I, page 95.) As to Colebrooke, he thought that an inadvertent omission of some of the ceremonies ought not to invalidate an adoption, but a wilful disregard of them all might. (Vol. II, Strange's Hindu Law, page 155.) As to Ellis, he thought that Datta Homam, though proper in all cases, was not indispensable if the person adopting and the boy adopted, were of the same gotra, and "if of different gotra, it was necessary." (Vol. II, Strange's Hindu Law, page 104.) In these circumstances and in the face of so much conflict of opinion, it might [9] be desirable to direct an inquiry as to actual usage and deal with the question with reference to the result of such inquiry.

Another question is whether there is enough in the texts current in this Presidency to warrant an inquiry as to usage. The two leading treatises on adoption which are often referred to in this Presidency are the Dattaka Mimamsa and the Dattaka Chandrika, though when there is a conflict between them, the latter is accepted as binding in preference to the former. But on the point now under consideration, both commentaries agree as to the necessity for observing the prescribed form. In section II, sloka 17 of Dattaka Chandrika (3), the commentator says that, in case no form as propounded should be observed, the adopted son is entitled only to assets sufficient for marriage. In section V, sloka 56, Dattaka

(1) 7 M 548.

(2) The case alluded to was probably *Bhairabnath Sye* v. *Mahes Chandra Bhadury*, 4 B.L.R.A.J. 162 (Reporter's note).

(3) Stokes' Hindu Law Books, p. 640.

Mimamsa (1), the commentator observes that "the filial relation is occasioned only by ceremonies, and that, of gift, acceptance, burnt sacrament, and so forth, should either be wanting, the filial relation even fails." Again, in II, Strange's Hindu law, pages 120-122, Vidiaranayana, the celebrated author of the Madhavya, is referred to as speaking of two kinds of adoption, *viz.*, Nitya Datta (permanent or regular, adoption) and Anitya Datta (temporary adoption) and of the former as consisting in the regular adoption made with the prescribed ceremonies, and of the latter as an adoption made without those formalities. This conveys the impression that, where a complete change of paternity and family is intended to be brought about by adoption, the adoption should be of the kind called Nitya Datta.

The Smritis and Sutras usually cited are those of Caunakha, Vasishta and Baudhayana. Caunakha's is quoted in Dattaka Mimamsa, Section V, sloka 1, and a burnt offering is part of the form prescribed by him for adoption. The same is the case with the procedure enjoined by the others. (See Vasishta, Chapter 15, sloka 6; Parisishta Prasna, 7th Adhyaya; or Baudhayana, Vol. XVII, Sacred Books of the East.) Both Manu and Caunakha declare that one who is eligible for adoption should be the reflection or have the resemblance of a son, and the commentators apparently thought that as adoption is made partly to secure spiritual benefit arising from the performance of obsequies, the prescribed ceremony was necessary to ensure to the adopted son competency to perform **[10]** those obsequies with efficacy. The original texts convey the impression that Datta Homam may probably be an essential part of a valid adoption as a general rule and that in a proper case there is sufficient ground for directing an inquiry as to usage.

Although the general rule may be as indicated above, there is reason to think that there are exceptions to it. There is a text of Manu to the effect that, if among several brothers, one has a son, that son is the son of all. The translation by Ellis of the ritual of Datta Homam which will be found in Vol. II, Strange's Hindu Law, page 218, may also be here referred to; the author of the ritual, it is observed by Ellis, states that regard is had to adoption from a different gotra; and as already remarked, Ellis considers the performance of Datta Homam, though proper in every case, to be not necessary when the adopted child is of the same gotra. Seeing that when the gotra is the same the person adopted belongs before adoption to the same general family and, as being descended from the same original ancestor, is in a sense already a member of the adoptor's family, he may be regarded as fit to be affiliated by gift and acceptance without any ceremony, for in his case adoption operates only to transfer him from one to another line of descent from the common original ancestor. Again, it may also be necessary to exact nothing more than a *bona fide* observance of the ceremonial in compliance with the prescribed procedure, and to avoid complicating the law of adoption with the subtleties of ceremonial law. To this extent we may adhere safely to the decision in *Singamma* v. *Ramanuja Charlu.*

In the case before us the adopted son was, prior to the adoption, a dayadi of Sulur Subba Ayyar and therefore of the same gotra. It appears further that defendant No. 4 waived her right to object to the adoption under a special agreement and the plaintiff is not the reversioner but

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(1) Stokes' Hindu Law Books. p. 598.

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a purchaser from her. On these special grounds, we dispose of the second appeal, which will be dismissed with costs.

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118 M. 11.

[11] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

PURUSHOTTAMA (*Plaintiff*), *Appellant v.* RAJU (*Defendant*), *Respondent.** [15th July, 1887.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Section 9—Joint shrotriyamdars—Distinct contract by tenant in respect of a share.*

The plaintiff was one of two joint shrotriyamdars. In fasli 1288 the defendant accepted a patta from and executed a muchalka to him in respect of the half share of the plaintiff. The plaintiff sued to enforce acceptance of a patta and execution of a muckalka for fasli 1290 and for arrears of rent :

Held, that the suit lay without joinder of the other joint shrotriyamdar.

SECOND appeal against the decree of S. T. MacCarthy, District of Chingleput, in Appeal Suit No. 18 of 1886 reversing the decree of V. Kuppusami Ayyar, Additional District Munsif of Poonamalle, in Original Suit No. 30 of 1885.

This was a suit to enforce the acceptance by the defendant of a patta tendered to him by the plaintiff, and the execution by the defendant of a muchalka for fasli 1290 and recover Rs. 267-2-7, being the amount of ayan tirvai and road-cess and interest for the same fasli.

The plaintiff alleged that he was shrotriyamdar of a moiety of the village of Sunampett and that the defendant was a mirasi tenant holding under him. The defendant pleaded *inter alia* that he was not bound to execute a muchalka, and that the patta tendered was not a proper one, and further denied the plaintiff's title.

The Court of first instance passed a decree in favour of the plaintiff, but this decree was reversed on appeal by the District Judge on the ground that the plaintiff could not sue alone.

The plaintiff preferred this second appeal.

Ramasami Mudaliar, for appellant.

The two shrotriyamdars have been receiving their shares of tirvai from the raiyats separately, and in fact there was an agree- [12] ment by the defendant to pay the plaintiff his moiety of the tirvai now sued for.

Srirangacharyar, for respondent.

The two shrotriyamdars constitute one landlord under the Rent Recovery Act and one of them is not entitled to enforce acceptance of a patta by the tenants in respect of the proportionate rent payable to him. *Krishnama* v. *Gangarau* (1).

The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

JUDGMENT.

It is urged by the appellant's pleader and admitted for the respondent that for fasli 1288 the respondent accepted a patta from the appellant, and executed a muchalka in respect of the half share of the shrotriyam claimed in the present suit. This being so, there was a distinct contract and holding in respect of that share, and all that was decided in the case

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* Second Appeal 919 of 1886.

(1) 5 M. 229.

reported in *Krishnama* v. *Gangarau* (1) was that where the tenant held the land under several shrotriyamdars and under a joint contract, and the shrotriyamdars might be regarded as a single landlord, then none of the shrotriyamdars could tender a patta for acceptance otherwise than in conjunction with the others.

We set aside the decree of the Lower Appellate Court and remand the appeal for rehearing. Costs of this second appeal will abide and follow the result.

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11 M. 12=11 Ind. Jur. 413.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

KHADAR (*Plaintiff*,) *Appellant v.* SUBRAMANYA AND ANOTHER (*Defendants*), *Respondents.** [18th April and 11th July, 1887.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Sections*, 3, 9, 79, 80—*Yeomiah lands—Unregistered holder rendering service and granting pattas—Estoppel by acquiescence of person entitled to the yeomiah holding.*

A yeomiahdar died leaving a brother who was then out of India. Shortly before his death, he made an invalid assignment of his holding to a third person who performed the service, and granted pattas of the land. The holding was resumable [13] on failure of the service. The brother of the late yeomiahdar returned after three years and obtained registration of his title. He now filed this suit to enforce acceptance of pattas tendered by him to the raiyats who had already accepted pattas from and executed muchalkas to the assignee :

Held, that the suit was not maintainable, as under the circumstances the plaintiff's conduct justified the tenant's belief that the assignee was entitled to collect rent from them until the assignment was questioned by the plaintiff and notice of his title given to them.

SECOND appeal against the decree of J. Hope, District Judge of South Arcot, in Appeal Suit No. 71 of 1885, reversing the decree of W. S. Meyer, Acting Head Assistant Collector of South Arcot, in Summary Suit No. 3 of 1884.

This was a summary suit by the landlord under Section 9 of the Rent Recovery Act to enforce the acceptance of a patta. The tenants defended the suit alleging *inter alia* that they had previously accepted a patta for the same Fasli from one Khadar Moidin.

The land in question was service yeomiah, which was held till 1881 by the plaintiff's brother. Shortly before his death in that year, the late yeomiahdar executed a deed of assignment to Khadar Moidin, which, however, was now held to be invalid. The plaintiff was at Singapore when the death of the late yeomiahdar took place ; Khadar Moidin accordingly entered into possession and performed the yeomiah service to Government and granted pattas to tenants, but he never got a registered title. The plaintiff returned from Singapore and the yeomiah was registered in his name on 2nd April 1884 ; in May the tender of the pattas by the plaintiff to the defendants took place, the refusal of which occasioned the present suit.

The Court of first instance passed a decree in favour of the plaintiff; but this decree was reversed by the District Judge who observed:—"There

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* Second Appeal No. 2 of 1886.

(1) 5 M. 229.

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was no *de jure* yeomiahdar at all prior to April 1884, but there was a *de facto* one to whom all the raiyats paid their kist and it would be a great hardship if they had to pay them over again."

The plaintiff preferred this second appeal.

Rama Rau, for appellant.

Seshagiri Ayyar, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

JUDGMENT.

[14] The appellant is the registered holder of a service yeomiah at Bhuvanigiri in the district of South Arcot, and the respondents are raiyats holding some of the yeomiah lands and are as such under an obligation to pay the assessment due to Government to the yeomiahdar. The yeomiah was formerly held by the appellant's brother, Mohammad Ali Bibi, and he died in April 1881 when the appellant was in Singapore. The service was since performed for some time by the deceased's brother-in-law, Khadar Moidin Saheb, apparently under a deed of assignment which was executed in his favor, but the yeomiah was never registered in his name. For Fasli 1283, the respondents accepted a patta, from him, executed a muchalka in his favour, and paid him the assessment due by them. On the 2nd April 1884, the yeomiah was registered in the appellant's name under the Proceedings of the Board of Revenue, No. 1202, and on the 22nd May 1884, the appellant tendered the patta F, but the respondents refused to accept it on two grounds, *viz.*, that they had previously accepted a patta from Khadar Moidin for the same Fasli, and that the village cess should not be included in the patta and the road-cess payable by them was half an anna and not one anna in the rupee as entered in the patta. The Head Assistant Collector disallowed the first objection and decreed the acceptance of the patta with the modification that the charge on account of the road-cess was half an anna instead of one anna in the rupee. On appeal, the Judge held that the first ground of defence was good in law and observed that the kist due for Fasli 1283 had been paid to Khadar Moidin before May 1884 in pursuance of an arrangement which had been in force for three years, and which Government had not seen fit to question. The only ground argued in support of the second appeal is that the previous acceptance of a patta from one who was neither a registered yeomiahdar nor lawfully entitled to the yeomiah was no valid defence as against the appellant, the lawful owner. It is conceded that the kist payable to Government was originally assigned to a former yeomiahdar. It is also not disputed that as between the appellant and Khadar Moidin, the former is the lawful owner. We take the finding of the Judge to be in substance that the assignment in favour of Khadar Moidin was, in the special circumstances of the case, only voidable by the appellant, and that until it was avoided by him and notice of his claim was given to the respondents, they were [15] entitled to treat the assignee, in the absence of any interference on the part of Government as a person entitled to recover rent from them either under Section 79 or Section 80 of Act VIII of 1865. It was held by the majority of the Judges of this Court in *Gouse* v. *Sundara* (1) that the term inamdar or landholder, as defined in Section 3, includes his heirs or legal representatives and assignees in cases

(1) 8 M. 394.

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in which the assignment amounts to a valid transfer of the assignor's *entire* interest. The yeomiah in question was a service yeomiah liable to be resumed by Government on discontinuance of the service. The performance of the service first by the appellant's brother during his life and after his death by Khadar Moidin until the appellant returned from Singapore and insisted on his right as lawful owner was an act beneficial to him; otherwise the Crown might have resumed the yeomiah. It is not alleged that the appellant made any arrangement for the enjoyment of the yeomiah or the performance of the service during his stay at Singapore and gave notice of it to the respondents either when his brother or Khadar Moidin entered into possession or until he returned from Singapore. There is reasonable ground for the inference that the appellant intended to allow the assignment to continue in force in his own interest until he should be able to return from Singapore and to render the service which he was bound to render. We cannot say that the Judge was in error in holding that the appellant's own conduct was such as to justify the respondents' belief that the assignee was authorized to collect rent from them until the assignment was questioned by the appellant and a notice of his title was given to them. We dismiss the second appeal with costs.

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11 M. 16.

[16] APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

PERUMAL AND ANOTHER (*Defendants Nos.* 1 *and* 2,) *Appellants*, *v.* RAMASAMI CHETTI AND OTHERS (*Plaintiffs*), *Respondents*.*
[19th April and 11th July, 1887]

Indian Easement Act—Act V of 1882, *Sections* 6, 7, 17*—Natural streams—Surface water —Rights of riparian owners.*

The owners of a tank fed by natural streams, which depended for their supply on natural rainfall and surface water, sued for an injunction to restrain superior riparian owners from damming the streams or interfering with the supply of water, over which the plaintiffs claimed a right of easement. The issue as to the ownership of the land on which the streams rose was undecided:

Held, (1) The Easement Act only declared the existing law as to easement over water;

(2) An easement can therefore be acquired in regard to the water of the rainfall. But surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise is not a subject of easement by prescription, though it may be the subject of an express grant or contract;

(3) It is the natural right of every owner of land to collect or dispose of all water on the surface which does not pass in a defined channel;

(4) Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to the conditions (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by riparain owners below the stream in the exercise either of their natural right or their right of easement if any;

(5) It was therefore necessary to ascertain where the streams rose, and the course source and length of their tributaries.

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* Second Appeal No. 966 of 1885.

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11 M. 16.

[F., 3 L.B.R. 23; 35 P.R. 1895; R., 4 C.L.J. 370 (386)=11 C.W.N. 85; 8 Ind. Cas. 456.]

SECOND appeal against the decree of A. J. Mungalam Pillai, Subordinate Judge of Madura (West), in Appeal Suit No. 366 of 1885, modifying the decree of T. A. Krishnasami Ayyar, District Munsif of Sivaganga, in Original Suit No. 227 of 1883.

The plaintiffs are the trustees of a certain temple, and, as such, the owners of a tank fed by two natural streams, which are supplied [17] by the natural rainfall and surface water of the district. The plaint prayed for a decree directing the removal of an embankment erected across the streams by the defendants and for a perpetual injunction restraining the defendants from interfering with the flow of water to the plaintiffs' tank. Both the lower Courts held that the plaintiffs had acquired a right to easement from immemorial user of the water in the streams and decreed as prayed.

The defendants preferred this second appeal.

Subramania Ayyar and *Bhashyam Ayengar* for appellants argued that the Indian Easements Act re-produced the English law on the subject and cited *Madras Railway Company* v. *Zemindar of Carvatenagarum* (1) and Angell on Water Courses, ed. 6th, p. 142.

Rama Rau for respondents argued that Section 6 of the Indian Easements Act created a departure from English law and relied on *Arni Jagirdar* v. *Secretary of State for India* (2), *Rayappan* v. *Virabhadra* (3), *Ramessur Persad Narain Singh* v. *Koonj Behari Pattuk* (4), *Khoorshed Hossein* v. *Teknarain Singh* (5).

The further arguments adduced on this appeal appear sufficiently, for the purpose of this report, from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.)

JUDGMENT.

The plaintiffs are the trustees of the Ariyakudi temple in the district of Madura and defendants Nos. 1 and 2 are the managers of another temple, called Iluppagudi temple, in the same district. The Dharmasanam village of Ariyakudi belongs to the former and the village of Kurichiyendal, which adjoins it on the north, belongs to the latter. The tank A of Ariyakudi in the Commissioner's plan is supplied by channels C and D, which take their rise in the tract of land lying between 1 and G2 and G3 and flow in a defined course, first, through Kurichiyendal, then through Ariyakudi, and, after uniting together, fall into the Ariyakudi tank, being fed on their way by small channels, C1, C2, D1 and D2, which rise also in the same tract of land. The rain annually falling on this tract flows into the tributaries and the main channels C and D and constitutes the source from which the Ariyakudi tank receives its supply. It is found by the Courts below that these channels have existed for more than thirty years, in fact from time immemorial, and that thay are natural streams, [18] which have had a continuous and defined course, until they terminated in the tank A. The District Munsif found further that the land, in which the streams originate, is wholly included in the village of Kurichiyendal and does not belong, as alleged by the plaintiffs, partly to Ariyakudi and partly to Kurichiyendal. On this question, however, the Subordinate Judge considered it unnecessary to record a finding. Both

(1) 1 I. A. 364 (385). (2) 5 M. 226. (3) 7 M. 530.
(4) 4 C. 633. (5) 2 C.L.R. 141.

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Courts concurred in the opinion that the plaintiffs had acquired a right of easement from immemorial enjoyment and decreed the claim. The decrees appealed against declared and directed (i) that channels C and D in the plan annexed belong to the plaintiffs; (ii) that defendants should in no way interfere with the said channels; (iii) that defendants Nos. 1 and 2 do remove the bund G2 and G3, which prevents water from flowing into channels C and D; (iv) that the portions of the said channels, which were filled up with earth by defendants, be dug again and restored to their former position; (v) that defendants Nos. 1 and 2 do pay the expenses, which may be incurred in removing the bund and digging the channel as aforesaid; (vi) that they be restrained from interfering either with the rain water that continues to flow into channels C and D or with the flow of water into the Ariyakudi tank by means of those channels; (vii) that they do pay to plaintiffs their costs; and (viii) that defendants do bear their own costs. From these decrees defendants Nos. 1 and 2 have preferred this second appeal.

The first objection argued before us is that the supply of water, which the plaintiffs claim, is only casual, intermittent, and exclusively dependent upon the rainfall on the defendants land and that the plaintiffs' claim cannot be supported. It is undoubtedly the natural right of every owner of land to collect and dispose of all water on the surface which does not pass in a defined channel. Assuming that an easement may be acquired in regard to such right (and we shall presently consider whether it may be acquired), we are of opinion that it is perfectly immaterial whether the supply is permanent or intermittent or dependent on springs which never fail, or on casual or periodical rainfall. It would be altogether unreasonable to hold in this country, many parts of which depend upon annual rainfall for their irrigation, that no right of easement can be acquired in relation to it, because there may be failure of rain in particular years or during the time of cultivation, and to that extent the supply may be precarious or casual. [19] It is explained in the Easement Act—Act V of 1882,—which only declared the law administered in this country on the subject, that a natural stream is a stream whether *permanent* or *intermittent*, tidal or tideless, on the surface of the land or underground, which flows by the operation of nature only and in a natural and known course. We must, therefore, overrule the objection that no easement can be acquired in regard to the water of the rainfall.

The next objection urged upon us is that the first, second, and third items of relief decreed to the plaintiffs are in excess of the right of easement, which is found to have been acquired by them. The accustomed user of that right is according to the finding confined to the uninterrupted flow of rain water that falls on the tract of land between HH and G2, G3 into channels C and D and their tributaries, and then through the former to the Ariyakudi tank A in their usual course. As an easement is a limiting right or a right in *alieno solo*, the relief awarded should certainly not be more extensive than what is necessary to its beneficial enjoyment. As riparian owners, defendants Nos. 1 and 2 are entitled to use and consume the water of the streams C and D for drinking and household purposes, for watering their cattle, and even for irrigating their land, or for purposes of manufacture, provided they exercise their right subject to the conditions, *viz.*, (i) that the use is reasonable; (ii) that it is required for their purposes as owners of the land; and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by riparian owners below the stream in the exercise either of their natural right or

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right of easement, if any—*Embrey* v. *Owen* (1)—The first and second items of relief decreed to the plaintiffs should, therefore, be modified, so as to save the first and second defendants' natural rights as riparian owners. The direction that the embankment G2, G3, be removed because it is new, goes likewise beyond the necessity of the case. All that the plaintiffs are entitled to claim is that so much of the embankment as prevents the flow of water in its accustomed course to the Ariyakudi tank across the bund should be removed. Any other direction is in excess of the plaintiffs' right and bad in law. In this respect also the decree must be modified.

The next objection which is urged in support of this appeal **[20]** refers to the principle that no easement can be acquired, unless the user is of *right* and *not in pursuance of an agreement* with or by permission of the dominant owner, express or implied, which negatives the existence of a right or subjects it to a condition on the fulfilment of which it ceases.

In the case before us there was no express agreement between the dominant and the servient owners, but it is suggested that a conditional agreement may and ought to be implied from the facts found, *viz.*, that, from time immemorial, there had been no wet cultivation at all in Kurichiyendal, until a few years ago, that, though during the last few years, there has been some wet cultivation, it has not been considerable, and that defendants Nos. 1 and 2 now desire to extend such cultivation by running up the bund G2, G3, and thereby diverting the streams C and D into the Kurichiyendal tank. The user which the plaintiffs and their predecessors have had from time immemorial, under these circumstances, must, it is contended, be treated as limited to the period during which the defendants and their predecessors did not choose to extend their wet cultivation. It is also said that the owners of Kurichiyendal could never have intended not to extend their wet cultivation for all time to come, and that it is reasonable to infer that the user was originally permitted only so long as they did not convert their dry land into wet cultivation; but it is conceded that, if the channels C and D took their rise beyond the land of defendants Nos. 1 and 2 and then flowed through it to the Ariyakudi tank, no such inference can be drawn, because appropriation of the water by a riparian owner lower down from time immemorial would deprive a riparian owner who holds land higher up of the natural advantages arising from the situation of his land. This is inconsistent with the contention that immemorial enjoyment may be presumed to be permissive; for, if the user must be taken to be not of right in the one case, because the owner of the upper land recently desired to irrigate it for the first time, it must be equally so in the other. The appellants' pleader overlooks the fact that, in order that such inference may be drawn, there must be some evidence, apart from a recent desire to extend wet cultivation, indicating a mutual understanding, when the user originated, and during its continuance that it was only permissive and not of right. It must be borne in mind that the enjoyment for purposes of irrigation of water flowing in a natural stream by a riparian **[21]** owner of lower land from time immemorial stands upon a different footing from the enjoyment of water flowing in an artificial stream originating in the mode of occupation or cultivation of a person's property and from the very nature of the case presumably of a temporary character and liable to variation. On this point we may refer to *Arkwright*

(1) 6 Exch. 353.

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v. *Gell* (1), in which the stream in dispute was an artificial water-course, which was made with the sole object of getting rid of a nuisance to certain mines and enabling their owners to get at the ore, which lay within the mineral field drained by it. It was pointed out in that case that the flow of water through that water-course was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine owners required it; that, in the ordinary course, it would most probably cease when the mineral ore above its level should have been reached; and that the right of user was, therefore, intended to endure only so long as the water-course continued there. In *Mason* v. *Hill* (2) on the other hand, in which the water-course in dispute was a natural stream, it was observed that the first title to water was a gift from nature, and that it was to be tried by ascertaining in the first place where, by the laws of nature, the water would flow, and, if a secondary title to it be claimed, whether there has been such a user of it from which grant may be presumed. The user must no doubt have been by a party claiming a right thereto not by stealth nor by permission nor in any other way which would negative a grant. Upon the facts found in this case, the user cannot be said to have been otherwise than under a claim of right. With reference to the contention that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream and apply it to a useful purpose has a good title against all the world, it was held in *Mason* v. *Hill* (2) that it was true only in the sense that neither the owner of the land below can pen back the water nor the owner of the land above divert it to his prejudice. As it is found in the case before us that channels C and D are natural streams and that the plaintiffs have used them from time immemorial for irrigating their land, there can be no doubt that defendants can neither prevent nor diminish the flow of such water as enters the channel in its accustomed course.

[22] It is then urged that the defendants are entitled to use the rain water falling upon the surface of their land for any purpose useful to them, and that any right which the plaintiffs have acquired by prescription must be taken to have been acquired subject to such right. It is contended on the other hand that the plaintiffs' right extends to all the rain water which falls on the defendants' land mentioned above and percolates into or otherwise enters the channels C and D. It is provided by Section 17, clause C of the Indian Easements Act V of 1882 that no easement can be acquired by prescription to surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise. In *Rawstron* v. *Taylor* (3) it was held that the plaintiff, who claimed a right of easement by prescription, had no right to surface water which had no defined course, for the plaintiff had no right to water in *alieno solo*, and natural water-courses were like ways of necessity, and the right to have a stream running in its natural direction did not depend on a supposed grant, but was *jure naturæ*. *Broadbent* v. *Ramsbotham* (4) was decided on the same ground. *Chasemore* v. *Richards* (5) decided that in the case of rain water sinking into the ground to various depths and then flowing and percolating through underground strata in courses which were not defined but continually varied was not the subject of an easement by prescription. In *Robinson* v. *Krishnama Chariyar* (6), decided in 1870, this Court considered the principles laid down in the English cases were applicable to

(1) 5 M. & W. 203, 231.
(2) 5 B. and Ad. 17.
(3) 11 Exch. 382.
(4) 11 Exch. 602.
(5) 7 H. and Cas. 349.
(6) 7 M.H.C.R. 44.

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this country and the Easement Act has adopted them. According, therefore, both to decision and legislation it is clear that surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise is not a subject of easement by prescription.

It may, however, be a subject of express grant or other contract as mentioned in Section 7, illustration (*g*). The reason why underground water not running in a defined stream is not a subject of prescription is that there is no visible means of knowing to what extent, if any at all, the supply to the plaintiffs' tank would be affected by water percolating in and out of defendants' land, and the reason why surface water not running in a stream or collected in a pool, tank, or otherwise is not a subject of prescriptive right is that there is no right of water in *alieno solo*, except to the extent that the right **[23]** to the uninterrupted flow of a natural stream in its usual defined course is *jure naturae*. While it is clear, therefore, on the one hand, that this right would extend to all the minor channels which run into the main channels C and D in defined courses forming their feeders or tributaries, it is equally clear, on the other that it will extend no further. The declaration that the defendants Nos. 1 and 2 are not entitled at all to the rain water falling on the surface of their land between HH and G2, G3 before it enters or percolates into the channels C and D or their feeders and becomes thereby part of them cannot be supported. In the view, however, which we take of the case, it is necessary to direct the Subordinate Judge to return a finding on the fifth issue, and also to show on the plan annexed to the decree the name, if any, of the source, the course, and the lengths of each of the several tributaries or minor channels, which are visible and flow into the channels C and D across the land of defendants Nos. 1 and 2.

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11 M. 23.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

NAGARAJA (*Plaintiff*), *Appellant v.* KASIMSA AND OTHERS (*Defendants*), *Respondents.** [19th April, 1887.]

Rent Recovery Act—Madras Act VIII of 1865, *Sections* 9, 10, 11.

A summary suit by a landlord to enforce the acceptance of a patta under the Madras Rent Recovery Act should not be dismissed on a finding by the Appellate Court that the patta tendered was not a proper patta. The Appellate Court ought to pass the decree which the Court of First Instance should have passed.

SECOND appeal against the decree of J. A. Davis, Acting District Judge of Tanjore, in Appeal Suit No. 499 of 1884, reversing the decree of P. W. Moore, Acting Sub-Collector of Tanjore, in Summary Suit No. 51 of 1884.

This was a summary suit under Section 9 of the Madras Rent Recovery Act to enforce the acceptance of a patta by the defendant from the plaintiff. The defence to the suit was that the **[24]** defendant was by custom liable to pay for his nanjai lands a fixed grain rent and not according to

* Second Appeals Nos. 384 to 386 of 1886.

amani, and that if he was to pay by varam, the landlord's share should be so fixed as not to exceed on an average the fixed grain rent paid hitherto.

The Sub-Collector passed a decree in favour of the plaintiff, but his decree was reversed and the suit dismissed on appeal by the District Judge on the ground that there was evidence of a customary payment of a fixed grain rent.

Rama Rau, for appellant.

Mr. *Norton*, *Venkatrama Ayyar* and *Seshagiri Ayyar*, for respondents.

The further facts of this case and the arguments adduced on appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

JUDGMENT.

Two questions are argued in support of this second appeal. The first is that the Judge is in error in dismissing the suit on the ground that the patta tendered was not a proper patta, and we consider this objection to be well founded. It is provided by Section 10, clause 3, Act VIII of 1865, that "if the Collector shall be of opinion that the patta tendered is not a proper one, he shall decide what patta ought to be offered and shall then pass a judgment ordering the defendant to accept such patta and to execute a muchalka in accordance with it." As the appellate authority revising the decree of the Court of First Instance, the Judge ought to have passed the decree which the first Court should have passed upon the facts found by him. The decree must, therefore, be amended so as to bring it into conformity with the provision of law indicated above.

The next objection taken to the decree is that the rate of rent is not ascertained by the Judge in accordance with the rules contained in Section 11 of the Act. Although the Sub-Collector found that no contract was proved to pay a fixed grain rent, the Judge considered that there was evidence of customary payment of a fixed amount of grain per pangu. We entertain, no doubt, that the Judge intended to find that a contract to pay grain rent was evidenced by custom. It is then said that the evidence on record only shows that when the whole village was rented, the total rent in grain was fixed at 11 kalams per pangu for nanjai and that it is not sufficient for inferring a contract with each raiyat to accept rent at the average rate. It appears that in Summary Suit No. 15 of 1874, 65 per cent. of the nett out-turn was [25] taken to represent the melvaram by the Assistant Collector, Mr. Forbes, and by the Judge on appeal. It is stated in the judgment then recorded that the defendant, Kasim Rowthen, agreed to be bound by the rate collected when the village was previously under amani management for several years. Again, there was another summary suit in 1875 against a different tenant, and the decision as to the rate appears to have been the same as in 1874. In the lease granted to certain raiyats in September 1876 for ten years, there is a provision that the rate of 11 kalams per pangu is payable only during the time the lease is in force, and that on the expiration of the lease, the lands may be taken under amani *as per custom observed* during the time of management by the late maharajah and during attachment by Government. Further, in 1882, similar suits were brought against some raiyats, and the amani rate was adopted. It is no doubt true that the defendant was not a party to any of these suits, but they negative a general custom in the village to pay 11 kalams per pangu for nanjai and show that if that rate was ever paid by particular raiyats, it was paid under a special

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agreement on the understanding that on the expiration of the period fixed by the agreement, the amani system was to be reverted to according to custom. It is not clear then on what specific custom the Judge relies, what was its duration, and whether it affords a reasonable ground for presuming that there was a contract with the defendant to accept rent at 11 kalams per pangu. We are not prepared to hold that if an average rate per pangu were accepted only in the event of the whole village being taken on lease, it would preclude the landlord from claiming more than the average rent when he has to make a separate settlement with each raiyat in respect of his holding. We shall therefore refer the following issues for trial :—

Whether it was the amani or the ijara system that was the customary system of management in the village prior to 1874, and what was the rate of melvaram paid under each system?

Whether the rate of 11 kalams per pangu was ever paid when the entire village was not rented out, and if so, for how many years? The finding will be returned in three months, when ten days will be allowed for filing objections. Each party will be at liberty to adduce fresh evidence.

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[26] PRIVY COUNCIL.

PRESENT :

Lord Hobhouse, Sir Barnes Peacock, Sir Richard Baggallay, and Sir Richard Couch.

[*On appeal from the High Court of Madras.*]

MINAKSHI NAIDU (*Defendant*), *Appellant v.* SUBRAMANYA SASTRI (*Petitioner*), *Respondent.* [16th June, 1887.]

Act XX of 1863 (*Religious Endowments*), *Section* 10—*Appellate jurisdiction—Order of District Judge filling vacancy on committee not appealable.*

It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge ; such right must be given by the enacted law, or equivalent authority.

The High Court has no jurisdiction to hear an appeal from the order of a District Judge made by him on petition pursuant to Section 10 of Act XX of 1863 (Religious Endowments), appointing a member to fill a vacancy in a committee. Neither that Act, nor the general law, gives any right of appeal, which therefore does not exist, from such an order.

In a cause which a Judge is competent to try, if the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground of irregularities, which, if objected to at the proper time, might have led to the dismissal of the suit. But when the Judge has no jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process.

Ledgard v. *Bull* (1) referred to and followed.

[F., 19 M. 285 (287) ; 26 M. 176 (178) = 12 M.L.J. 264 (266) ; 9 A.W.N. (1889) 7 ; 1 L.B.R. 277 ; 121 P.R. 1907 = 51 P.W.R. 1907 ; Appr., 2 C.L J. 384 = 9 C.W.N. 956 (960) ; R., 13 B. 650 (652) ; 23 B. 22 (26) ; 25 C. 146 (151) ; 31 C. 849 (853) = 8 C.W.N. 705 (707);38 C. 639 (669) ; 39 C. 353 (373) = 14 C.L.J. 552 ; 11 M. 220 (231) (F.B.) = 12 Ind. Jur. 49; 11 M. 319 (321) ; 13 M. 211 (213) ; 22 M. 172 (173) ; 23 M. 314 (317) = 10 M.L.J. 51 ; 24 M. 95 ; 33 M. 323 (326) = 20 M.L.J.

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(1) 13 I. A. 134 = 9 A. 191.

718=6 M.L.T. 121 36 M. 16 (17)=10 Ind. Cas. 879=21 M.L.J. 613=(1911) 2 M.W.N. 13: 5 C.L.J. 611; 7 C.L.J. 152 (166); 14 C.L.J. 489 (492); 17 C.L.J. 605 (607)=13 Ind. Cas. 170; U.B.R. (1892-1896), Civil, 447; 3 L.B.R. 203; 1 M.L.J. 537; 9 M.L.J. 173; 10 M.L.J. 51 (53); 9 N.L.R. 33 (34); 36 P.R. 1902=22 P.L.R. 1902 (F.B.); 2 S.L.R. 37 (41); D., 26 M. 85; 9 A.W.N. 168; 10 M.L.J. 398.]

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APPEAL from an order (11th November 1881) of the High Court, affecting to reverse an order (10th February 1881) of the District Court of Madura, made under Section 10 of Act XX of 1863, an Act "to enable the Government to divest itself of the management of religious endowments."

The order of the District Court of Madura, to which this appeal related, appointed a member to fill a vacancy in the committee managing the Minakshi Sundraswrar Devasthanam in Madura, that being a religious endowment within the scope of Act XX of 1863, of which Section 10 is as follows:—

"Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The [27] remaining members of the committee shall as soon as possible give public notice of such vacancy, and shall fix a day which shall not be later than three months from the date of such vacancy for an election of a new member by the persons interested as above provided under rules for elections which shall be framed by the Local Government, and whoever shall be then elected under the said rules shall be a member of the committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court on the application of any person whatever may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply, and if this order be not complied with the Civil Court may appoint a member to fill the said vacancy."

On the 8th December 1880 Ponnambalam Pillai and twenty three other inhabitants of Madura informed Mr. P. P. Hutchins, District Judge, by petition, that Gurusami Sastryal, one of the five members of the committee, had died on the 5th September preceding, and that the surviving members had taken no steps to fill up the vacancy.

The following order was consequently made on the 10th February 1881:—

A vacancy occurred some months ago on the committee of the Minakshi Sundraswrar Devasthanam by the decease of Gurusami Sastryal. The committee failed to fill it up within the allotted period, and petitions were presented to this Court to take the matter into its own hands. I sent for the lists of voters, and, as a preliminary step for my own satisfaction, I endeavoured to ascertain the wishes of the public by appointing a date for the registration of votes.

The election was held on the 28th December last.

The tellers recorded 300 votes for Minakshi Naik; 141 for Subbaragava Sastry, son of the late Gurusami Sastry; 13 for Vakil Dorasami Ayar; and 8 for Ramia Munian, a Patnul Chetti.

Subsequently, I heard Mr. Scott for the last-named candidate, Mr. French for the second, and Mr. Pole for the first. I at once intimated that I should not appoint the second, as I thought him too young, nor the

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third, because, apart from other objections, it would not be becoming for me to put a second vakil of my own [28] Court on the committee. The remaining candidates were Minakshi Naik and Ramia Munian Chetti, and I said that I should probably appoint the former, unless the pamphlet referred to by Mr. French, as subversive of the worship of Siva and as bearing Minakshi Naik's signature, should show that he would not be a proper person for the office. I find nothing whatever in that publication which can possibly be construed into hostility to the worship of Siva.

Mr. Scott has repudiated the election as an indication of the popular opinion, and perhaps it may be so. Very probably, the result is more due to better party organization than to real public feeling. But I am quite satisfied that some of the complaints were groundless and that the Patnul Chetti's adherents had free access both into the palace and to the tellers' tables, and that the proceedings were conducted in a perfectly impartial way—at all events, the election is sufficient to support the preference which I should naturally give to one with whose qualifications I am personally acquainted than to one of whom I know nothing except that he cannot read Tamil. I say this without intending to cast the slightest slur on Ramia Munian Chetti's character which seems to be well guaranteed, and notwithstanding my natural desire that so large a section of the population as the silk-weavers should be represented on the committee.

Since hearing the argument, another candidate has come forward in Mr. Rama Row, the Treasury Depüty Collector. I at once wrote to him that I should be glad to appoint him if he was about to retire, as I felt sure that his official habits and experience would be of great benefit to the institution. He is, however, unable to assure me that he will retire very shortly, and I do not think it desirable that a public official of his standing, and far less a magistrate, should be on the committee.

I have read the Tinnevelly judgment, but it does not support the objections to the appointment of a Vishnuvite. The great Tirumal Naik himself, to whom the pagoda owes its chief grandeur, was, I believe, of that sect. The two members last elected held the same opinions, and so have many others entrusted with great authority by the committee. They all worship Siva as well as Vishnu.

It is accordingly ordered that Minakshi Naidu be and he hereby is appointed to be a member of the committee for the [29] management of the Minakshi Sundraswrar Devasthanam of Madura *vice* Gurusami Sastryal deceased.

On the 21st April 1881 the respondent presented a petition to the High Court of Madras praying that the order of the Civil Judge might be rescinded, that one G. Subramanya Sastry might be appointed, or that a new election might take place.

On the 8th August the respondent presented a petition to the successor in office of the District Judge of Madura, praying that he would take further evidence in the matter for submission to the High Court, or would cancel the order of his predecessor. Upon this the District Judge passed the following order:—

"Looking to the wording of Mr. Hutchins' order, I find it to be perfectly clear that this is not an election under the Act with which I could exercise any interference. Mr. Hutchins was exercising his power under Section 10 of the Act, and, for his own satisfaction, held an election as a test of the wishes of the people; his order was, no doubt, passed in consideration of the wishes of the people as expressed in the election,

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but it can only be upset by an appeal to the High Court. The petition is dismissed."

On the 11th November 1881, the High Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) made an order cancelling the appointment of this appellant, and directing the District Judge to make a new appointment guided by the observations contained in the following judgment:—

"The institution is admittedly, at present, devoted to the worship of Siva, and in accordance with the letter and spirit of the Act its concerns should be directed by persons of the same persuasions—persons whose religious convictions will be enlisted in support of their fiduciary office. We shall set aside the appointment made by the Judge, not because we entertain any doubt of the fitness of the gentleman selected on the score of integrity and reputation, but because he has pronounced himself actively in favor of the cult of Vishnu.

"We shall not, however, take it upon ourselves to make an appointment, but shall direct the Judge to do so, having regard to the consideration we have mentioned. Each party will bear his own costs of this appeal."

The same Judges, on the 20th September 1882, rejected a petition of review under Section 623 of the Code.

Minakshi Naidu then applied under Section 600 of the Code for [30] a certificate in order to appeal to Her Majesty in Council, making it the first of his grounds that the order of the District Court of Madura was final. On 20th April 1883 the Judges holding that they could not give leave to appeal in this case, rejected the application. However, on the 9th February 1884 he obtained special leave to appeal.

On this appeal Mr. *J. D. Mayne* appeared for the appellant.

Mr. *R V. Doyne*, for the respondent.

For the appellant it was argued that the High Court was wholly without jurisdiction to reverse or vary the order of the Civil Court. By Section 10 of Act XX of 1863, the Civil Court, meaning the officer holding the post of District Judge, was directed to appoint, upon default of an appointment having been made by the remaining members of the committee. In conforming to the Act he was not acting as Judge of a Court vested with a jurisdiction in a suit of any kind, nor did he recognise a right. He was only in this manner *a persona designata*. No jurisdiction to the High Court, or to any Court, was given to hear an appeal from an order made under Section 10; nor was there a jurisdiction given by the general law.

Reference was made to Section 2 of Act X of 1877, the code then in force, where "decree" was defined; also to Section 11, explaining "civil suit" to be where a right is contested; also Sections 588 and 622. The amendment of the latter section by Section 92 of Act XII of 1879 and its appearance as amended in the present Code (Act XIV of 1882) was also referred to.

Reference was also made to *Rajah Amir Hasan Khan* v. *Sheo Baksh Singh* (1), *Maharaja Dhiraj Mahtab Chand Bahadur of Burdwan*, in re (2), *Sankar Dobay*, in re (3), and *Anthony* v. *Dupont* (4). In the last case the Madras High Court had interfered under Section 622, but there was no other precedent for such a course. *In re Venkateswara* (5), that an appeal does not exist in the nature of things and that a right to appeal from any

(1) 11 I. A. 237.
(2) 2 B. L. R. 217 (181 & 301).
(3) 4 B. L. R. 65 = 5 B. L. R. App. 59.
(4) 4 M. 217.
(5) 10 M. 98.

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decision of any tribunal must be given by express enactment appeared in *Sand Back Charity Trustees* v. *North Staffordshire Railway Company* (1); and by the Indian law appeals were allowed in suits of a Civil [31] nature, where they were not disallowed, but a suit there must be; in other words, there must be parties, there must be a right presented to a Court, and a decision thereupon. All these elements were wanting here. Lastly, it could not be concluded that the objection to the jurisdiction had been waived. As the High Court had no jurisdiction to entertain the appeal, no waiver in that Court could operate. Neither express, nor implied, consent of the parties could give jurisdiction to a Court which did not possess it by law—*Ledgard* v. *Bull* (2).

Mr. *R. V. Doyne* was called upon only in reference to the question of jurisdiction, which, it was intimated, would be disposed of before the order would be discussed on its merits.

For the respondent, Mr. *R. V. Doyne* contended that under the general powers of superintendence which the High Court possessed as the successor of the Sadr Diwani Adalat, the jurisdiction to hear the appeal had been duly exercised, and that such authority having really existed in the court, the objection as to the jurisdiction was now taken too late; an argument to which was added that the appellant by applying for a review had himself invoked it.

Reference was made to Regulation V of 1802, preamble; Charter Act, 24 & 25 Vic., c. 104, sections 9 and 15; Letters Patent of 1865, clauses 15 and 16; Code of Civil Procedure, Act X of 1877, Section 622.

An application might be distinguished from a suit, but the order of the Judge when made fell under Section 622, not being such an order as was excluded from appeal by Section 588, which gave an appeal from specified orders, excluding other orders of a similar class. The appointment, however, amounted to a decree within the meaning of the definition in the code; and it was hardly correct to apply the expression that unless an Act creating a right gave an appeal there could be none, inasmuch as the superintending power of the High Court made it rather that there would be an appeal, unless it had been expressly taken away.

Counsel for the appellant was not called upon to reply.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR RICHARD BAGGALLAY.—This is an appeal against an order of the High Court of Madras, which cancelled an order of the [32] District Judge of Madura appointing the present appellant to fill up a vacancy in the committee of a pagoda in the Madras Presidency.

The appointment was made by the District Judge under the provisions of Section 10 of Act XX of 1863, entitled "An Act to enable the Government to divest itself of the management of Religious Endowments," and commonly known as *the Pagoda Act*. By that Act it was provided that the local Government should appoint one or more committees in every division or district to take the place, and to exercise the powers of, the Board of Revenue and the local agents, under the regulations thereby repealed, that the members of such committees should be appointed from among persons professing the religion for the purposes of which the temple, or other religious establishment, was founded or should be maintained, and in accordance, so far as could be

(1) L. R. 3 Q. B. Div. 1, at p. 4.

(2) 13 I.A. 134 = 9 A. 191.

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ascertained, with the general wishes of those who were interested in the maintenance of such temple or religious establishment, and that the appointments should be for life; Section 10 provided for supplying vacancies in the following terms: "Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the committee shall, as soon as possible, give public notice of such vacancy, and shall fix a day, which shall not be later than three months from the date of such vacancy, for an election of a new member by the persons interested, as above provided, under rules for elections which shall be framed by the local Government, and whoever shall be then elected under the said rules shall be a member of the committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply; and if this order be not complied with, the Civil Court may appoint a member to fill the said vacancy."

The interpretation clause provided that the expression "Civil Court" should mean the principal Court of Original Civil Jurisdiction in the district in which the temple was situated.

[33] The committees appointed under the Act appear to have varied in number; in the case under consideration a committee of five was originally appointed. There had been changes from time to time, and, on the 5th September 1880, Gurusami, one of the then five members of the committee, died.

The period of three months expired on the 6th December 1880, and several applications were thereupon made to the District Judge at Madura to take such course as he might deem advisable. He accordingly issued a notice that, unless an election was held before the end of the year, he would take the matter into his own hands. An election did in fact take place on the 28th December 1880, and at such election, tellers, appointed by the District Judge, attended and reported to him the result; the present appellant obtained the largest number of votes, and by an order of the District Judge, dated 10th February 1881, was appointed to fill the vacancy in the committee. As the three months from the death of Gurusami had expired before the election, the power and the duty of appointing his successor had devolved upon the District Judge; the object of the Judge, in permitting an election to take place after the expiration of the three months, was, as he states, to satisfy his own mind as to who would be the proper person for him to select.

The Judge having appointed the appellant on the 10th of February 1881, a petition of appeal was presented to the High Court by persons, who were either interested as candidates, or were in favor of other candidates. The substantial grounds of the appeal were that the Madura temple was devoted to the worship of Siva, and that the present appellant was a Vishnuvite. The High Court agreeing with the petitioners, discharged the order of the District Judge.

From that order of the High Court the present appeal is brought, and the question has now been, for the first time, raised whether the High Court had jurisdiction to deal by way of appeal with the order of the District Judge. It should be mentioned that after the High Court had

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decided adversely to the present appellant, a petition of review was brought before that Court, and they declined to further interfere. During the proceedings in the High Court it was never suggested that that Court had no jurisdiction to deal with the question until an application was made for leave to appeal to the Queen in Council, when it was [34] inferentially stated; it was, however, then too late for the High Court to entertain the question.

On the 4th March 1884, leave was given to the appellant by Her Majesty in Council to enter and prosecute his present appeal.

When the appeal was opened, it appeared to their Lordships desirable that the question of the jurisdiction of the High Court to entertain an appeal from the order of the District Judge should be first taken into consideration, as, if that objection should prevail, it would be unnecessary to go into the disputed questions by which the merits of the case were surrounded ; and with the question of jurisdiction alone their Lordships now proposed to deal.

In approaching the consideration of this question, their Lordships cannot assume that there is a right of appeal in every matter which comes under the consideration of a Judge ; such right must be given by statute, or by some authority equivalent to a statute. The first question which arises in the present case is whether any right of appeal is given by the Pagoda Act itself. There is nothing in the Act which would suggest it, unless it is to be found in Section 10, to the terms of which their Lordships have already referred. Sections 14 to 20 of the Act provide for the interference of the Court by way of suit in certain cases, but they are entirely limited to cases which may be classified as breaches of trust or neglect of duty. There is no other provision whatever for the institution of suits in the Pagoda Act itself. In the opinion of their Lordships the tenth section places the right of appointing a member of the committee in the Civil Court not as a matter of ordinary civil jurisdiction, but because the officer who constitutes the Civil Court is sure to be one of weight and authority, and with the best means of knowing the movements of local opinion and feeling, and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with the district and with all the surroundings. The exercise of the discretion being so placed in the District Judge their Lordships are unable to find anything in the tenth section which confers a right of appeal.

It has however been suggested that, though there may be no right of appeal under the Pagoda Act itself, yet a right of appeal must be found in the general law, and their Lordships' attention has been particularly directed to Section 540 of Act X of 1877, which [35] gives a general right of appeal from decrees of Courts exercising original jurisdiction ; the jurisdiction conferred by the code (Section 10) is to try suits of a civil nature. The Act of 1877 contained, in its interpretation clause, a declaration of the meaning of the word "decree," as used in that Act, but this interpretation was modified by Act XII of 1879, and, as modified, the interpretation is as follows :—

" 'Decree' means a formal expression of an adjudication upon any right, claim, or defence, set up in a Civil Court where such adjudication decides the suit or the appeal." In the opinion of their Lordships there was no civil suit respecting the appointment, and it would be impossible to bring an order made by the District Judge pursuant to Section 10 of the Pagoda Act within the definition of a decree as contained in the code,

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and no other general law has been suggested. Mr. Doyne, in the course of his argument, contended that if a person, very improper and unfit by reason of his religious qualifications, or moral conduct, was appointed, there must be a right, either by appeal against the Judge's order, or by suit, or in some other way, to remove the person so appointed. There is force in this argument, but whether a person so improperly appointed could, as has been suggested, be removed by proceedings equivalent to proceedings by *quo warranto* in England, or whether, upon a full consideration of the merits, the appellant could be considered as a person improperly appointed, are questions upon which their Lordships are not called upon to express an opinion. In their opinion it is clear that there is no appeal from that which was a pure discretion vested in the District Judge.

It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had, to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point, it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard* v. *Bull* (1), as it in very concise terms deals with the circumstances under which there can be a waiver of a right to [36] complain of a want of jurisdiction. Their Lordships say:—" The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it; and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought; and their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit." In the present case there was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could have conferred upon the High Court that jurisdiction which it never possessed.

Having regard to all the circumstances of the case, their Lorships will humbly advise Her Majesty to allow the appeal, to discharge the order of the High Court, and to dismiss the appeal to the High Court without costs. There will be no costs of the present appeal.

Solicitors for the appellant: *Messrs. Gregory, Rowcliffes & Co.*
Solicitor for the respondent: *Mr. R. T. Tasker.*

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(1) 13 I.A. 134 (144) = 9 A. 191 (203).

1887
JULY 29.

FULL
BENCH.

11 M. 37
(F.B.).

11 M. 37 (F.B.).

[37] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

REFERENCE BY THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.* [29th July, 1887.]

Stamp Act—Act I of 1879, *Sections* 3, 31, 51.

Allowance for spoiled stamps may be made under Section 51 of the Stamp Act when a stamped instrument has been endorsed by the Collector under Section 31.

CASE referred to the High Court by the Board of Revenue under Section 46 of the Stamp Act—Act I of 1879.

The reference was made as follows—

"On the 15th April last Mr. Straith, on behalf of the North Travancore Land Planting Society, forwarded two deeds of transfer to the Collector of Madras, and applied, under Section 30 of the Stamp Act, for adjudication of the stamp-duty leviable upon them. The Collector adjudicated; the amount, Rs. 40 was levied from Mr. Straith, and payment of the full duty was certified to under Section 31.

"A clerical error was subsequently discovered in the deeds, and the instruments having thereby become useless, Mr. Straith now asks for a refund of the Rs. 40, so levied from him and certified to under Section 51.

"The Board therefore beg to submit the following question for the orders of the High Court:—

"Can a refund of stamp-duty levied and certified to under Section 31 of the Stamp Act, be claimed under the provisions of Section 51?"

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

The Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT and PARKER, JJ.) delivered the following

JUDGMENT.

Section 31 of the Stamp Act provides that any instrument upon which an endorsement has been made under that section shall be deemed to be "duly stamped," and may be acted upon as if it had been originally duly stamped. Under Section 3, [38] clause 10, "duly stamped" as applied to an instrument means stamped or written *upon an impressed stamp* in accordance with the law in force in British India when such instrument was executed or first executed.

Our answer, therefore, is that allowance may be made under Section 51 of the Stamp Act for instruments endorsed under Section 31 of that Act.

* Referred Case No. 1 of 1887.

11 M. 38 (F.B.).

1887 JULY 29.

FULL BENCH.

11 M. 38 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

REFERENCE UNDER SECTION 49 OF THE INDIAN STAMP ACT, 1879.* [29th July, 1887.]

Stamp Act—Act I of 1879, *s.* 49.

A bail-bond was executed to a District Munsif, who expressed no doubt as to the amount of duty to be paid and made no application to have the case referred. The District Judge referred the case to the High Court :

Held, that the District Judge was not authorised to make the reference.

CASE stated to be referred for the decision of the High Court by J. D. Goldingham, District Judge of Bellary, under Section 49 of the Stamp Act, in the matter of a bail-bond executed to the District Munsif of Naraindeverkerry. The District Munsif expressed no doubt as to the amount of duty to be paid, and made no application to have the case referred to the High Court.

Counsel were not instructed.

The Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT, and PARKER, JJ.) delivered the following

JUDGMENT.

It is not explained how this reference comes to be made by the District Judge : it should have been made, if at all, by the District Munsif through the District Judge ; but it does not clearly appear that there are grounds for such a reference under Section 49. The District Munsif had apparently no doubt as to the amount of stamp duty payable on the instrument ; and it is in such case only that a Court is authorized to make a reference under Section 49 of the Stamp Act.

The reference is therefore returned to the District Judge.

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11 M. 39. (F.B.).

[39] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

REFERENCE BY THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.† [29th July, 1887.]

Stamp Act—Act I of 1879, *Section* 3, *cl.* 13—*Mortgage—Indemnity bond.*

An agreement entered into by the Secretary of State and a salt contractor recited that the contractor has deposited certain promissory notes to secure the due fulfilment of the contract and provided that the promissory notes should be returned on the due fulfilment of the contract :

Held, that the agreement was a mortgage as defined by the Stamp Act.

CASE referred to the High Court by the Board of Revenue under Section 46 of the Stamp Act.

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* Referred Case No. 3 of 1887. † Referred Case No. 4 of 1887.

1887 JULY 29. — FULL BENCH. — 11 M. 39 (F.B.).

The reference was made as follows:—

"The Assistant Commissioner of Salt and Abkari Revenue, Tinnevelly division, impounded under Section 33 of Act I of 1879 and forwarded to the Collector, a document, purporting to be a mortgage with possession of property valued at Rs. 2,000. The agreement was drawn on a stamp of the value of Rs. 10.

"The Collector considering the document to be a mortgage and also an indemnity bond for a further (indefinite) amount, ruled that it should be stamped with aggregate duty, *viz.*, Rs. 20+Rs. 5, or Rs. 25 in all.

"The Board are of opinion that the document is a mortgage-deed and should have a stamp of Rs. 20, but that the indemnity clause being incidental to all mortgage-deeds is not liable to a separate duty—*vide Reference by the Board of Revenue* (1).

"The Board have refunded the proportionate penalty levied on the indemnity clause of the document under Section 42, but have no power under the Act to revise the adjudication as to the stamp duty and to order a refund of the duty improperly levied. They have, therefore, resolved to refer the case to the High Court under Section 46, and will, in case of the judgment of the High Court being in accordance with their opinion, order a refund of the excess duty levied."

[40] The agreement in question, to which the Secretary of State for India in Council and Rozario Fernando therein called the contractor were parties, related to the carriage of salt. It was, *inter alia*, recited that "the contractor has lodged in the treasury of Salt Circle Office Government promissory notes . . . . as security for the due and faithful performance by the contractor of this, his contract;" and it was, *inter alia*, witnessed that "upon the completion of this contract to the satisfaction of the Deputy Commissioner, the Deputy Commissioner will cause to be returned and delivered up to the contractor the said promissory notes to the value of Rs. 2,000, so deposited by the contractor as security for the due and faithful performance of this, his contract."

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

The Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT, and PARKER, JJ.) delivered the following

JUDGMENT.

The judgment of the High Court is in accordance with the opinion of the Board of Revenue.

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11 M. 40 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt and Mr. Justice Parker.

REFERENCE BY THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.* [29th July, 1887.]

Stamp Act—Act I of 1879, *Sections* 5, 14, 35, 37, 39.

A deed of release was endorsed on a deed of conveyance for Rs. 100. The conveyance bore an impressed stamp for one rupee, but the endorsement was unstamped:

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* No. 5 of 1887.

(1) 1 M. 133.

1887 JULY 29. FULL BENCH. 11 M. 40 (F.B.)

Held, that the conveyance was valid and that the release could be validated on payment of the deficient stamp duty and the penalty under Section 39 of the Stamp Act.

CASE referred to the High Court under Section 46 of the Stamp Act. The reference was made as follows:—

"The Sub-Registrar, Ootacamund, impounded, under Section 35, clause 2, of the Indian Stamp Act, and forwarded to the Collector, [41] a document purporting to contain two instruments, one a conveyance written on the face of the paper and one a release written on the back of the paper. The document bore a stamp of one rupee.

"The Collector considered that the conveyance required a stamp of one rupee, and that therefore the release is not entitled to the benefit of the proviso to Section 37, being written not only in contravention of Section 13 but also in contravention of Section 5 of the Act. The Collector doubted whether he could validate the release by a certificate under Section 39 on payment of deficient stamp duty and penalty, or whether he should order the release to be executed over again on a stamped paper.

"The Board feel doubt on the following points.

(*a*) Whether the first instrument should be considered to have been written, executed, and stamped according to law. The Board think that it should, and would regard section 14 of the Act as only invalidating the second instrument. The first instrument was duly stamped and written in accordance with the terms of section 12; and the existence of the second instrument on the back does not appear to invalidate the first.

(*b*) Whether the second instrument can be validated on payment of the deficient stamp duty and the penalty under section 39.

"The Board think it can, though obviously it might be very inconvenient that it should be possible that two valid instruments should be written, the one on the face and the other on the back of a stamped paper.

"The Board, feeling some doubts on the case, have resolved to refer it to the High Court."

The *Acting Government Pleader* (Mr. *Powell*) for the Board of Revenue.

The Full Bench (COLLINS, C. J., KERNAN, MUTTUSAMI AYYAR,, BRANDT, and PARKER, JJ.) delivered the following

JUDGMENT.

As to both questions, the High Court agrees in the view expressed by the Board.

1887 JULY 12.

APPELLATE CIVIL.

11 M. 42.

11 M. 42.

[42] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

VENKATACHALA (*Defendant No.* 1), *Appellant v.* KUPPUSAMI (*Plaintiff*), *Respondent.** [12th July, 1887.]

Civil Procedure Code, Sections 31, 53—*Public right—Amendment of plaint.*

A sued for an injunction to restrain interference with his right to graze cattle on the bed of a certain tank. The other raiyats of the village in whom the same right vested were originally joined as plaintiffs, but the plaint was amended under Section 53 of the Code of Civil Procedure, and their names were struck off the record. A proved no special damage:

Held, (1) that the fact that the other raiyats of the village have similar rights does not make A's right a public right in the sense that no action can be brought upon it unless special damage is proved;

(2) that the right claimed vests in A severally as well as jointly with the other raiyats, and the amendment of the plaint was not contrary to the provisions of Sections 31 or 53 of the Code of Civil Procedure.

[R., 5 Bom. L.R. 116 (117); 8 C.W.N. 425 (427. 430) (P.C.)]

SECOND appeal against the decree of D. Irvine, District Judge of Trichinopoly, in Appeal Suit No. 69 of 1885, confirming the decree of W. Gopalacharyar, District Munsif of Kulitalai, in Original Suit No. 472 of 1884.

This was a suit for an injunction to restrain defendants from interfering with plaintiff's right to graze his cattle and cut trees for agricultural purposes in the bed of the Periayeri (big tank) of Toraiyur. The plaintiff was one of the raiyats and the first defendant was the Zamindar of Toraiyur. The plaintiff first brought the suit in conjunction with other raiyats, but on the objection of the first defendant that the suit was bad for misjoinder, the Court directed the amendment of the plaint by striking out the names of the other plaintiffs. The suit was then gone into on the merits, and a decree was passed by the District Munsif in favour of the plaintiff which was confirmed on appeal by the District Judge.

Defendant No. 1 preferred this second appeal.

Ramachandra Rau Saheb, for appellant.

Mr. Parthasaradhi Ayyangar, for respondent.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this [43] report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.)

JUDGMENT.

Three objections are taken to the decree of the Judge, and the first of them is that the right which is the subject of the present suit is a public right, and that in the absence of special damage no suit ought to have been brought upon it. The respondent's case was that as a raiyat of the village of Toraiyur, he was entitled to graze his cattle on the tank-bed and the fact that the other raiyats of the village have similar rights does not make his right a public right in the sense that no action can be brought upon it unless special damage is proved. As observed by the Judge, the right in contest is one which vests in the respondent and the other raiyats jointly and severally. The next objection taken in appeal is

* Second Appeal No. 692 of 1886.

that the respondent ought not to have been permitted to amend the plaint and that his suit ought to have been dismissed. The amendment allowed consisted in striking out the names of nine other persons which appeared in the original plaint as those of co-plaintiffs and allowing the plaint to stand as one framed for the purpose of establishing the respondent's right alone. The right claimed vests, as already observed, severally as well as jointly in the respondent and the other raiyats, and the amendment made is not in our judgment contrary to the provisions either of Section 31 or 53.

1887 JULY 12. — APPELLATE CIVIL. — 11 M. 42.

As to the merits, we see no reason to interfere, and upon the facts found, the decision is right.

We dismiss this second appeal with costs.

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11 M. 43.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

NARAYANASAMI AND OTHERS (*Defendants*) *Appellants v.* KUPPUSAMI (*Plaintiff*), *Respondent.**
[22nd October, 1886, and 19th April, 1887.]

Hindu Law—Adoption—Only son given in adoption by widow.

A widow is competent to give in adoption whenever the husband is legally competent to give, and when there is no express prohibition from him.

[44] Three principles appear to regulate the power to give in adoption : (1) the son is the joint property of the father and the mother for the purposes of a gift in adoption, (2) when there is a competition between the father and the mother, the former has the predominant interest or a potential voice, and (3) after the father's death the property survives to the mother.

The adoption of an only son is not invalid—*Chinna Gaundan* v. *Kumara Gaundan* (1), followed.

[**Affr.**, 22 M. 398 (407) (**P.C.**) ; **N.F.**, 14 B. 249 (**F.B.**) ; 5 C.P.L.R. 26 (32) ; **F.** ,18 M. 53 (59, 60) ; **Appr.**, 14 A. 67 (94) (**F.B**); **R.**, 19 B. 428 (474) ; 16 M. 384 (395) ; 19 M. 497 (498) = 6 M.L.J. 90 = 1 Bom. L.R. 144 (147, 152).]

APPEAL against the decree of R. Vasudeva Rau, Subordinate Judge of Negapatam, in Original Suit No. 46 of 1883.

This was a suit to recover family property brought by Kuppusami, who claimed as the adoptive son of Nagalinga Pillai. Narayanasami, defendant No. 3, claimed to hold the property in dispute as the adoptive son of an undivided brother of Nagalinga Pillai. Both adoptions were put in issue ; and it was contended that the adoption of Kuppusami could not be valid in that he was an only son, and that his father was dead at the time when the adoption was alleged to have taken place. The Subordinate Judge found that both the adoptions set up were valid and decreed accordingly.

Against this decree the defendants appealed and the plaintiff filed a Memorandum of Objections.

Bhashyam Ayyangar and *Desikacharyar*, for appellants.

Subramanya Ayyar and *Kaliyanarama Ayyar*, for respondents.

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* Appeal No. 90 of 1885.
(1) 1 M.H.C.R. 54.

1887 APRIL 19. — APPELLATE CIVIL. — 11 M. 43.

The further facts of the case and the arguments adduced on the appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

JUDGMENT.

There were two brothers at Negapatam Sattiya Pillai and Nagalinga Pillai, who constituted together a joint Hindu family owning the property now in litigation. Each of the brothers married several wives, but neither of them had any male issue. Nagalinga, the younger brother, died about the 10th November, 1876, leaving him surviving two widows, Subbu Lakshmi and Sundaram; and Sattiya Pillai's branch of the family consisted of Sattiya Pillai and his two wives, Parvati and Sornam, and a daughter named Annam. The real parties to this appeal are two minors named Kuppusami, the plaintiff, and Narayanasami, defendant No. 3. It was alleged for the former, that, about 15 days prior to his death, Nagalinga Pillai adopted him, that he had since lived in coparcenary with Sattiya Pillai, that Sattiya Pillai died on the 21st January 1883 without male issue, natural [45] or adopted, and that, as the only surviving male coparcener of the joint Hindu family, he was solely entitled to the property now in dispute. The *factum* and validity of the adoption were denied for and by the appellants. The two brothers had a sister named Ponnammal, who had four sons named (1) Appadorai Pillai, (2) Govinda Pillai (3) Singaravelu Pillai and (4) Kayaroganam Pillai, who had formed together another joint Hindu family, which, according to Subbu Lakshmi's evidence, was possessed of property of 70,000 or 80,000 rupees value. Of these four brothers, Govinda Pillai died first, Appadorai Pillai died in 1875, Singaravelu died in 1881, and Kayaroganam died in 1883. In this family, none of the brothers, except Appadorai Pillai, had male issue and even he had an only son—the respondent—when he died in 1875. In advertence to this circumstance, the appellants contended that the respondent's adoption, even if true, was invalid for two reasons, *viz.*, first because he was the only son of his father and as such not eligible for adoption, and. secondly, for the reason that, assuming that a father was competent to give his only son in adoption so as to validate it when it was made, the mother was certainly not entitled to do the same either with or without the consent of his kinsmen in the absence of his permission. Apart from denying the respondent's adoption, the appellant alleged that Narayanasami was adopted by Sattiya Pillai the day previous to his death, *viz.*, the 20th January, 1883, and that, by virtue of such adoption, he was exclusively entitled to the property in suit. We may also mention here that the respondent's natural mother, Vedam, is the sister of Nagalinga's widows and that the third defendant's natural father, Ramasami Pillai, is Sattiya Pillai's first cousin on the mother's side and a cousin in the second degree on the father's side. The questions raised for decision in the suit were, whether the alleged adoptions or either of them were or was true, and whether the respondent's adoption was invalid on either of the grounds suggested on behalf of the appellants.

The Subordinate Judge has found that both adoptions are true and valid and decreed to each of the rival claimants a moiety of the property in dispute. To this decree, both parties object, the appellants, so far as it upholds the respondent's adoption, and the latter, so far as it recognizes the adoption of the third appellant. We shall consider first whether the appeal can be supported and then deal with the Memorandum of Objections.

1887 APRIL 19. — APPELLATE CIVIL. — 11 M. 43.

[46] [Their Lordships here set out and discuss the evidence as to the adoption of the respondent. The judgment then proceeds as follows :—]

Upon considering the whole evidence, we are not prepared to hold that the Subordinate Judge was wrong in considering the respondent's adoption as sufficiently proved.

The next contention is that the adoption is invalid either because the respondent was the only son of his father or because there was an implied prohibition, which rendered his mother incompetent to give him in adoption. As to the first ground of objection, it was not pressed and we are content to hold by decided cases. The question was considered in this Presidency in 1862, and after consideration the High Court then came to the conclusion that it was concluded by authority, *Chinna Goundan* v. *Kumara Goundan* (1). In Regular Appeal 70 of 1882, this decision was followed. Again, the Judicial Committee referred to the decision in 1862 and to the decision in *Raje V. A. Nimbalkar* v. *Jayavantrav M. Ranadive* (2), as showing that the maxim "*Quod fieri non debuit factum valet*" had received a limited application in Southern and Western India, in *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra* (3). We are not prepared to depart from the course of decisions in this Presidency, and we hold then that the adoption of an only son, if actually made, is valid, however sinful the act may be on strict religious considerations.

As to the second ground of objection, according to the original texts of Hindu Law, the prohibition of the adoption of an only son is made in order that the family of the giver may not thereby become extinct, but not with reference to any distinction between the power of the father and after his death of the mother to give an only son in adoption. As was contended by the pleader for the respondent, the texts suggest a disqualification rendering one ineligible for adoption whether he is given by the father or the mother. Vasishta says "an only son let no man give or take; for he is destined to prolong the line of his ancestors" (Dattaka Chandrika, section 1, sloka 29) (4). Caunaka says, "By no man having an only son is the gift of a son ever to be made. By a man having several sons such gift is to be anxiously made," (Dattaka [47] Chandrika, Sections 1-29). The texts contain a suggestion as to who ought not to be adopted and therefore either given or taken in adoption. If the husband then can give an only son in adoption on the ground that the texts are only directory or rest on theological considerations, the same reasoning applies by whomsoever that son is given. The general rule is, as suggested in Dattaka Chandrika, section 1, slokas 31 and 32, that the mother can give whenever the father can legally give, for what is not expressly prohibited by him is tacitly permitted by him. Three principles appear to regulate the power to give : (1) a son is the joint property of the father and the mother for the purposes of a gift in adoption ; (2) when there is a competition between the father and the mother, the former has a predominant interest or a potential voice ; and (3) after the father's death, the property survives to the mother.

According to Manu, chap. IX, p. 168 (5) the father or the mother may give. According to Yajnavalkya who is followed in Dattaka Chandrika, he, whom his father or mother gives, is a son given. According to Vasishta—" let not a woman either give or take a son, unless with the consent of the husband." The author of the Dattaka Chandrika interprets

(1) 1 M. H. C. R. 54.
(2) 4 B.H.C.R.A.C. 191.
(3) 5 I. A. 40 (53).
(4) Stokes' Hindu Law Books, p. 636.
(5) Institute of Manu by Jones, Ed. 4, p. 252.

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this text with reference to that of Yajnavalkya and deduces the theory of implied consent in the absence of express prohibition. According to the Mitakshara, chap. I, Section XI (1), he, whom his father or mother gives for adoption, shall be considered as a son given. In the note to Mitakshara, chap. I, Section XI, several interpretations of the passage "whom his father or mother gives" are noticed by the translator. According to the Mitakshara, the particle "Cha" in the original text is conjunctive and both the father and the mother must join in the gift. According to Bulambatta, the particle is used in a disjunctive sense. According to Smriti Chandrika, he, whom his father or mother affectionately gives as a son, is a given son or dattama (Smriti Chandrika, chap. X, 3) (2.)

According to Dattaka Chandrika, where there is no express prohibition, women are considered to be independent on the authority of Yajnavalkya. The theory of implied prohibition in the absence of express authority cannot then be supported in [48] principle in regard to the gift of a son in adoption. We are then referred to the decision of the Bombay High Court in *Lakshmappa* v. *Ramava* (3) and in *Somasekhara Raja* v. *Subhadra Maji* (4.) In Western India, Dattaka Mimansa is a binding authority and according to it no adoption can be made for the husband after his death without his express authority.

The Mayukha Kaustubha and other treatises of special authority in Bombay introduced the theory of implied authority, on the ground that an adoption by a widow was a meritorious act, which, unless forbidden by the husband, might be taken to have been sanctioned. As a limitation of the theory founded on the character of adoption as a meritorious act, they held that the adoption of an only son was a sinful act and that it did not come within the rule of implied authority. It followed then that in the absence of express authority from the husband, a widow can neither give nor take an only son in adoption. In Southern India, however, the theory of implied authority from the husband to adopt has not been recognized. There must be either the express permission of the husband, or what is equivalent to it the authority of his sapindas ; otherwise the widow is not competent to adopt. The meritorious character of an adoption as a religious act was not accepted as the basis of a general presumption of law and the limitation suggested in connection with it has likewise no application in this Presidency. We must hold then on the authority of Dattaka Chandrika, and Yajnavalkya that the widow is competent to give whenever the husband is legally competent to give and when there is no express prohibition from him. The result is that this appeal must fail, and we accordingly dismiss it with costs.

[The Memorandum of Objections was also dismissed with costs, their Lordships having ruled that the Subordinate Judge was right in holding that appellant No. 3 had been duly adopted as alleged.]

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(1) Stokes, p. 415; Mandlik, p. 468. (2) Ed. by Kristnasawmy Iyer, pp. 139-140.
(3) 12 B.H.C.R. 364. (4) 6 B. 524,

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[49] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt and Mr. Justice Parker.

MINAKSHI AND ANOTHER (*Defendants*), *Appellants v.* RAMANADA (*Plaintiff's Representative*), *Respondent.**
[3rd September, 1886 and 29th April, 1887.]

Hindu Law—Adoption—Dattaka Mimansa, Section V, slokas 16-20—*Dattaka Chandrika, Section II, sloka* 7—*Yajnavalkya, Chapter II, verse* 128—*Mitakshara, Chapter I, Section XI, paragraph* 1—*Smriti Chandrika,* 152.

It is a general rule of Hindu Law that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state.

[N.F., 15 M.L.J. 211; F., 32 B. 619=10 Bom.L.R. 948; R., 17 A. 294 (F.B.); 22 B. 973; 14 M. 459 (460); 18 M. 397 (399); 20 M. 283 (289).]

SECOND appeal against the decree of J. Hope, District Judge of Chingleput, in Appeal Suit No. 98 of 1879, reversing the decree of the District Munsif of Trivellore, in Original Suit No. 677 of 1878.

This was a suit to set aside an adoption.

A widow acting under the authority of her deceased husband adopted a boy with whose mother he could not have contracted a legal marriage.

The father of the deceased man brought this suit against the widow and the adoptive son to have the adoption set aside as invalid, on the ground of affinity between the natural mother and the adoptive father. The District Munsif dismissed the suit on the ground that the adoption contravened no rule of Hindu Law, but his decree was reversed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. *Shephard*, for appellants.

Bhashyam Ayyangar, for respondent.

The second appeal came on for hearing before (KERNAN and MUTTUSAMI AYYAR, JJ.), who made the following

ORDER :—Mr. Shephard maintains that there has been a mistranslation of some of the important texts, and that the cases in this Court adopting the general rule, *viz.*, "that a boy cannot be legally adopted whose mother the adoptor could not have married," [50] is not only not absolute but has no legal foundation. We refer the decision of this appeal to a Full Bench.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court.

The *Acting Advocate-General* (Hon. *J. H. Spring Branson*), *Anandacharlu* and *Ramasami Ayyangar*, for appellants.

Bhashyam Ayyangar and *Subba Rau*, for respondent.

JUDGMENT.

The suit, which is the subject of this second appeal, was brought by one Appa Sastri to set aside an adoption. Appa Sastri had two sons: Kachappa Sastri was the elder and Krishna Sastri was the younger. On

* Second Appeal No. 267 of 1882.

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the 19th September 1876, Krishna Sastri died, leaving a widow named Minakshi Ammal; and Kachappa Sastri died in June 1877, leaving a minor son. In August 1877 Minakshi Ammal adopted defendant No. 2, Chinnappien. It is admitted that his mother was a sagotra of Krishna Sastri and it is found by the Courts below that Krishna Sastri authorized his wife to adopt, that the plaintiff gave his sanction to the adoption, and that defendant No. 2 was accordingly adopted by defendant No. 1. The plaintiff's case was that, as no legal marriage was possible between Krishna Sastri and the mother of defendant No. 2 in her maiden state, the adoption was invalid. The District Munsif held that the Hindu Law contains no such prohibition as is mentioned above and upheld the adoption; but, on appeal, the District Judge set aside the adoption on the ground that the plaintiff's contention was well founded. The defendants preferred this second appeal, and the question referred to the Full Bench is whether it is a rule of Hindu Law that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state. It is conceded that among Brahmans marriage is prohibited between persons of the same gotram. In Caunaka's text cited in Dattaka Mimansa, section V, sloka 16 (1), and in Dattaka Chandrika, section II, sloka 7 (2), it is stated that, in order that one may be eligible for adoption, one should bear "the reflection of a son." This phrase was interpreted by both commentators to denote the capability to have been begotten by the adoptor through appointment and so forth; Dattaka Mimansa, section V, verse 16, and Dattaka Chandrika, section II, sloka 8. In [51] sloka 17, the author of the Dattaka Mimana observes that the brother, paternal and maternal uncles, the daughter's son and the sister's son are excluded, and in sloka 18, he states that prohibited connection is common to them all, and reiterates the proposition that prohibited connection exists whenever there is unfitness to be begotten by the individual himself by appointment. In the next paragraph he says that when the mutual relation between a bride and a bridegroom bears analogy to that of father or mother, such marriage is a prohibited connection; and in support of that proposition, he cites a passage from Grihyaparisishta describing prohibited connection in the case of marriage. That passage is as follows:—"The mutual relation between a couple being analogous to the one being the father or mother of the other, connection is forbidden; as for instance, the daughter of the wife's sister and the sister of the paternal uncle's wife." In sloka 20, the "commentator states that, "in the same manner as in the above text of "the Grihyaparisishta prohibited connection is excepted in the case of "marriage, so in the case in question (one who, if begotten by the adopter, "would have been the son of) a prohibited connection must be excepted, "in other words, such person is to be adopted as with the mother of "whom the adoptor might have carnal knowledge." The Sanskrit words which are rendered carnal knowledge are "Patiyogam."

The contention in support of this second appeal is that these words are not correctly translated and that the original Smriti contains no allusion to the possibility of a legal marriage or to fitness to be begotten through appointment.

There is a learned criticism on this point in Mandlik's translation of Yajnavalkya, pages 478-486; and the arguments adduced by the appellants' pleader were similar to those to be found in that book. The first

(1) Stokes' Hindu Law Books, p. 590. (2) *Ib.*, p. 638.

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contention is that the interpretation placed by the commentators on the original Smritis is not warranted. The words in those Smritis are "Putra Sadrisa" and "Putra Chayavaham," and their literal meaning is that the child taken in adoption should be one that is like a son born, or that is the reflection of such son. The authors of those Smritis, Caunaka and Manu, did not explain in what respect there should be a likeness or resemblance, and the commentators supplied the omission by analogy. In doing so, they took as a guide the ancient Hindu Law which regulated "niyoga" or the practice of begetting a child [52] by appointment, and considered that the likeness or resemblance consisted in "fitness to be begotten by self through niyoga." There is this justification for the analogy, *viz.*, that the object in permitting niyoga to the extent to which it was recognized by the ancient law, was to provide a substitute for the son of the body and thereby to prevent the extinction of that spiritual benefit which was believed to arise from the performance by a son of funeral and annual obsequies. It cannot be denied that niyoga, howmuchsoever it was censured by Manu and others, prevailed in former times and was recognized by ancient Hindu Law as a cause of filiation, though it was considerably restricted. Of the twelve descriptions of sons, Kshetraja was one and such a son ranked in the ancient law above the given son. See Mitakshara, chaps. I, XI, paragraph (1) and Smriti Chandrika, chap. X, section 4 (2).

The suggestion made by the appellants' pleader that we should now see whether the commentator's interpretation by analogy was justifiable cannot be adopted. It should be remembered that in several instances the commentaries themselves have become new law-sources, owing to the adoption of the opinion expressed therein by the people as part of the customary law. It is not possible to say beforehand, except by reference to actual usage, whether the opinion of the commentator on any particular point is part of the Hindu Law as received by the people ; and the only course open to Courts of Justice is, as pointed out by Muttusami Ayyar, J., in the Sivaganga case—*Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (3) to take the commentaries which are accepted generally as authoritative as containing the law applicable to the parties, unless they show by clear evidence that in some special matter the usage of the people is not in accord with them.

Another argument is that in Dattaka Mimansa, section II, sloka 20, there is mistranslation. Though the correct translation is as suggested by Mandlik, and though the Sanskrit words in the original mean no doubt "with the mother with whom niyoga is "possible" instead of "with the mother of whom the adoptor might have had carnal knowledge," we do not consider that the rule as laid down by Sutherland (4) has led to any substantial error. According to the commentaries, the rule is that niyoga must be [53] possible between the adoptive father and the mother of the child taken in adoption ; but according to the inference drawn by Sutherland, it is equivalent to saying that legal marriage must be possible. Prohibited connection in the case of marriage has reference to the relationship in which the couple between whom marriage is proposed stand irrespective of marriage and when the girl selected for marriage is a maiden. But prohibited connection in the case of niyoga has reference to the relationship between a married woman and the person who is appointed to beget a child upon her. In comparing the law of prohibited connection in the

(1) Stokes' Hindu Law Books, p. 410.
(2) Edition by Kristnasawmy Iyer, pp. 139-140.
(3) 3 M. 290 (339).
(4) Sutherland's Law of Adoption, p. 223 (Synopsis).

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one case with that in the other, it is necessary to bear in mind the theory that by marriage a woman passes into her husband's family, or, as the writers on Hindu Law say, her gotram becomes that of her husband. It should also be remembered that the rules of prohibited connection had a common object in both cases, *viz.*, the prevention of incest.

In the case of marriage there are three prohibitions, *viz.*—

(i) The couple between whom marriage is proposed should not be sapindas ;

(ii) They should not be sagotras ; and

(iii) There should be no Viruddha Sambandha or contrary relationship, that is, such relationship as would render sexual connection between them incestuous.

This contrary relationship is defined as consisting in the couple being so related to each other that by analogy the one is the father or the mother of the other, as for instance, the daughter of the wife's sister and the sister of the paternal uncle's wife. Now the rules as to the person eligible for appointment to beget a child are to the following effect:—According to Manu, chap. IX, verse 59 (1), a brother or a sapinda relation can alone be appointed. The brother or sapinda mentioned is the brother or sapinda of the woman's husband who by reason of marriage is in law her own brother or sapinda. As a sapinda his gotram must be the same as that of her husband, and as the marriage between her and her husband must be taken to have been in accordance with the law as to prohibited relationship, she could not have been in her maiden state a sapinda of the person declared eligible for appointment. There is, therefore, no conflict between the law of marriage and [54] the rule prescribed by Manu as to niyoga. Yajnavalkya declares in chap. II, verse 128 (2), that a sapinda or sagotra or some other person may be appointed to beget issue. In Mitakshara, chap. 1, sec. XI, verse 1 (3), the son of the wife is defined to be one begotten on a wife by a kinsman of her husband or some other relative. In Dattaka Mimansa, sec. V, verse 16 (4), the commentator says the person appointed may be a brother, a near or distant kinsman and so forth, and, as a justification for introducing the words "so forth," he observes as follows:—" Nor is such appointment of one unconnected impossible, for the invitation of such may take place under this text." " For the sake of seed, let some Brahmana be invited by wealth." As to the sapinda or sagotra of her husband, he could not have been her sapinda or sagotra when she was a maiden, as already explained. As to some other person, the proper construction is, some person like the others previously specified, in the sense that sexual intercourse with him would not be incestuous under the marriage law. Thus, there is no conflict between the law of appointment as to the person eligible for appointment and the law of marriage as to the person eligible for marriage. The object in both was that the sexual intercourse authorized by law should not be incestuous, and the religious foundation for the rule is that the offspring of incest is outcaste and not competent to offer funeral or annual oblations with efficacy. The point in the analogy consists in securing a son competent to perform those oblations and the analogy holds good whether it is considered in connection with the law of appointment or the law of marriage. Marriage, niyoga and adoption were alike ordained from a

(1) Institutes of Manu by Jones, Ed. 4, p. 238.
(2) Mandlik, pp. 218, 219.
(3) Stokes' Hindu Law Books, p. 410.
(4) *Ib.*, p. 590.

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religious point of view by ancient writers on Hindu Law for the production of a son competent to offer annual and funeral oblations with efficacy, and Sutherland referred to the law of marriage as to what is and is not incestuous connection, probably because it is the law now in force; whilst the commentators referred to the law of appointment and explained it by reference to the law of marriage because the object common to marriage and niyoga was alike to prevent incest. It does not seem to us that in substance there is any error whether the rule of prohibited connection which is taken as a guide is taken from the one or other, provided special cases of [55] deviation from the rule referable to other ancient practices are recognized as exceptions to the general rule when they are proved by usage. As to the argument that the expression "Viruddha Sambandha" or contrary relationship or prohibited connection is applied by writers on Hindu marriage to relationship other than sapinda or sagotra relationship, —it is perfectly true; but it does not follow that sapinda and sagotra relationship does not render the connection equally incestuous. It would be monstrous to say, and there is no authority for the statement, that a brother might be appointed to beget a child upon his sister for her husband; and marriage is prohibited among Brahmans in Southern India between a girl and a boy who are of the same gotra, because they stand to one another in the relation of brother and sister as being descended from the same paternal ancestor.

Another objection is that, according to this rule, the adoption of a daughter's son, of a sister's son, and of a brother is not permitted, whilst according to usage it is permitted. In the case of the two former, the special usage is referable to the ancient law of Putrika Putra; and in the case of a brother, if a special usage is proved, it may be referable to the ancient practice of regarding the eldest brother as a father. On this point, however, we do not consider it necessary to express any opinion in the absence of evidence as to usage. But these special cases do not seem to us to negative the applicability of the rule under consideration as a general rule. The case before us is not one referable to any authorized ancient practice or text; nor was there any plea or evidence of a special usage. We are therefore of opinion that this second appeal cannot be supported and that it must be dismissed with costs.

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11 M. 56.

[56] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RATHNASAMI AND OTHERS (*Defendants*), *Appellants v.* SUBRAMANYA (*Plaintiff*), *Respondent.** [20th January and 11th July, 1887.]

Transfer of Property Act—Act IV of 1882, *Sections* 130, 135, 136, 137—*Limitation Act—Act XV of* 1877, *Schedule, II, Article* 116—*Apportionment.*

A sued as assignee of a registered bond (payable in 1872) hypothecating land in the mofussil.

B, A's assignor, was a vakil practising in the High Court. B had obtained an assignment of the obligee's interest in the bond sued on and also another bond for Rs. 3,000 between the same parties, after the 1st July 1882 for Rs. 4,500. B had previously purchased the two bonds at a sale in execution of the decree of a

* Appeal No. 37 of 1886.

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Mofussil Court for Rs. 5 each. A's assignment from B purported to be made to A in payment of certain debts owed to him by B. No interest has been paid on the bond and no tender had been made to the plaintiff.

Held,—That the creditor's personal remedy was passed by Article 116 (1); and on the evidence, that therewas no consideration for the bond sued on or that it had failed.

Per cur.—The true construction of Section 136 of the Transfer of Property Act appears to us to be that the officers mentioned in it habitually exercising their functions in a particular Court are precluded from buying any actionable claim cognizable by that Court......We are referred to no evidence on the record as showing that B practised as a pleader regularly in the Subordinate Court at Negapatam, and we must therefore overrule the contention that the assignment to him is inoperative altogether. There is, however, no doubt that the assignments to him and by him are governed by Section 135, and that under Section 137 the person to whom a debt is transferred takes it subject to the liabilities to which the transfer was subject at the date of the transfer.

Upon the facts of the case B was clearly not entitled to recover more than Rs. 4,500, whatever might be due on the document (2). As he was the purchaser of an actionable claim, Section 135 of the Transfer of Property Act applied to him, and he could not recover more than the price he paid and the interest due thereon.

There is no foundation for the suggestion that where two actionable bonds are brought together for Rs. 4,500 and only Rs. 950 are recovered upon one of them the assignee is precluded from recovering the difference, but that he must submit to a loss arising from an apportionment.

[R., 16 A. 315 (317) (F.B.); 18 A. 265 (267) (F.B.); 21 C. 568 (582) (F.B.); 13 M. 225 (234) (F.B.); 19 M. 100 (103); 26 M. 686 (714) (F.B.); 7 O.C. 108 (111).]

APPEAL against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in Original Suit No. 35 of 1884.

[57] This was a suit by the assignee of a registered hypothecation bond for Rs. 7,250 (filed as exhibit A), dated 22nd April 1871, and payable on 30th June 1872. The land hypothecated belonged to the defendants and was situated in the mofussil.

The obligee of exhibit A assigned it under exhibit B, dated 22nd November 1871, to Namaswaya Mudali, who, in turn, assigned it together with another bond under exhibit C, dated 8th July 1882, for Rs. 4,500 to Arunachala Chetti, *benamee* for Dorasami Ayyar, a vakil practising in the High Court. Arunachala Chetti and Dorasami Ayyar assigned it again together with other bonds to the plaintiff under exhibit D, dated 22nd July 1884, the transfer being professedly made in discharge of previous debts owing by Dorasami Ayyar to the assignee. The original deeds were not handed over on these assignments, and before the date of exhibit C, Dorasami Ayyar had purchased exhibit A, together with another bond for the sum of Rs. 3,000 made between the same parties as exhibit A, and mentioned in it as still outstanding, at a Court sale held in execution of a decree. The purchase money paid by Dorasami Ayyar was Rs. 5 for each bond. On the bond for Rs. 3,000 Dorasami Ayyar recovered in 1880, as a compromise, the sum of Rs. 950. No interest had been paid on the bond A and no tender had been made to the plaintiff before action.

The Subordinate Judge passed a decree in favour of the plaintiff for the full amount sued for, declaring the defendants personally liable.

Defendants Nos. 2, 3, and 4 preferred this appeal.

Bhashyam Ayyangar and *Desikacharyar*, for appellants.

Mr. *K. Brown* and *Rama Rau*, for respondent.

(1) See also *Seshayya* v. *Annamma*, 10 M. 100 (Reporter's note).
(2) See *Subbammal* v. *Venkatrama*, 10 M. 289 (Reporter's note).

The following cases were among those cited in the argument: *Rajanikanth Nag Rai Chowdhuri* v. *Hari Mohan Guha* (1), *Modun Mohun Dut* v. *Futtarunnissa* (2), *Grish Chandra* v. *Kashisauri Debi* (3).

The rest of the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C. J., and MUTTUSAMI AYYAR, J.)

JUDGMENT.

One Aiyavu Nayak, deceased, his nephew, defendant No. 1, and his grand nephew, defendant No. 2, formed **[58]** together a joint Hindu family which owned in 1871, among other property, some 12 velies of land in the village of Keelaperambur situated in the district of Tanjore. The decree which is the subject of this appeal purports to enforce a hypothecation bond (Exhibit A) which Aiyavu Nayak, the defendant No. 1, and the mother and guardian of defendant No. 2 executed in favour of one Velayuda Udayan for Rs. 7,250 on the 22nd April 1871. That bond secured the debt on the land mentioned above and provided for its re-payment before the 30th June 1872 with interest at 9 per cent. per annum. The consideration, as recited in the document, consisted of three distinct items, *viz.*, Rs. 2,000 and Rs. 752½, principal and interest due on a prior hypothecation bond (Exhibit A1), which was executed by Aiyavu Nayak in favour of the obligee on the 25th September 1867, and Rs. 4,497½ received for the purposes of paying off a debt owing to the Branch Bank of Madras at Negapatam, and discharging the assessment due to Government by the joint family.

In the bond (Exhibit A) which is the subject of the present litigation, allusion is made to another hypothecation bond for Rs. 3,000 which was executed on the 10th December 1865 in regard to some six velies of land belonging to Aiyavu Nayak's family in the village of Velanpuducoody, still as outstanding. Document A was transferred first by the obligee to one Namaswaya Mudali on the 23rd November 1871, again by Namaswaya to one Arunachala Chetti, *benamee* for Dorasami Ayyar, on the 8th July 1882, and lastly by Arunachala and Dorasami to the respondent —the plaintiff—on the 22nd June 1884 by Exhibits B, C, and D. The property under hypothecation is partly in the possession of the second defendant or first appellant who obtained a decree for a third share of the property belonging to his family in the partition suit No. 153 of 1876 on the file of the Sub-Court, and partly in the possession of defendants Nos. 3 to 5, who claim to have purchased the hypothecated land on the 9th December 1874. The respondent brought the present suit to recover Rs. 17,151, being principal and interest said to be due to him as the last assignee of the hypothecation bond (Exhibit A.) His case was that the several transactions evidenced by Exhibits A to D were real and binding on the defendants, and the Subordinate Judge decreed the claim, disallowing, however, so much of the interest as exceeded the principal. By his decree he made defendants Nos. **[59]** 1 and 2, and all their property responsible for the claim, and directed the sale of the 12 velies of land under hypothecation in default of payment; and defendants Nos. 2, 3, and 5 have preferred this appeal. The objections urged in its support are (1) that there was no consideration for Exhibit A, or that there was a failure of consideration, if any; (2) that the document is not binding on the first appellant who was a minor in 1871; (3) that the claim to a personal decree is barred by limitation; (4) that Exhibits B to D were merely speculative, and

(1) 12 C. 470. (2) 13 C. 297. (3) 13 C. 145.

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the consideration alleged for them was either nominal or fictitious; and (5) that the claim is invalid under Act IV of 1882, or at all events in respect of more than the proportionate amount paid by the respondent's assignor with reference to the two hypothecation bonds which formed the subject of the assignment (Exhibit C) in his favour.

As to the preliminary objection, that the claim to recover the debt otherwise than by the sale of the property under hypothecation is barred by limitation, we are of opinion that it must prevail. The bond A was payable on or before the 30th June 1872, and the present suit was brought in June 1884, a few days before the expiration of 12 years, whilst the statutory period prescribed by Article 116 of the second schedule of the Limitation Act for a suit to recover the debt due on a registered bond like A is six years. Article 132 applies only to the remedy against the hypothecated property. So it was held by the Privy Council with reference to the corresponding article in the second schedule of Act IX of 1871 in *Ramdin* v. *Kalka Pershad* (1). The words used in that Act are, "For money charged upon immoveable property," whilst the words used in Article 132 of Act XV of 1877 are "To enforce payment of money charged upon immoveable property,"and the language employed in both appears to refer to suits in which the plaintiff seeks to enforce the charge. The case of *Pestonji Bezonji* v. *Abdool Rahiman Bin Shaik Budoo* (2) decided that Article 132 in Act XV of 1877 applied only to the remedy against immoveable property and not to every remedy which the instrument carried with it. It is no doubt provided by Section 43, Act X of 1877, that a person entitled to more than one remedy in respect of the same cause of action may sue for all or any of the remedies, that if he omits (except with the leave of the **[60]** Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted, and that for the purposes of that section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action. But it does not necessarily follow from this that the same period of limitation was intended to be prescribed for the enforcement of both remedies, and the intention was to prevent several suits for several remedies unless there was some special cause in which case liberty was reserved for the party concerned to obtain leave of the Court to institute different suits. The decree appealed against cannot then be supported so far as it makes the first and second defendants and their general property liable for the claim.

The next objection taken in appeal is that assuming that there was consideration to support documents A to D, the claim is bad in whole or in part under Act IV of 1882. This Act came into force on the 1st July 1882 and it cannot apply either to the assignment B, which is dated November 1871, or to the purchase by Dorasami, the respondent's assignor, of the hypothecation bond A for Rs. 5 at the Court sale held in execution of the decree in Original Suit No. 15 of 1873, on the 2nd March 1878. It is then argued that the assignment (Exhibit C), dated the 8th July 1882, was made for the benefit of Dorasami, though ostensibly in the name of Arunachala, and that as Dorasami was a vakil of the High Court, the assignment of an actionable claim in his favor was contrary to the provisions of Section 136 of Act IV of 1882. That section provides that "no Judge, Pleader, Mukhtar, Clerk, Bailiff or other officer connected with Courts of Justice can *buy any actionable* claim falling under the jurisdiction

(1) 12 I A. 12 (14). (2) 5 B. 463.

of the Court in which he exercises his functions." An actionable claim is defined by Section 130 to be "a claim which the Civil Courts recognize as affording grounds for relief whether a suit for its enforcement is or is not actually pending or likely to become necessary." The Subordinate Judge confines this prohibition to cases where *bonds* which are actionable are attached and sold in execution of decrees of Courts of Justice, but we do not consider that such is the proper scope of the section. The words "falling under the jurisdiction of the Court" do not mean "*in execution of decrees.*" Nor is there anything in Section 136 to suggest that the sale contemplated by it is only a *Court sale.* It is urged by the appel-**[61]** lants' pleader that a vakil of the High Court is entitled to practise as well in every Subordinate Court as in the High Court, and that he is not at liberty to buy an actionable claim anywhere in this Presidency. But we are unable to accept this suggestion either, for it goes beyond the words "the Court in which he exercises his functions." The true construction appears to us to be that the officers mentioned in Section 136 habitually exercising their functions in a particular Court are precluded from buying any actionable claim cognizable by that Court. The intention was probably not to place them in a position in which they may be tempted to use the influence or the information which they may acquire by virtue of their possible connection with the transaction of business in the Court, to the prejudice of persons who might have to resort to it for the adjudication of actionable claims. We are referred to no evidence on the record as showing that Dorasami Ayyar practised as a pleader regularly in the Subordinate Court at Negapatam, and we must therefore overrule the contention that assignment C is inoperative altogether. There is, however, no doubt that the assignments C and D are governed by Section 135, and that under Section 137 the person to whom a debt is transferred takes it subject to the liabilities to which the transferor was subject at the date of the transfer. Assuming that the hypothecation A is a valid transaction as against the appellants, the subsequent partition and purchase on which the appellants rely must be taken to have been made subject to it. On the 22nd March 1878 Dorasami bought the hypothecation bond A and the hypothecation bond for Rs. 3,000, of the 10th December 1865, for Rs. 5 each at the Court sale held in execution of the decree in Original Suit No. 15 of 1873 on the file of the Subordinate Court. This is proved by the sale account (Exhibit V) the list of attachment (Exhibit VI), and Dorasami Ayyar's receipt (Exhibit X), which was admitted in evidence on appeal. This being so, it must be taken that, by the Court sale, the right to recover the entire amount due to the judgment-debtor, Velayuda Udayan, under those documents passed to Dorasami Ayyar, although he paid no more than Rs. 10 for them. But it is shown by the assignment B that the two documents purchased by Dorasami were included in the four bonds assigned by the judgment-debtor Velayuda Udayan to Namaswaya *alias* Chokku Mudali of Peralam in November 1871. This prior assignment placed Dorasami in this **[62]** predicament, *viz.*, unless he showed that the prior assignment was a colorable transaction, or obtained its transfer, his purchase for Rs. 10 at the Court sale was ineffectual. He ventured, however, to institute Original Suit No. 125 of 1880 against defendants Nos. 1 and 2, and Aiyavu Nayak and three others to recover from them and by the sale of the hypothecated property Rs. 7,050, which he said was due upon the hypothecation bond for Rs. 3,000 of the 10th December 1865. But whilst that suit was pending, he entered into a compromise with the defendants therein and accepted from them Rs. 950 in full

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satisfaction of his claim. Thus Dorasami's speculation in regard to the hypothecation bond of December 1865 was successful to this extent, *viz.*, that he recovered Rs. 950 upon a bond for which he had paid Rs. 5 as its price. However, in July 1882, he succeeded in obtaining from Namaswaya an assignment of the two bonds purchased at the Court sale, for, as it alleged. Rs. 4,500, whilst the amount due upon them was over Rs. 16,000. He took the transfer C not in his own name, but in the name of Arunachala, a Nattukotai merchant or money-lender with whom, it would seem, Dorasami had dealings. It is not clear why Dorasami did not take the assignment in his own name, but it was probably because of his having instituted Original Suit No. 125 of 1880 and accepted Rs. 950 in satisfaction of his claim under one of those documents. By the desire of Dorasami, Viaravan Chetty, the principal of Arunachala, instituted Original Suit No. 31 of 1883 in the Subordinate Court at Negapatam, the bond sued upon being again the hypothecation bond of the 10th December 1865, and the amount claimed therein being Rs. 5,000; but the Subordinate Judge of Negapatam dismissed the claim. It would appear that the original bond was not forthcoming at the trial of that suit and that Namaswaya handed to Dorasami only a registered copy. Dorasami's connection with the assignment C, his agreement with Arunachala that if the suit failed, Dorasami was to pay him back Rs. 4,500 advanced for C, and if the suit succeeded, the latter was to pay the excess to the former, the institution by Dorasami and the result of Original Suit No. 125 of 1880, and the suspicious character of the evidence produced at the trial to prove the loss of the original bond were referred to by the Subordinate Judge in support of his decision. Thus Dorasami's scheme of improving his position as purchaser by the assignment C failed and ended **[63]** in a loss so far as it related to the document of the 10th December 1865. It is to be observed, however, that Dorasami purchased also document A for Rs. 5 and got it included in the two documents, of which the assignment C was taken for Rs. 4,500 in the name of Arunachala. After the dismissal of Original Suit No. 31 of 1883, Dorasami and Arunachala assigned the hypothecation bond A on the 22nd June 1884, to the respondent—plaintiff—who is Dorasami's wife's brother, and whose son is Dorasami's son-in-law. Document D, which evidences this assignment, recites, and it is the plaintiff's case that the consideration for it was the liquidation of two prior debts amounting to Rs. 16,000 and odd.

Upon the foregoing facts Dorasami was clearly not entitled to recover more than Rs. 4,500 whatever might be the amount due upon document A. The respondent's case was that the assignment C was taken by Namaswaya *bona fide* and for value. That being so, as the purchaser of document A at the Court sale Dorasami bought nothing, for, the interest of Velayuda, the judgment-debtor, had been transferred to Namaswaya seven years previous to the purchase. As the assignee of Namaswaya under Exhibit D, he paid only Rs. 4,500 for the bond A and another document. As he was the purchaser of an actionable claim Section 135 of Act IV of 1882 applied to him, and he could not recover more than the price he paid and the interest due thereon. As to the contention that Rs. 4,500 was paid for two bonds, and that a proportionate part is alone recoverable on document A, we cannot accede to it. The intention indicated by Section 135 is to prevent traffic in actionable claims by rendering the difference between the amount of the claim and the actual price paid, irrecoverable by action, and thereby removing the motive

for unconscionable dealing in such claims. There is therefore no foundation for the suggestion that when two actionable bonds are bought together for Rs. 4,500, and only Rs. 950 are recovered upon one of them, the assignee is precluded from recovering the difference, but that he must submit to a loss arising from an apportionment. The intention of the legislature was only to take away the profit or discount which might tend to encourage speculative purchases, and it is therefore reasonable to hold that the assignee may recover the whole of the difference between what he paid for the two documents and what he actually recovered upon one of them.

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[64] It is urged for the respondent that whatever might be the sum paid by Arunachala, the respondent who accepted the assignment D, in satisfaction of prior debts, is entitled to recover what is due under document A under Section 135, clause (*b*). If the respondent were the first assignee, we might support the contention; but as the third assignee, he could only take what his assignor was competent to assign, *viz.*, his right to recover what he had actually paid together with interest. In the view that documents A to D evidenced real transactions, the respondent could recover no more than Rs. 3,550 and the interest due upon it.

[Their Lordships next proceed to review the evidence in detail and conclude as follows :—]

Having regard, however, to the whole evidence, we are of opinion that no money was paid when the hypothecation bond (Exhibit A) was executed, that neither Velayuda nor Namaswaya paid the debt due to the Bank or to Saviri Muthu Nadan, that the consideration for Exhibit A, if any, failed, and that the circumstances in which the several assignments were made and the meagre and unsatisfactory evidence as to the payment of value for them strengthen that conclusion. On this ground the respondent's claim must fail. We therefore set aside the decree of the Subordinate Judge and direct that the suit be dismissed with costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KUNHALI BEARI (*Defendant No.* 10), *Appellant v.* KESHAVA SHANBAGA (*Plaintiff*), *Respondent.** [28th July & 24th August, 1887.]

Hindu law—Decree against father—Sale of ancestral estate in execution of money decree—Son's rights and liabilities.

A purchased the half share of the judgment-debtors in certain immoveable family property, at a court-sale held in execution of money decrees against B and his brother, who were members of an undivided Hindu family. B's undivided son sued A—B and the remaining members of his family being also joined as defendants—to recover a share in the land, alleging that his interest was not bound by the sale; but he did not prove that the debt for which the decrees were passed was immoral, and it appeared that A had bargained and paid for the entire estate. [65] The plaintiff was a minor at the time of the sale, and B was not the managing member of the family :

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Held, that the Court-sale was binding on the plaintiff's share—*Nanomi Babuasin* v. *Modhun Mohun* (L.R., 13 I.A., 1; S.C. I.L.R. 13 Cal. 21) discussed and followed (1).

[F., 2 C.P.L.R. 234; Appr., 28 B. 383 (390); R., 12 M. 309 (311) = 13 Ind. Jur. 292; 21 M. 222 (224); 4 Bom.L.R. 597 (601); 16 C.P.L.R. 19 (23); Cons., 16 M. 99 (102); D., 13 M. 51 (53).]

SECOND appeal against the decree of C. Venkoba Charyar, Subordinate Judge of South Canara, in Appeal Suit, No. 19 of 1886, confirming the decree of J. P. Fernandez, District Munsif of Kasargod, in Original Suit, No. 325 of 1884.

This was a suit by the plaintiff to recover a share of family property belonging to him and defendants Nos. 1 to 9 jointly. The plaintiff and defendants Nos. 6 to 9 are the sons, and defendants Nos. 2 and 3 are the brothers, and defendants Nos. 4 and 5 are the nephews of defendant No. 1, and they constitute together with him a joint Hindu family which is governed by the Mitakshara law.

Defendant No. 10 had purchased the property in suit at a Court-sale held in execution of money decrees obtained against defendants Nos. 1 and 2, and he pleaded that the decrees and sale were binding on the plaintiff. It was not shown that the debt for which the decrees were passed were immoral.

The District Munsif decreed in favor of the plaintiff, and his decree was confirmed on appeal by the Subordinate Judge, who observed that "it is admitted that the debt was a mere personal debt of the father, and there is nothing to show why and for what purpose it was contracted," and expressed an opinion that the principles laid down in *Suraj Bunsi Koer's* case (2) were not applicable to a suit brought in the lifetime of the father.

Defendant No. 10 preferred this second appeal.

Srinivasa Rau, for appellant.

Gopala Rau, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report, from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

JUDGMENT.

The appellant (defendant No. 10) is the purchaser at a Court-sale. The respondent (plaintiff) and defendants Nos. 6 to 9 are the five sons of defendant No. 1, defendants Nos. 2 and 3 [66] are his brothers, and defendants Nos. 4 and 5 are his brother's sons. The respondent and defendants Nos. 1 to 9 are Konkani Brahmans residing in South Canara and constituting together a joint Hindu family, which is governed by the Mitakshara law. One Kunhali Beari obtained money decrees against the defendants Nos. 1 and 2 in Original suits, Nos. 176 and 177 of 1863 and No. 108 of 1865, on the file of the District Munsif of Vitla, and in their execution the judgment-creditor brought to sale the first and second defendants' half-share of the property in suit; and one Maine Beari purchased it for Rs. 340 on the 7th March 1874 and re-sold it to the appellant in April 1876. It is conceded that the half-share was separated either under process of the Court or by consent, and is now in the appellant's possession. The respondent was a minor at the time of the

(1) See also *Simbhunath Pandey* v. *Golab Singh*, 14 I.A. 77. *Pettachi Chettiar* v. *Sangili Veera Pandia*, *ib.* p. 84. *Doulat Ram* v. *Mehr Chand*, *ib.* p. 187—(Reporter's Note).

(2) 6 I.A. 88.

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attachment and sale. Of the three decrees, in execution of which the sale took place, the decree in original suit 108 of 1865 was alone passed against defendants Nos. 1 and 2, and of the half-share purchased at the Court-sale a moiety or a quarter-share belonged to the respondent's father, and the respondent would be entitled on partition to a sixth part therein or to twenty-fourth share of the entire family property. The respondent instituted the present suit to set aside the sale so far as it affected his undivided interest and both the Courts below upheld his claim. It was not shown that the debt, for which decrees were passed, was vicious or immoral, and the contention in second appeal is that the respondent's interest also passed by the court-sale. We are of opinion that it is well founded. The distinction, which was formerly made between a mere money decree and a decree which executed a pre-existing mortgage of ancestral property, was not considered to be sound by the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun*(1). It was held in that case, irrespective of the distinction that, if the purchaser bargained and paid for the entire estate, including the father's and the sons' interests therein, the purchaser was at liberty to defend his title upon any ground which would have justified the sale had the sons been brought in to defend their interests in execution proceedings. It was observed that "all the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or [67] the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale." In the case before us, there is no doubt that the purchaser bargained and paid for the first defendant's quarter-share which included the sons' interest also, and the debt was proved to be neither immoral nor vicious nor illusory. As ruled by this Court in *Narasanna* v. *Gurappa* (2), which followed the decision of the Privy Council, the respondent's interest must be taken to have passed by the court-sale. It is now argued for him that the Privy Council's decision is not applicable to a case in which the father was not the managing member of the joint family. The *ratio decidendi* is *not* that the father was sued as the head or representative of the joint family as between him and his brother, but that the father had power to sell also the son's interest in ancestral property to pay his own antecedent debts, which are neither vicious nor immoral and which it is the son's pious duty to discharge. It is then suggested that the son's pious obligation can only arise after the father's death, and that there can be no valid sale during his lifetime. If the suggestion were adopted, it would negative the father's power to sell the son's interest at all during his life, and it is inconsistent with the course of decisions that recognize such power. Again, it is admitted that if the father is the managing member of a joint Hindu family, which consists of himself, his brothers and sons, he can then sell the son's interest for his personal debts which are not immoral or vicious, but it is not shown how he can then take advantage of the son's obligation which is to arise only after his death. The true foundation for the pious obligation is the relation between father and son as such and it is the son's pious duty to pay his debt, whether he is a managing co-parcener or not at his death, or when he contracted the debt. The test is whether the father has a disposing power over the son's share, and this power he has whether he or his brother is the managing member of the joint family.

(1) 13 C. 21. (2) 9 M. 424 (428).

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Our attention is next drawn to two decided cases, *viz.*, *Basa Mal* v. *Maharaj Singh* (1) and *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas* (2). In the latter case the defendant obtained a money decree against two brothers, Jagjivandas Dayaram and [68] Dayabhai Dayaram. Both were in possession of family property as managing members of a joint Hindu family. They had firms at Surat and Baroda, in which they were jointly interested. The business of the firms was the family business and the decree-debt was contracted in the course of that business. In execution of his decree, the defendant in that case attached some ancestral property of both the judgment-debtors; and the sons of Jagjivandas sued to set aside the attachment on the ground that by reason of their father's death before the attachment, his interest in ancestral property survived to them and ceased to be liable in their hands for the payment of his personal debts. The District Judge held that the son's shares were not liable, but the High Court reversed the decree. Adverting to the above decision of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun*, West J., observed : " By this, the disposition of the family estate or a disposal of it under proceedings taken against the father alone is made to affect the son's as well as the father's interest, except so far as the son can establish, in a proceeding taken for that purpose, that the voluntary disposal was made under circumstances which deprived the father of the disposing power, or that the enforced disposal was on account of an obligation to which the son was not subject. The father is in fact made the representative of his family, both in transactions and suits, subject only to the right of the sons to prevent the entire dissipation of the estate by particular instances of wrong-doing on the father's part." This decision then is an authority for the view that, as between the father and son, the father is the representative of his branch of the family, that, as against the son, he has a disposing power in regard to the share of the family property belonging to that branch, and that the son can only invalidate the sale in execution by showing that it was on account of an obligation to which he was not subject under Hindu law. The fact of Jagjivandas and his brother Dayabhai having been in possession of family property as managers of a joint Hindu family is referred to as one of the circumstances showing that the debt decreed in that case was a family debt. In *Basa Mal* v. *Maharaj Singh*, the son brought the suit to set aside the court-sale, alleging that the mortgage on which the decree was founded was executed by the father to raise money for immoral purposes. The facts found, however, were that the property which was sold was ancestral, that it was in the son's possession, [69] and that a considerable portion of the money advanced was required by the father for the payment of revenue, but that the father made it necessary for him to borrow by imprudent and extravagant proceedings and that the purchaser had knowledge of the son's claim. The Subordinate Judge held that the son's share did not pass by the sale, but the High Court held that it did, observing that the son failed to show that the debt was immoral, whilst the decree and the sale certificate showed that the sale was of the entirety of the interest in the execution of a decree against the father. In its judgment, however, the Court referred to the decisions of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (3) *Deendyal Lall* v. *Jugdeep Narain Singh* (4). *Suraj Bunsi Koer* v. *Sheo Prosad Singh* (5), *Bissessur Lall Sahoo*

(1) 8 A. 205 (213). (2) 11 B. 37. (3) 1 I.A. 321.
(4) 4 I.A. 247. (5) 6 I.A. 88.

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v. *Maharajah Luchmessur Singh* (1), *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (2), *Baboo Hurdey Narain Sahu* v. *Rooder Perkash Misser* (3), *Nanomi Babuasin* v. *Modhun Mohun*, and concluded as follows:—"It seems to us that two broad rules are deducible from the foregoing authorities. First, when a decree is made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was incurred for immoral purposes of the kind mentioned by Yajnavalkya, chap. II, sloka 47 (4), and Manu, chap. VIII, sloka 159 (5), and one which it would not be their pious duty to discharge. Next,—if, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold is his right, title and interest in the joint ancestral estate, then the auction-purchaser acquires no more than the [70] father's individual right and interest—the right to demand partition to the extent of his share."

The contention in the case before us is that the father must be the managing member of the joint family consisting of himself and of his brothers and that the Privy Council's decisions are otherwise not applicable; but the facts of the case last cited do not show that the father had a brother and that the question was discussed with reference to his position as managing member in relation to the brother. The term "manager" is probably used in the decision to exclude the case of a divided son. As to the Privy Council's decisions, the first case noticed by the Allahabad High Court is that of *Appovier* v. *Rama Subba Aiyan*(6). That case is important only as embodying the explanation by Lord Westbury of the notion of a joint Hindu family, and it is otherwise not pertinent to the question now under our consideration. The next is *Girdharee Lall* v. *Kantoo Lall* (7). The property in dispute in that case was acquired by one Kunhya Lal, who had two sons, Bhikari Lal, the elder, and Bujrung Sale, the younger. Upon the death of the father, the elder son, Bhikari, became the manager of the joint Hindu family and had a son, named Kantoo Lall. The two brothers became heavily indebted, granted bonds and other charges on the property which they had inherited from their father. On being much pressed by their creditors, they sold the lands then in dispute and applied most of the sale-proceeds in discharge of their debts. About this time, the younger brother had also an infant son. Then both Kantoo Lall, the son of the elder brother Bhikari Lall, and the son of the younger brother, instituted a suit to recover the lands on the ground that the sale by their fathers was in excess of their rights under the Mitila law, which is the same as the Mitakshara law as to the son's liability. The Privy Council held that the suit must fail on the grounds that the debt was not shewn to be immoral and that the ancestral property which descends to a father under the Mitakshara law is not

(1) 6 I.A. 233. (2) 9 I.A. 128. (3) 11 I.A. 26.
(4) Mandlik's Translation, p. 205.
(5) Jones' Institutes of Manu, Ed. IV., p. 198.
(6) 11 M. I. A. 75. (7) 1 I. A. 321.

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exempted from liability to pay his debts because a son is born to him. They made no distinction between the claim of the son of the younger brother and that of Kantoo Lall, because the younger brother was not the managing member of the joint family, but dealt with both claims alike with reference to the pious duty of sons to pay their fathers' debts. In [71] support of their opinion the Judicial Committee referred to the rule of Hindu law as stated by Lord Justice Knight Bruce, *viz.*, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt, and applying it to the case before them in which the debt was not shown to be immoral declined to set aside the sale in 1874. This decision is then a clear authority against the contention that the pious obligation which arises only after the father's death cannot be referred back to validate a sale by the father, and that unless the father is the managing member, the rule founded on the pious duty of the son cannot be applied.

The third case is *Muddun Thakoor's case.* He purchased at a sale in execution of a decree against the two fathers named in *Girdharee Lall* v. *Kantoo Lall.* The Judicial Committee upheld the sale as against Kantu Lal and his cousin ; the principle on which this decision rested being that the purchaser in execution was not bound to go behind the decree or further back than to see that there was a decree against the two fathers, that the property sold was property liable to satisfy the decree if the decree had been properly given against them, and that if he made an inquiry to that extent and then purchased the estate under an execution *bona fide* and for value, the sale was not liable to be set aside at the suit of the sons.

The fourth case was *Deendyal* v. *Jugdeep Narain Singh.* In that case the contest had no reference to the father's position as the managing coparcener of a joint family of brothers. The decree was against the father alone and it was in terms what is designated a money decree, though the document on which it was based was a hypothecation bond and there was an averment after decree that the debt decreed was a family debt. The Judicial Committee held that the interest which passed by the sale in execution was the right, title and interest of the father as an individual coparcener, and that that interest amounted only to a right to demand partition, and not to a specific share in any particular portion of the property of the joint family. In the result, it treated the theory of the pious obligation of the son as immaterial under the circumstances of that case, and the right of the purchaser as limited to that of the father as an individual coparcener. The principle then on which it seems to rest was [72] that if a creditor had desired to make the son's interest liable, he should have made him a party to the suit, and shown in the suit that the debt was a family debt; that otherwise the right, title and interest of the judgment-debtor, which alone it was competent to him to bring to sale, must be taken to be the interest of the father as an individual, and that it is not competent to the purchaser to go behind the decree and seek to extend the interest liable to be sold by a reference after decree and sale either to the character of the debt as a family debt or of the transaction on which the suit was founded as a hypothecation of joint family property. The decision in *Kantoo Lall's case* pointed out that the decree against the father should be given effect to with reference to the exposition of Hindu law by Lord Justice Knight Bruce that the freedom of the son from the obligation to pay his father's debt had reference to the nature of the debt

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and not to the nature of the property sold as ancestral or self-acquired. The decision in *Deendyal's case* proceeded on the other hand upon the view that the interest that passes by the Court sale is what is liable to be sold as the individual property of the judgment-debtor, strict regard being had to the frame of the suit, and to the terms of the decree in relation to the coparcenary law and the law of procedure.

The fifth case is *Suraj Bunsi Koer's case.* In that case there was a decree against the father, and it gave effect to a mortgage executed by him. But when the mortgaged property was attached in execution, the son objected to the attachment on the ground that the debt was not binding on him. His objection was, however, overruled and he was referred to a regular suit. With notice of the son's claim the purchaser bought the property at the sale held in execution, and the contest was whether in that state of facts the sale was binding on the son. It must be remembered that one of the facts found in that case was that, if the creditor had instituted the inquiry which he was bound to have instituted as ruled in *Hunooman Persaud's case* (1), he should have seen that the necessity for the debt was the father's improper and immoral way of life which required the expenditure of funds not derivable from his regular income, and that it was conceded that the son had established against the execution creditor a case, which, if he had been the purchaser at the execution sale, would have entitled the [73] son to full relief against him. The contest was thus narrowed to the point whether he was entitled to the same relief as against the purchaser, and as the latter had notice, the Judicial Committee distinguished it from *Muddun Thakoor's case* and upheld the sale only to the extent of the father's interest in the property sold. In their judgment, the Judicial Committee referred to *Kantoo Lall's case* and *Muddun Thakoor's case* and approved of the principle laid down in the former, *viz.*, that the freedom of the son as far as regards ancestral property, from the obligation to discharge the father's debts, under Hindu law, can be successfully pleaded only by a consideration of the invalid nature of the father's debts adding, however, that that case went beyond the decision of the Sudder Dewany Adawlut in treating the son's obligation to pay his father's debts unless contracted for immoral purposes as a sufficient answer to his suit to set aside the sale. As to *Muddun Thakoor's case*, they approved of the principle on which it was decided, *viz.*, that a purchaser at an execution was not bound to go further back than to see that there was a decree against the father, and that the property was liable to satisfy the decree, and that if he instituted inquiry on both these points and purchased *bona fide* and paid value, the entire property including the son's interest would pass by the court-sale. They deduced two propositions as established beyond doubt, *viz.*, "(I) that when joint ancestral property had passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted; (II) that the purchasers at an execution sale, being strangers to the suit, if they had not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

(1) 6 M. I. A. 393 (424).

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The sixth case is that of *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*. In that case the joint Hindu family consisted of two minors, Mosaheb and Chuman, the sons of Ramnath Dass, the son of Nath Dass. The creditor brought three suits in respect of rent due from members of the joint family. In one, the widows of Nath Dass and Ramnath Dass were impleaded as the guardians **[74]** of the two minors, and the rent claimed accrued due in respect of the Mouzah of Rudarpore which was leased to Nath Dass and Ramnath Dass, since deceased. A decree was passed against the minors, but it contained a direction that it was to be executed against the property of the deceased lease-holders and *not* against the person and self-acquired property of the judgment-debtors. In the other two suits also, decrees were passed for rent due beyond what was decreed in the first suit. A Mouzah called Muddunpore was sold in execution of all the three decrees for Rs. 35,000, and the guardians of the minors made no objection to the sale at that time. It was found that the Mouzah sold was the property of the joint family. In the second suit, one of the two sons mentioned in the first suit as minors, Mosaheb, was alone impleaded as the heir of Nath Dass and the rent claimed was in respect of the Mouzah of Ramnugger. The decree directed that it was to be executed against the property left by the deceased lease-holder of Ramnugger, Nath Dass, and not against the person or self-acquired property of the defendant. The third decree was passed in a suit in which the widow of Nath Dass was impleaded as the guardian of Mosaheb, and it contained a similar direction as to the property against which it was to be executed. The second and third decrees were informally drawn up. Three years after the sale of the Mouzah of Muddunpore, Mosaheb and Chuman sold their alleged right to recover from the purchaser the difference between the amount of the first decree, Rs. 8,000, and Rs. 35,000, for which the Mouzah of Muddunpore was sold. The contention was that that Mouzah was not liable to be sold in execution of the second and third decrees. The Privy Council held that whatever irregularity there might have been in drawing up the decrees, they were substantially decrees in respect of a joint debt of the family and against the representative of the family and may be properly executed against the family property. The principle of this decision is then that in execution procedings, the Courts will look at the substance of the transaction and will not be disposed to set aside an execution upon mere technical grounds, when they find that it is substantially right.

The next case is *Muttayan Chettiar* v. *Sangili Vira Pandia*. In that case the rule laid down in Kantu Lal's was held to apply even when the ancestral estate affected by it was an impartible zamindari.

[75] The eighth case is that of *Hurdey Narain Sahu* v. *Rooder Perkash Misser*. In it there was only a money-decree against the father, and the Privy Council applying the principle laid down in *Deendyal's case*, held that nothing more than the right of the father to demand partition of his share passed by the court-sale. They said that the decree was an ordinary one for the payment of money and that that case was distinguishable from the cases where the father, being a member of a joint family governed by the Mitakshara law, had mortgaged the family property to secure a debt and the decree had been obtained upon the mortgage and for the realization of the debt by means of the sale of the mortgage property. Thus the decision in *Deendyal's case* was reconciled with the *dictum* in *Suraj Bunsi Koer's case* by recognizing a distinction between a money-decree and a decree which directed the sale of specific property in execution of a previous mortgage by the father.

The last case is that of *Nanomi Babuasin* v. *Modhun Mohun*, in which also there was only a money-decree against the father and the sons were not impleaded in the suit as defendants. It was held that the debt not being immoral or vicious, the entire ancestral property which was attached and sold passed by the court-sale. The grounds on which the decision rests are (1) that the father's disposing power extended to the son's interest also if the debt was not contracted for an immoral purpose; (2) that the purchaser at the court-sale bargained and paid for the entire estate; and (3) that assuming that the sons might impeach the sale by reason of their not having been impleaded, they could only do so by showing that the debt was contracted for immoral purposes, and that as the debt was found in that case to be a family-debt, their right was of no avail to them.

From the foregoing decisions it is clear that the son cannot set up his vested interest as a coparcener with his father in respect of ancestral estate for the purpose of denying the father's power to alienate it for an antecedent debt or against his creditor's remedies for his debt if such debt has not been contracted for an immoral purpose. This rule is deduced from the principle that the freedom of the son from the obligation to pay his father's debt has reference to its nature as immoral or vicious, and not to that of the estate as ancestral or otherwise. The contention that there was no family necessity for the debt or that it was only the personal debt of the **[76]** father or that the pious obligation arose only on the father's death and that it could not be referred back to the date of the sale cannot be upheld. The answer given to it by the Privy Council is, destructive as it may be of independent coparcenary rights in the sons, the decisions have established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for their debt if not tainted with immorality.

Another proposition which is deducible is that it is immaterial whether the decree against the father is a money-decree or one founded on a mortgage and containing a direction for the sale of the mortgaged property. The reason is that it being held that the father has a disposing power over ancestral property in respect of his antecedent debt which is not tainted with immorality, the Court can sell in execution whatever he can lawfully sell, and the entire property will pass by such sale. As to the contention that the son was not a party to the suit or the decree, the answer is, all the sons can claim is that not being parties to the sale or execution proceedings, they ought not to be debarred from trying the fact or the nature of the debt in a suit of their own, and it will avail them nothing unless they can prove that the debt was not such as to justify the sale.

As to the contention that the father is not the managing member of the entire joint family it is to be observed that the father's disposing power does not rest on his position as such and that in *Kantoo Lall's case* it was held to have been possessed both by Bhikari Lal and his brother, though, as between them, the former was alone the managing coparcener. The principle is that by reason of the disposing power mentioned above, the father represents his sons also in transactions and suits, provided that the power is properly exercised.

The only cases then, in which the son's interest is not affected by the court-sale are, (1) where the debt is immoral, and (2) when the purchaser does not bargain and pay for the entire estate. The reason is

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that in the one case the father has no disposing power at all, and in the other that power is exercised only to create a smaller interest than it extends to. The result is that the contention of the respondent's pleader in the case before us must fail. We reverse the decrees of the Courts below and dismiss the suit with costs throughout.

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11 M. 77.

[77] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

THIAGARAJA AND OTHERS (*Defendants*). *Appellants v.* GIYANA SAMBANDHA PANDARA SANNADHI (*Plaintiff*), *Respondent.**
[15th February, 1887.]

Right of occupancy—Permanent cultivator—Paracudi—Burden of proof—Form of suit.

The defendants' ancestors or predecessors in title were the cultivating tenants of the lands of a certain temple from a date not later than 1827, in which year they were so described in the paimaish accounts. In 1830, they executed a muchalka to the Collector, who then managed the temple, whereby they agreed among other things to pay certain dues They were described in the muchalka as *paracudis.* In 1857, the plaintiff's predecessors took over the management of the temple from, and executed a muchalka to, the Collector, whereby he agreed among other things not to eject the raiyats as long as they paid kist. In 1882, the dues (which were payable separately,) having fallen into arrear, the manager of the temple sued to eject the defendants :

Held, (1) that the suit was not bad for misjoinder ;

(2) that the burden of proving the permanent character of the tenure set up by the defendants lay on them ;

(3) that there was nothing to show that the defendants were more than tenants from year to year. *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady,* 6 M.H.C.R., 164, and *Krishnasami* v. *Varadaraja,* I.L.R., 5 Mad., 345, discussed and distinguished.

[**Appr.**, 8 C.W.N. 545 (552) (**P.C.**) = 27 M. 291 (299) = 14 M.L.J. 200 ; **D.**, 16 M. 137 (138); 16 M. 271 (273).]

APPEALS against the decrees of R. Vasudeva Rau, Subordinate Judge of Negapatam, in Original Suits Nos. 106 and 107 of 1880.

These were suits by the plaintiff as sole Adhinam trustee of a mattam to which a certain temple was attached to eject the defendants from lands in the village of Sandaputtur belonging to the temple and to recover arrears of rent, &c. The defendants or their ancestors had been in possession of the lands in question at all events since 1827, in which year they were described as cultivating raiyats in the paimaish accounts. In 1830, they had executed a muchalka for the lands to the Government, whose rights under it were subsequently transferred to the plaintiff's predecessor.

In the muchalka, the executants, therein described as *paracudis,* agreed to cultivate the lands, no term being fixed for their holding : they further agreed to pay certain sums as kist and swamibhogam, [78] and it was provided that attachment was to be made if the payments fell into arrear. In 1857, the plaintiff's predecessor took over the management of the temple from the Collector and executed to him a muchalka, to which neither the defendants nor their ancestors were parties, agreeing among other things not to eject the raiyats as long as they paid kist, &c. In

* Appeals Nos. 106 and 107 of 1882.

1882, the payment having fallen into arrear, the plaintiff brought these suits.

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The Subordinate Judge of North Tanjore decreed for the plaintiff and the defendants preferred this appeal.

Mr. *Shaw*, for appellants.

Rama Rau, for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgments of the Court (KERNAN and BRANDT, JJ.).

JUDGMENTS.

KERNAN, J.—The principal question is, are the appellants (tenants of the village of Sandaputtur) entitled to a right of permanent occupancy?

The ancestors of the defendants and after them the defendants have been in possession as cultivating raiyats since, at all events, 1827—see paimaish account, 18th May 1827. In January 1830, a muchalka (exhibit A) was executed by the tenants of the village, ancestors of the defendants, agreeing to cultivate the lands, and to pay the rents as therein reserved to the Collector on behalf of the temple.

In that muchalka, no term is fixed for tenure, and the persons signing the muchalka are therein called paracudis. *Prima facie*, "paracudis" are cultivators without occupancy rights—see the description given in *Krishnasami* v. *Varadaraja* (1).

By exhibit A, the parties signing agree to cultivate the wet and dry lands from fasli 1830 as per paimaish fasli 1826. The lands and the rates are specified and the period of payment and the whole kist and swamibhogam. It is provided "as we have thus agreed to pay, we will, as long as the lands are in our possession, pay the said instalments of kist and swamibhogam." It is provided that attachment is to be made if arrears accrue. Provision is made for higher rates on cultivation of betel, &c., and for payment of teerva on cultivated waste and for payment of swatantrams to village servants and for sending men daily and fortnightly to [79] festivals to carry articles, and that Government should remit on account of drought or flood.

There is nothing in that muchalka to lead to the conclusion that the cultivators were more than tenants from year to year.

In the year 1857, the Government delivered over to the predecessor of the plaintiff all the rights to the temple and temple lands, including of course the rights under the muchalka (exhibit A). On the 7th December, 1857, a muchalka was executed by plaintiff's predecessor to the Collector. In it there is a special clause that the plaintiff's predecessor should not eject any of the raiyats so long as they paid the kist properly payable by them. The plaintiffs or those whom they represent were not parties to the muchalka of 1857, and can derive no benefit from it. They could not enforce that clause.

In *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (2) and in *Krishnasami* v. *Varadaraja* (1), the muchalka to the Collector contained similar clauses; yet in each case it was not considered that such clause did not operate to give the right of permanent occupancy.

The defendants' ancestors and the defendants themselves have paid swamibhogam to the temple and kist to Government from 1827.

During that period there was no large or substantial amount spent on reclamation; although it was so alleged, the evidence was insufficient to

(1) 5 M. 345.

(2) 6 M.H.C.R. 164 (168).

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prove the allegation. No act is found to have been done in respect of the lands which would show a consciousness by the cultivators that they occupied on more than the ordinary terms of tenancy from fasli to fasli. The sale in 1880 by defendants Nos. 11 and 18 were after former suit commenced.

The tenants were bound to do service for the temple by assisting at the car procession to drag the car. But this obligation was part of their rent services.

If the cultivators were ejected by the plaintiff, they need not give their future service.

It is contended that long possession is evidence of right of occupancy. But when the right of possession or right to continue in possession is proved, as in this case, to have arisen under a written instrument which does not provide for right of permanent occupancy, then the right to possession must *prima facie* follow **[80]** the terms of the instrument in the absence of any subsequent agreement.

If the defendants rely on a right of occupancy created after that instrument, then it lies on them to prove the grant, oral or written, of such right, or circumstances from which such grant could be legally presumed. There is no such grant either alleged to have been made, nor are there any circumstances proved from which such a grant or right of occupancy could be presumed.

Whenever a tenant or raiyat gets possession of land for one year and continues in possession at the expiration of that year, he is *prima facie* held to so continue on the terms of his lease. Therefore the defendants must all be held to have continued by their ancestors or by themselves to hold each succeeding year on the terms of the muchalka of 1826. The result is that each of the cultivators is only tenant from year to year.

Krishnasami v. *Varadaraja* (1) is in its circumstances different from this. In that case there was no muchalka proved as here. There was an order passed by the Collector to allow the particular *paracudi* into possession to cultivate. Here the muchalka of 1826 is clearly only from year to year at the outside.

In that case defendant No. 4 and all the other defendants were members of one family. The plaintiff in that suit had previously brought a suit against defendant No. 4 to eject him, and it was decided in that suit that defendant No. 4 was entitled to a permanent right of occupation. As regards defendant No. 4, therefore, the plaintiff's right was at an end, being *res judicata*.

As regards the other defendants, it was held that the adjudication in the former suit, in which their relation succeeded in respect of a right claimed by them, and the fact that there was no muchalka produced, and the deed of transfer by the Collector to the plaintiff (in terms the same as the transfer in this case) and long possession paying rent, were circumstances which created such evidence of right of occupancy as to throw on the plaintiff the *onus* of proving that such defendants, other than defendant No. 4, were not entitled to such occupancy right.

I think that the defendants are not entitled to the occupancy right which they claim; and, inasmuch as due notice to quit was given, the plaintiff is entitled to maintain the ejectment.

[81] The tenants of property held under a Mutt are not entitled to the protection of the Rent Act, as the plaintiff is not a land-holder within

(1) 5 M. 345.

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the meaning of the Act, and the defendants, however willing they may be to pay an increased rent, cannot have such rent fixed under the Rent Act.

There has been no misjoinder of defendants, as they all derived jointly under the muchalka of 1830 under which the kist and swamibhogam were reserved in fixed rates at total amounts specified.

For convenience sake each head of a family holding separate part of the demised land has had the kist and swamibhogam fixed and the amount has been paid separately by him. The tenants arranged the holding amongst themselves and there was not a separate demise of each particular lot to the separate holder.

Defendants Nos. 11, 18, 19 and 21 sold their holdings to defendants Nos. 98 and 99, respectively, and should not have been made parties to this suit. As regards them, this suit should, I think, be dismissed. And inasmuch as the plaintiff insisted on retaining them as defendants after their written statements alleged that they parted with their interest, I think the plaintiff should pay their costs.

As regards the rent due, we are not able to say that the plaintiff satisfactorily proved how much rent is due. The books of the temple and accounts have not been sent up. Moreover, we think that when the plaintiff has for so long a period received swamibhogam from the several tenants separately, an account should be taken by the Subordinate Judge of the sum due by each tenant and that the decree should be modified by directing each tenant to pay the rent due by him.

Defendant No. 20 died before this suit was filed. He is named a defendant in error.

The defendants, except Nos. 11, 18, 19, 20 and 21, should pay the costs of this appeal.

No. 107 of 1882. This is a suit similar in its facts and circumstances to suit No. 106 to eject the tenants of the village of Keelavelu, and therefore the judgment in No. 106 applies of this suit.

The 36th and 37th defendants sold part of their lands to the 87th defendant and the rest of their holding to Nadaraja Padayachi before this suit was filed, and were not then in pos-[82]session of the lands. This suit is to be dismissed as against the 36th and 37th defendants with costs.

The defendants in this Court, except the 36th and 37th defendants, are to pay the plaintiff's costs to this appeal.

BRANDT, J.—The plaintiff, as sole Adhinam trustee of the temple of Vythinatha Swami at Vathur in Sheali taluk, has brought the two suits, out of which these appeals have arisen to eject the defendants, who are cultivating raiyats from the lands of two villages, which admittedly belong to the temple; and to recover arrears of swamibhogam alleged to be due to the temple. The first suit (No. 106) relates to the lands of the village of Sandaputtur and the second suit (No. 107) relates to the lands of Keelavelu.

The defendants pleaded in the first place that the suit in each case was bad for misjoinder of many defendants, each of whom paid his swamibhogam separately, and who ought to have been separately sued.

In the first suit (No. 106), defendant No. 11 alleged that he had sold his interest to one Marimuttu Padayachi, and defendants Nos. 18, 19 and 21 stated that they had sold their interest to Munnaru Padayachi. Defendant No. 20 is said to have died. In the second suit (No. 107), defendants Nos. 36 and 37 stated that they had sold their interest to Nadaraja Padayachi and to Sornam. In each of these cases the vendees

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were joined as defendants to this suit. One Chinnasawmi Naik was also added as defendant to the second suit. Defendants Nos. 38 and 54 are dead and the suit was withdrawn as against some others. The defendants chiefly insisted that they had a permanent right of occupancy; that they had been in possession of the lands for a very long time and had improved them at a great expense; and they were not liable to be ejected. They further stated that very little of the swamibhogam was in arrears, and that when it was tendered, the plaintiff refused to receive it.

The judgment of the Subordinate Judge was substantially the same in both suits. In each case he found that the suit was not bad for misjoinder, because all the defendants claimed under one or two persons in each case, who had executed a muchalka in January 1830 consenting to hold the lands upon certain terms. The Subordinate Judge decided that the defendants had made no substantial improvements, and had no permanent right of occupancy, but were tenants from year to year. He therefore decreed [83] that the defendants should be ejected from the lands in question in each suit; that the plaintiff should be placed in possession, with mesne profits, and arrears of rent, and costs of the suit, and that such mesne profits, arrears of rent, and costs to be paid by all the defendants in the first suit, and by certain specified defendants in the second suit.

The objection of misjoinder, though mentioned at the hearing, was not one of the original grounds of appeal. It is sufficient to say that, as all the defendants in each case claim by inheritance or by purchase or otherwise under one and the same person, or under one of two persons who executed the muchalka in each case in January 1830, the plaintiff had a common cause of action against the defendants in each case and was not obliged to sue them separately. Hence the objection of misjoinder on the ground of separate payment of swamibhogam by the several defendants cannot be allowed.

The principal question raised by these appeals is, whether the defendants had a right of permanent occupancy, or whether they were merely tenants from year to year?

Defendants rely very much on their possession of the lands by themselves, or by those under whom they claim from the 1st of January 1830, if not from a still earlier date. But mere length of tenure for any period will not give a right of permanent occupancy to a raiyat, who has been let in as a tenant from year to year. Sir Colley Scotland in *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady*(1) admitted that the decision in *Venkataramanier* v. *Ananda Chetty*(2) had gone too far in laying down too broadly a pattadar's right of occupation, and it was admitted by Turner, C.J., in *Krishnasami* v. *Varadaraja* (3) that the period of occupation, which should confer upon the raiyat a permanent tenure, could only be settled by legislation. In the case of *Krishnasami* v. *Varadaja* (3) there were other circumstances, besides mere length of tenure, which justified the Court in throwing the burden of proof upon the plaintiff, and among other circumstances was a decision of the Sudr Court in 1861 recognizing a permanent title in defendant No. 4, to whom all the other defendants were related. In the present case no such circumstances are found, and it may [84] be observed that no custom in the defendant's favour has either been alleged or proved.

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(1) 6 M.H.C.R. 164 (171). (2) 5 M.H.C.R. 120.
(3) 5 M. 345 (357).

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The muchalka of the 1st January 1830 does not tend to show that the title of those who executed them was permanent. On the contrary, there are some expressions which favour a contrary supposition; and if there are expressions which indicate an intention that the occupation should be for more than one fasli, they are (as Sir Colley Scotland said of similar expressions in a muchalka in *Chockalinga Pillai's* case) (1) indefinite as to any period of time except that of the fasli, and clearly therefore did not bind the will of either party beyond the currency of each fasli while the tenancy remained undetermined. The defendants say that their tenancy was not created by this muchalka, but that it existed before that as a right of permanent occupancy. The defendants' predecessors in title may have been in possession before 1830. But if they had a permanent right of occupancy, they would probably have taken care to have that right expressly recognized in the muchalkas of 1830. At present the permanency of their title before 1830 has not been proved.

In the muchalka executed in favour of Government by the plaintiff's predecessor on the 7th December 1857, he promised to respect the rights and privileges of the paracudis according to the customs of the respective villages, and of the country; and that, as long as they should pay the kist properly, he would not eject them. But he did not thereby admit that the raiyats had any permanent right in the soil, or that the swamibhogam was to be the same for all ages. The passage in question amounts to little more than an engagement to respect the rights of the raiyats, whatever those rights might be.

In the result it appears to me that the defendants have not shewn that they had any higher title than that of cultivating tenants from year to year. That being their tenure, the plaintiff was at liberty (as decided in *Chokalinga Pillai's* case (1)) to enhance the rent and after due notice to eject the defendants at the end of the fasli for non-payment. Notice has now been given, and the decision of the Subordinate Judge as to the ejectment of the defendants must be upheld.

I agree that the evidence as to the alleged improvements is [85] unsatisfactory, and nothing can be allowed to the defendants on that account.

I agree that suit No. 106 as against the defendants Nos. 11 and 18, and his son and brother, defendants Nos. 19 and 21, who had sold their lands, should be dismissed with costs. I would make the same order as to the defendants Nos. 36 and 37 in suit No. 107.

I agree also that the Subordinate Judge should be directed to inquire how much is due from each of the defendants, and that on receipt of his return the decree should direct each tenant to pay the swamibhogam due by him.

The defendants, except those as to whom the suit has been dismissed or withdrawn, or who have died, must pay all the plaintiff's costs.

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(1) 6 M.H.C.R. 164 (168, 171).

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APPELLATE CIVIL.

11 M. 85.

11 M. 85.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

SUPPU AND OTHERS (*Defendants Nos.* 3 *to* 6), *Appellants v.* GOVINDACHARYAR (*Plaintiff*), *Respondent.**
[16th July, 1887.]

Civil Procedure Code, Sections 514, 521, 522—*Award, appeal against decree in terms of—Extension of time for presenting award—Evidence.*

Where a decree purports to have been made in terms of an award under Section 522 of the Code of Civil Procedure, an appeal lies against it if there was no award in fact or in law.

An order extending the time for the presentation of an award upon an application presented within time is not bad in law by reason of its having been made after the expiry of the term which it purports to extend.

It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence.

[**F.**, 2 N.L.R. 81; **R.**, 20 B. 596 (605); 25 C. 757 (773) (**F.B.**); 18 M. 423 (433) (**F.B.**); 9 Bom. L.R. 757 (763) (**P.C.**); 5 O.C. 13 (14); **Expl.**, 15 M. 384 (385); **D.**, 17 B. 357 (361).]

APPEAL against the order of K. R. Krishna Menon, Subordinate Judge of Tinnevelly.

Original Suit No. 62 of 1884, on the file of the Subordinate Court at Tinnevelly, was at the instance of both parties referred to arbitration. On the 10th October 1885, after the expiry of the time fixed for making the award, an application for the extension **[86]** of the time was granted, and the arbitrators presented their award on 20th March 1886. The defendants objected to the award as being invalid on the grounds that the extension of time was illegal, and further that the arbitrators had not proceeded according to the rules of legal evidence. The Subordinate Judge overruled these objections and passed a decree in the terms of the award. The defendants preferred this appeal.

Subramanya Ayyar, for respondent, objected that no appeal lay and cited *Monji Premji Set* v. *Maliyakel Koyassan Koya Haji*, I.L.R., 3 Mad., 59, and *Micharaya Guruvu* v. *Sadasiva Parama Guruvu*, I.L.R., 4 Mad., 319.

Sankara Nayar, for appellant.

An appeal lies in such a case as this—*Pugardin* v. *Moidin*, I. L. R., 6 Mad., 414. The test is whether the award was properly made, if not there is an appeal—*Lachman Das* v. *Brijpal*, I.L.R., 6 All., 174. The extension of time was irregular and illegal, Civil Procedure Code, Sections, 514, 521, 522—*Simson* v. *Venkatagopalam*, I. L. R., 9 Mad., 475. Another objection is that the award should have been rejected on the ground of the misconduct of the arbitrators in the improper admission of evidence—*Pureshnath Dey* v. *Nobin Chunder Dutt*, 12 W. R., 93.

Subramanya Ayyar for respondent.

The extension of time was not irregular, Civil Procedure Code, Section 514—*Ramaya Goundan* v. *Ramaswami Ambalam*, 7 M. H. C. R., 173; *Pugardin* v. *Moidin*, I. L. R, 6 Mad., 414. The Court interfered in revision in *Simson* v. *Venkatagopalam*, I. L. R., 9 Mad., 475.

[BRANDT, J. - The Court interferes where there is no award in fact or in law.]

* Appeal No. 123 of 1886.

That is not the present case. The rules of evidence do not apply to arbitrators. Evidence Act, Section 1, *Howard* v. *Wilson*, I.L.R., 4 Cal., 231; Russell on Awards, sixth Edition, p. 310.

The further arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.)

JUDGMENT.

The preliminary objection has been taken that no appeal lies under Section 522.

That section presupposes the existence of an award as the basis of the decree, and it cannot apply to a case in which there has been no award in law or in fact. It is urged that there was [87] no award in law in this case, first, because the time originally fixed for making the award was in two instances extended after the expiration of the period previously fixed, and, secondly, because the award shows on its face that it does not rest on legal evidence. As to the first objection we see no reason to think that the order made by the Subordinate Judge upon an application for an extension of time presented within time was bad in law by reason of its being made after the expiry of the term which it purported to extend. Section 514 provides that the Court may, if it thinks fit, grant a further time, and from time to time enlarge the period for the delivery of the award, while Section 521 enacts that no award shall be set aside, except on certain specified grounds, and that no award shall be valid unless made within the period allowed by the Court.

There is then no ground for holding the award to be invalid upon the ground suggested. The case of *Simson* v. *Venkatagopalam* (1) is only an authority for the proposition that time should not be extended so as to validate an award which the arbitrators had no jurisdiction to make when they made it. On referring to the award itself, we see no objection on the face of it such as to vitiate it. It is alleged that there is no legal evidence on which the arbitrators were entitled to recognise the plaintiff's claim to the extent to which they decreed it. But the award contains a distinct statement that the claim, so far as it was allowed, was proved to the satisfaction of the arbitrators; nor is it a valid objection to an award that the arbitrators have not acted in strict conformity to the rules of evidence. We see no reason to think that the award on which the decree appealed against rests is bad in law, and we dismiss this appeal with costs.

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11 M. 88.

[88] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

VENKATASAMI AND ANOTHER (*Defendants Nos.* and 23), *Appellants* *v.* SUBRAMANYA (*Plaintiff*), *Respondent.** [25th July, 1887.]

Transfer of Property Act—Act IV of 1882, *Sections* 1, 67, 86—89—*Usufructuary mortgage, dated 20th April* 1882, *sued on in* 1884—*Form of decree.*

In a suit filed in 1884 on a usufructuary mortgage, dated 20th April 1882, a decree was passed for the payment of the mortgage-money, or in default for the sale of the mortgage property:

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* Appeal No. 22 of 1886.
(1) 9 M. 475.

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Held, (*semble* under the Transfer of Property Act) that the decree for sale was the right decree.

[N.F., 11 A. 367 (370); 21 C. 677; **Disappr.**, 12 M. 109.]

APPEAL against the decree of Mr. Justice Handley, a Judge of this High Court, in Civil Suit No. 293 of 1884.

This was a suit on a usufructuary mortgage, dated the 20th April 1882. The mortgage-deed was admitted by the contending defendants who, however, argued, *inter alia*, that the plaintiff could not "obtain a decree for foreclosure or sale," as to which Handley, J., observed, "even if that would be so under the Transfer of Property Act, which I doubt, the Act does not apply to this case for the mortgage sued on is dated before it came into force." The learned Judge held that the plaintiff's case was established, and passed a decree for the sum claimed, and in default of payment in six months, for the sale of the mortgage property as prayed in the plaint.

The defendants preferred this appeal on the ground (among others) that the Transfer of Property Act was applicable and in any case the plaintiff as usufructuary mortgagee was not entitled to sue for foreclosure or sale.

Mr. *Subramanyam* and *Appadorai Mudaliar*, for appellants.

Anandacharlu and *Visvanadha Ayyar*, for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.) Their Lordships after **[89]** discussing the evidence and expressing an opinion upon it in accordance with that of Handley, J., proceed as follows :—

JUDGMENT.

Then comes the question whether the decree under appeal is open to objection in so far as it orders a sale of the property under mortgage in default of payment in six months.

It is urged that such direction is bad in law under clause (*a*) of Section 67 of the Transfer of Property Act—Act IV of 1882—which provides that nothing therein contained "shall be deemed to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale."

What is the precise effect of the limitations contained in the foregoing clause?

The suggestion that no decree either for foreclosure or sale can be lawfully made in a suit based on a usufructuary mortgage is on the face of it absurd. The intention is to indicate the specific remedy which, in the absence of an express contract, is available in regard to each of the transaction defined by Section 58, *viz.*, simple mortgage, mortgage by way of conditional sale, usufructuary mortgage, and English mortgage.

Section 67 provides, first, that a simple mortgagee is not at liberty to sue for foreclosure, and implies thereby that he can only ask for sale, for the contract as defined in Section 58, Clause (*b*), provides only for sale, and discloses no intention that the property should in any event vest absolutely in the mortgagee or that the mortgagor should be divested of the estate otherwise than under a sale. Similarly, a mortgagee by conditional sale is not entitled, in the absence of an express contract, to institute a suit for sale, for the contract provides for the mortgage ripening into a sale in

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default of payment, and implies an intention on the part of the mortgagee to take the mortgaged property in satisfaction of the debt when that event has happened. His remedy is accordingly confined to a suit for foreclosure. Section 88, paragraph 2, excepts a mortgage by way of conditional sale from the class of cases in which the Court *may* pass a decree for sale in a suit for foreclosure. An usufructuary mortgagee as defined by Section 58, Clause (*d*), may retain possession of the mortgaged property until his debt is re-paid, and may appropriate the rents and profits accruing from the property, either in lieu of interest or in payment of the **[90]** principal or partly in lieu of interest and partly in payment of principal.

Whether the mortgagee is at liberty to claim foreclosure as of right will depend upon the terms of the particular contract, but the contract as defined by the Act does not imply an intention that the mortgagee may at his option insist upon either remedy as in the case of an English mortgage. Section 67, Clause (*a*), provides that the usufructuary mortgagee is not entitled as such, in the absence of an express contract to the contrary, to institute a suit for foreclosure or sale. It implies that he can sue only for the one or for the other, and not for the one or the other in the alternative. That this is the true construction is clear from Sections 86—89, the language of which and, in particular, the words in Section 86, "shall transfer the property to the defendant; and shall, if necessary, put the defendant into possession of the property," include usufructuary mortgages among transactions upon which the mortgagee may institute a suit for foreclosure or a suit for sale.

It is important to bear in mind the distinction that exists between the power of the Court to decree a sale in a suit for foreclosure, and the right of the usufructuary mortgagee as founded on the contract. The second paragraph of Section 88 deals with such power and is taken from 44 and 45 Vict., c. 41, Section 25. It was a power constantly exercised by Courts of Equity in England, and it may be that it is inserted in this Act with reference to a notion which was commonly held in this country, that a mortgage was intended to be only a security and to be always redeemable. In exercising this power the Court is authorized to impose such terms, as it thinks fit to prevent injustice or unfairness to the mortgagee.

The usufructuary mortgage, which is the subject of the present suit, was not in the nature of a mortgage by way of conditional sale. The decree for sale was the only one which the plaintiff was entitled to claim and the Court was at liberty to make. We must overrule the objection taken in appeal to the form in which the decree has been made, and dismiss the appeal with costs.

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APPEL-
LATE
CIVIL.

11 M. 91=
12 Ind. Jur.
13.

11 M. 91=12 Ind. Jur. 13.

[91] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

AMMAKANNU (*Plaintiff*), *Appellant v.* APPU (*Defendant*), *Respondent.** [21st April and 16th August, 1887.]

Hindu Law—Maintenance of son's widow—Self-acquired property.

A Hindu is under no obligation to maintain his adult son or his son's widow out of his self-acquired property. Thus a daughter-in-law can enforce no claim for maintenance against the self-acquired property of her father-in-law which has passed to his grandson, unless the father-in-law showed by conduct or otherwise an unequivocal intention that it should be taken subject to the obligation of providing for his support.

[Cons., 22 M. 305 (306)=9 M.L.J. 14.]

SECOND appeal against the decree of J. Hope, District Judge of South Arcot, in Appeal Suit No. 215 of 1885, reversing the decree of C. Sury Ayyar, District Munsif of Cuddalore, in Original Suit No. 192 of 1885.

This was a suit brought by a widow against her husband's nephew to recover maintenance out of the self-acquired property of her father-in-law now in the hands of the defendant.

The District Munsif decreed as prayed, but his decree was reversed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Mahadeva Ayyar, for appellant.

Rama Rau, for respondent.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.)

JUDGMENT.

" The appellant, Ammakannu Ammall, is the widow of the undivided brother of Ragava Pillai, the son of one Srinivasa Pillai, and the father of the minor respondent named Appu *alias* Lokanada Pillai. The appellant's husband predeceased his father and the finding is that it was the latter who acquired the property now in the respondent's possession. The appellant's case was that as between her and the respondent the [92] property in question was ancestral, that her father-in-law was bound to maintain her, and that she was entitled to a decree for maintenance against the respondent and to have it charged on the property in his hands. The respondent's contention was that his grandfather satisfied the appellant's claim in full during his lifetime and that, at all events, her maintenance was not a charge on the property which is in his possession. It was found that the plea of satisfaction was not proved, but the Judge was of opinion that the claim itself could not be supported under Hindu law. He observed that the property in dispute was acquired by the appellant's father-in-law, that he was under no obligation to provide for her maintenance out of his self-acquired property, and that the respondent's father and the respondent inherited it from him in regular course of succession free of such obligation. It is argued in support of this second appeal that a father-in-law is bound under Hindu law to support his widowed daughter-in-law irrespective of any ancestral or joint property vesting in

* Second Appeal No. 785 of 1886.

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11 M. 91 = 12 Ind. Jur. 13.

him on his son's death by survivorship, and that for the purposes of the present suit the property which the respondent and his father inherited from his grandfather ought to be treated as ancestral.

"As to the first contention, we are inclined to argee with the Judge that, according to Hindu law, a father is under no legal obligation to maintain his adult son or the son's widow out of his self-acquired property. It is stated by the author of Smriti Chandrika (Krishnasawmi Iyer's translation, Chapter XI, Section I, § 34) that the duty of maintaining a coparcener's widow, whether the survivor is a father or a brother, is dependant on his taking by survivorship coparcenary property. Again, "where there is no property but what has been self-acquired," says the Mitakshara, "the only parties whose maintenance out of such property is imperative are aged parents, wife and minor children" (see Mitakshara on Subtraction of Gift). The decisions in support of this view are collected in Mr. Mayne's learned Treatise on Hindu Law, §§ 375 and 376. The first contention cannot therefore be supported.

"With reference however to the second contention, it must be borne in mind that the suit which is the subject of this second appeal was brought not by the son's widow against her father-in-law but by the uncle's widow against her husband's nephew. It is not sufficient to show that the property in question was acquired by the appellant's father-in-law, that her husband had no vested [93] interest in it by birth, and that as he predeceased his father he had also acquired no interest in it by inheritance, but it is necessary to go a step further and to inquire whether the property was burthened with the appellant's maintenance by her father-in-law before it descended to the respondent's father. If it was, it ceased to be self-acquired property as against the appellant on its descent from her father-in-law to her brother-in-law. If the former who acquired the property and who was competent to alienate it at his pleasure subjected it to her maintenance, either by express declaration or by conduct, the heir could only take it subject to the appointment made by the person who acquired the property. This question was not considered by the Judge, though the plea of satisfaction by the grandfather set up by the respondent, and the averment in the plaint that the appellant had lived in the family as one of its members until 1879 suggest that the parties believed that the father-in-law desired to support her. The finding therefore that the property was acquired by Srinivasa Pillai and that the appellant's husband predeceased him is not sufficient in law for the disposal of this appeal. We shall ask the Judge to try the following issue upon such evidence as the parties may adduce, and return a finding.

"Whether the respondent's grandfather manifested by his conduct or otherwise an unequivocal intention that his self-acquired property should be taken subject to the obligation of providing for the support of his widowed daughter-in-law."

[The District Judge returned a finding to the effect that no such intention had been manifested. This was accepted by their Lordships, who accordingly dismissed the second appeal.]

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APPELLATE
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11 M. 94.

11 M. 94.

[94] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

PULAMADA AND OTHERS (*Defendants*), *Appellants v.* RAVUTHU AND OTHERS (*Plaintiffs*), *Respondents.**
[18th July and 5th August, 1887.]

Civil Procedure Code, Sections 50, 53—*Amendment of plaint—Change in form of suit, the cause of action being unchanged.*

The plaintiffs alleged that the defendants had encroached on the bed of a tank, raised embankments, and cultivated crops which interfered with the plaintiffs' supply of water; and they prayed for a decree ejecting the defendants from the land encroached on and restraining them from interfering with it:

Held, that the Court was not precluded by Section 53 of the Code of Civil Procedure from passing a decree declaring the plaintiffs' right to the water of the tank, directing the defendants' embankments, &c., to be removed, and regulating the cultivation of their lands; but that the defendants' liberty of cultivation should not be restricted more than was necessary to secure the plaintiffs' supply of water.

[R., U.B.R. (1897—1901) 231 (236).]

SECOND appeal against the decree of S. Gopalacharyar, Subordinate Judge of Madura (East), in Appeal Suit No. 520 of 1884, reversing the decree of P. S. Gurumurthi Ayyar, District Munsif of Tirumangalam, in Original Suit No. 100 of 1883.

The plaintiffs alleged that they were owners of some of the land in a certain village, and that the rest of the village belonged to, or was in the occupation of, the defendants: that the land was irrigated by a tank of which the water-spread was about 3½ gulies: that the defendants had encroached on gulies 2-4-1 and made wells and embankments and raised wet crops, and thus prevented the full accumulation of water in the tank and diminished the supply of water for the plaintiffs. The plaint prayed for a decree ejecting the defendants from, and preventing them from interfering with, the land encroached on.

The District Munsif dismissed the suit, but the Subordinate Judge on appeal passed a decree declaring the plaintiffs' right to be supplied with water from the tank, directing that the defendants' land be restored to its former condition, and restricting its cultivation to certain specified crops.

[95] The defendants preferred this second appeal.

Subramanya Apyar, for appellants.

Rama Rau, for respondents.

The further facts of this case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

JUDGMENT.

The suit from which this second appeal arises was in the nature of an ejectment brought by the respondents against the appellants. The plaint, as originally framed, prayed for a decree restraining the defendants from interfering with, and ejecting them from, 2-4-1 gulies of land in their

* Second Appeal No. 611 of 1886.

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possession lying in the bed of the tank in the village of Vattuvappatty in the district of Madura.

The respondents' case was that they and defendants Nos. 3, 7, 13, 19 and 20 owned wet lands under that tank ; that 3½ gulies was its original area ; that defendants 6-10 encroached upon it in 1285, and that by digging wells on and using the portion encroached upon as they liked, narrowed the water-spread, prevented the tank on which the respondents' land depended for irrigation from receiving its usual supply, and thereby caused to them loss of produce. The appellants who resisted the claim contended that the land in suit was their ancestral property, that it did not form part of the water-spread of the tank in question, that the respondents owned no wet land under it, and that the tank was not an old reservoir. They also denied the alleged encroachment, pleaded limitation in bar of the claim and alleged that the tank never exceeded one guli in extent.

The District Munsif found that for more than 12 years before suit, the extent of the tank had consisted only of one and odd gulies, and that the land in dispute had not been submerged during that period, and upon that finding, he came to the conclusion that the suit was barred, and dismissed it with costs.

Thereupon the plaintiffs preferred an appeal and they urged that the nature of their claim was misapprehended by the Court of First Instance, and that they were, at all events, entitled to a declaration that defendants were not at liberty to use the land in dispute in the way they have done since Fasli 1285, *viz.*, raising garden crops, and that they were bound to raise only such crops as they used to raise prior to 1285. This contention, the appellant [96] opposed on the ground that no relief should be decreed in appeal, which was not claimed in the plaint. The Subordinate Judge decided that the relief claimed before him was included in, and formed part of, the case disclosed by the plaint. On this view he remitted three issues for trial, *viz.*, (1) whether the plaintiffs owned nunja lands depending for their water-supply on the tank in question ; (2) whether the defendants interfered with the tank so as to diminish its water-spread ; (3) whether the right of the defendants was only of a qualified nature as alleged by the plaintiffs, and whether the plaintiffs' claim as founded thereon was barred by limitation. On the first issue, he found that the plaintiffs owned nunja lands which were entitled to a regular supply of water from the tank through the two sluices or openings now in existence. On the second issue he found that the extent of the tank consisted originally of 3-8-3 gulies, that its water-spread extended at present only to 1-4-2 guli, that gulies 2-4-1 lying to the east of the present water-spread were submerged until 8 or 9 years before suit, and that they since ceased to be submerged, because the tank ceased to receive its usual supply in consequence of the defendants having raised the level of their lands and of the embankments erected by them subsequently to 1285. On the third issue he held that the respondents' claim was good and not barred by limitation so far as it related to the securing of the usual supply of water in the tank and to the restoration of its capacity. Upon these findings he was of opinion that it was necessary to direct defendants Nos. 6 to 10 and 21 to 24 to restore their lands to their original level, and to use them as they did before 1285, and decreed that the lands be reduced in level as specified in the decree, that no vegetation or crops other than those mentioned in Exhibit F, *viz.*, cucumber, pagal, melons, and gourds be raised, and that they might raise

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such crops only when they could do so without obstruction to the flow of water into the tank or retention of water by it. Defendants 8—10 and 22—24 have preferred this second appeal.

The first objection taken in support of this second appeal is that the Subordinate Judge allowed the suit as originally framed to be altered in appeal into a different suit. It is no doubt provided by the proviso to Section 50 of the Code of Civil Procedure that the plaint cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character. But we observe [97] that the ground of action, *viz.*, the unauthorized diminution of the extent of the tank-bed so as to diminish its capacity and the supply of water available to the plaintiff, was throughout the same. Though the respondents' prayer for ejectment of the appellants and for an injunction restraining all interference with the lands in question on their part was not one which could be granted, this did not preclude the Subordinate Judge from decreeing a relief less than what they claimed. The specific right and its infraction alleged were not altered in appeal and we cannot therefore say that the procedure of the Subordinate Judge is in construction of the provisions of Section 53.

Another objection urged on behalf of the appellants is that the lands in suits are their private property and that the Subordinate Judge has recorded no finding to the contrary. We are not prepared to attach weight to this contention. The Subordinate Judge has distinctly found, as facts, that the extent of the tank was reduced from more than three gulies to about one guli, that though this reduction took place more than 12 years before suit, it did not prejudice the respondents' right until the appellants raised subsequently to 1285 the level of their lands and put up embankments so as to prevent the tank from receiving and retaining its usual supply of water. We cannot then say that the appellants' lands did not form part of the tank-bed, or that they were held otherwise than subject to the condition that they shall not so enjoy them as materially to diminish the capacity of the tank and diminish the supply of water available for lands depending upon such supply for their irrigation.

The third question argued in second appeal is that so long as appellants' lands continue on their former level, the restriction imposed in regard to the specific crops which the appellants are to raise and the time when they are to raise them, is an unwarranted interference with freedom of enjoyment. The respondents' pleader is unable to show that this objection is not well founded and concedes that the decree under appeal, requires to be modified. The restriction goes beyond what is necessary for the protection of the respondents' rights, and it cannot be assumed that because the appellants raised four specific crops prior to 1285, they are not at liberty to raise other crops hereafter, provided they do so without diminishing the supply of water available in the tank for the respondents' land. We therefore amend the decree of [98] the Subordinate Judge in this respect and confirm it in other respects. As both parties have succeeded and failed in part we direct that each bear their costs in this Court.

11 M. 98=2 Weir 142.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

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APPELLATE CRIMINAL.

11 M. 98= 2 Weir 14

QUEEN-EMPRESS v. ENGADU AND OTHERS.*
[23rd August, 1887.]

Criminal Procedure Code, Sections 61, 167, 170, 344—*Remand of prisoners in custody the police.*

The right construction of Section 167 of the Code of Criminal Procedure is that in proceedings before the police under chapter XIV, the period of remand cannot exceed in all fifteen days, including one or more remands.

[F., 23 B. 32 (34).]

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by G. Stokes, Acting District Magistrate of Cuddapah.

The case was reported as follows :—

"These are dacoity cases. The prisoners were remanded for fifteen days under Section 167 of the Code of Criminal Procedure. The police applied for a remand for the collection of further evidence for a further period, but the Sub-Magistrate refused to grant any further remand on the authority of the ruling of the High Court, communicated with G.O., No. 3092, dated 22nd November 1883, and directed the prisoners to be released. As the ruling in question seems to me to be highly dangerous to the administration of public justice and unnecessary, and as, with all deference, I think it founded on a mistaken view of the law, I make this reference.

"These three dacoities were committed, the first at Kallur in Chandragiry taluk, North Arcot district, the second in the limits of Srirangarajapaliem village, Pullampet taluk, *i.e.*, on the road from Rajempet to Rayachoti, and third at Ghatlu in Madanapalle taluk, Cuddapah district. The distance of the scene of offence in the first case from that in the second I am unable to state, but it can [99] hardly be less than three days' journey at the shortest by road and rail. The distance of that of the second from that of the third is seventy miles by road. In the first case, the persons attacked were inhabitants of Kurnool, journeying to Madras. In the second, coral merchants of the Vayalpad taluk, whose houses are as far from the scene of crime as Ghatlu. In the third they were inhabitants of Madanapalle, which is close to Ghatlu.

"The above cases came to light by some of the stolen property being found in the possession of the accused. The prisoners were arrested with property in Kadiri taluk at a place, I believe, about fifty miles from Ghatlu. The result of the ruling to which I call attention would be that the police had to get the owner of property and have it identified, had to collect all the evidence as to the commission of the offence and identity of prisoners, and to work up the case within fifteen days; but in the above cases it is at once obvious that this is quite impossible, and any one at all conversant with the detection of dacoity cases will know, that, unless it is a very unskilfully-contrived crime, it is impossible to get the evidence together much under one-and-a-half months; yet until the evidence is got together no charge sheet can be put in under the Criminal Procedure Code, and, consequently, there is no Magistrate having

* Criminal Revision Case No. 289 of 1887.

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APPELLATE CRIMINAL.

11 M. 98 = 2 Weir 142.

jurisdiction in the case who can remand for more than fifteen days. The prisoners arrested must be released with the certainty that they will not for years if ever be caught again.

"The remarks which I have now to make I desire to make with all respect to the learned Judge, who made the ruling. In my opinion, the ruling is clearly wrong. It proceeds on the contrast between the Sections 167 and 344 of the Code of Criminal Procedure. I would submit, with all deference, that the words 'from time to time for a period not exceeding fifteen days' mean exactly the same as the words 'for a term not exceeding fifteen days at a time.' That they were intended to do so I entertain no doubt, for let us consider the old law, the evil, and the remedy. The section corresponding to 167 of the former Criminal Procedure Code contained no mention of a time to which the remand was limited. The result was that a Magistrate in Bombay held that he could remand for an indefinite period. The High Court ruled on revision in *Reg* v. *Surkyavalad Dhaku* (1) that remand in this case **[100]** was governed by the same rule as contained in the section corresponding to Section 344 of the present Criminal Procedure Code. I submit that by the true rules of interpretation of statutes on this state of facts, the proper interpretation is that the legislature intended in adding to Section 167 of the Code of Criminal Procedure not to change but to clear the law.

"This view is, I would respectfully submit, borne out by the discussion which preceded the passing of the Code of Criminal Procedure. It will be observed that in the bill, as originally drafted, the words used were 'for a term not exceeding fifteen days in the whole.' The words 'in the whole' were struck out by the select committee, and it was stated in their report the section had been altered so as to leave the existing law intact."

Prisoners were not represented.

The Acting Government Pleader (Mr. *Powell*), for the Crown.

The further facts and arguments in this case appear sufficiently, for the purpose of this report, from the judgments of the Court (KERNAN and BRANDT, JJ.).

JUDGMENTS.

KERNAN, J.—The ruling of the 23rd October 1883 pronounced by a Judge sitting in the Admission Court was as follows:—"The referring officer is right. The construction of Section 167 is that in proceedings before the police under chapter XIV, the period of remand cannot exceed in all fifteen days, including one or more remands.

"In proceedings under chapter XXIV, Section 344, much larger power of remand is given, not exceeding fifteen days *at a time*.

"The contrast between the sections is very clear."

The Third-class Magistrate, on the 2nd and 6th December 1886, in two cases having recorded that the fifteen days' remand against the prisoners expired that day, and that he was not authorized to grant remand for a time exceeding fifteen days under Section 167, directed the prisoners to be set at liberty.

The Acting District Magistrate refers the case to have the above ruling considered on the ground that Section 167 authorizes the Magistrate to remand from time to time for a term not exceeding fifteen days *at a time*.

We think the ruling of 1883 is right. The Magistrate might from time to time remand, but the sum of the periods of remand cannot exceed

(1) 5 B.H.C. Cr.C.31.

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"a term of fifteen days." The words "at a time" do not occur in Section 167 after "fifteen days." Where it was intended by [101] the Code that remand might be made for fifteen days "at a time," the Code expressly says so (see Section 344 in the second paragraph or proviso). The power of remand under Section 167 is given to detain the prisoners in custody while the police make the investigation, and in a proper case to prepare to commence the inquiry. Section 167 gives the Magistrate discretion (recording his reasons) to remand from time to time, but limits the period for the exercise of that discretion to fifteen days. During the period of investigation by the police, evidence usually is not brought before the Magistrate, as the inquiry has not been begun. If the construction of Section 167 is as contended for by the Magistrate, the prisoner might find himself in custody for months before any witness is confronted with him, or any evidence recorded by the Magistrate. Such construction would cause great grievance and would then be wholly unnecessary, for Section 170 authorizes the police officer, if there is evidence or reasonable ground of suspicion, to forward the accused to a Magistrate empowered to take cognizance of an offence on police report. Then, under Section 344, an application might be made for cause shown as specified there to the proper Magistrate to postpone the commencement of the inquiry and remand the prisoner.

Section 344 requires cause for the remand to be shown, whereas Section 167 gives a discretion to the Magistrate, merely directing him to record his reason and give notice to the District Magistrate. Apparently, the police officer thought there were good grounds for the charge, but he asked five days' remand to charge-sheet witnesses.

The prisoner was not forwarded under Section 170. The Third-class Magistrate, apparently, was not authorized to act on a police report and was not authorized to make an order under Section 344. At all events, the application for remand was under Section 167 and not under Section 344. We do not agree with the Magistrate and we make no order.

BRANDT, J.—Under an order made under Section 167, Criminal Procedure Code, the accused person is detained in the custody of the police, or in such other custody as the Magistrate making the order thinks fit. Ordinarily, no doubt, he will be in the custody of the police.

Such detention is altogether different from the custody in which an accused person is kept under remand given under Section 344, [102] Criminal Procedure Code, which is the custody provided by the legislature for under-trial prisoners.

In the former case, the accused is not placed before a Magistrate for trial or for the purpose of an inquiry by a Magistrate with a view to commitment, but to enable the police to complete, if possible, or, at least, to proceed with, their investigation.

The intention of the legislature—having regard to Sections 61 and 167 and to the requirements of justice generally—is that an accused person should be brought before a Magistrate competent to try or commit with as little delay as possible—*Manikam* v. *The Queen* (1). There may be cases in which no evidence may be available within sixteen days from the date of an accused person's arrest, but such should be and probably are rare, and such evidence as may then be available should be placed before a Magistrate competent to hold an inquiry or try. The Magistrate has then power under Section 344, Criminal Procedure Code, to postpone without limit (provided that the accused be not remanded for

(1) 6 M. 63.

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more than fifteen days at a time), the commencement of the inquiry or trial for the purpose of obtaining further evidence which it appears likely may be obtained if time is given, or for other reasonable cause, and if no such evidence is then forthcoming and if it is not shown that any is likely to be obtained, it appears only reasonable that the accused person should no longer be retained in custody; there is nothing to prevent his being re-arrested, if evidence be subsequently secured.

Reading the two Sections 167 and 344 together and having regard to the other considerations above stated. I concur in the opinion of my learned colleague.

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11 M. 103.

[103] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

RAJARATHNAM (*Defendant*), *Appellant v.* SHEVALAYAMMAL (*Plaintiff*), *Respondent.** [12th August, 1887.]

Limitation Act (*Act XV of* 1877), *Section* 15—*Period of injunction included.*

A member of a firm sued for a partnership debt and obtained a decree; he died before execution. In a suit brought by his widow an injunction was issued restraining his partner from realising the partnership assets. Subsequently, a receiver was appointed for the partnership assets, and he applied for execution of the above decree:

Held, that the time during which the injunction was in force was not to be excluded in computing the period of limitation.

[R., 26 M. 780 (786) = 13 M.L.J. 412; 7 Ind. Cas. 886 (888).]

APPEALS against the orders of C. W. W. Martin, District Judge of Salem, dated 18th March 1885, and made in Appeal Suits Nos. 98, 99, 100 of 1884, reversing the order of District Munsif of Salem, dated 31st March, 1884, and made on execution-petitions in Original Suits Nos. 131 of 1877, 20 of 1879, and 621 of 1879.

In the case, from which appeal No. 119 of 1885, was preferred, the facts were as follows:—

A and B were partners. On 6th December 1879 A obtained a decree in a suit brought by him on behalf of the partnership. A died on 31st December 1879 while the decree was unexecuted. On 4th October 1880 A's widow instituted Original Suit No. 17 of 1880, on the file of the District Court of Salem against B to wind up the partnership. On 29th October 1880, the plaintiff obtained an injunction against B, restraining him for realising the partnership assets. On 20th September 1882, a decree was passed apportioning the assets between plaintiff and defendant, and on 23rd February 1883 a receiver was appointed. On 28th May 1883, the receiver applied for the execution of the decree obtained by A on behalf of the partnership on 6th December 1879.

The facts of the other cases were similar and the Court disposed of all these cases together.

[104] The District Munsif held that the receiver's applications were barred by limitation; but his decree was reversed, on appeal, by the District Judge, who set out the reasons for his decision as follows:—

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* Appeal against Order No. 119 of 1886.

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"I am of opinion that the principles on which the judgment of the Madras High Court proceeds in *Shunmugam* v. *Moidin* (1), when taken with the principles on which the decision in *Kalyanbhai Dipchand* v. *Ghanasham Lal Jadunathji* (2) rests, make it justifiable to find that the present applications are not barred. The Madras judgment says 'an order prohibiting the collection of debts is an order prohibiting their collection by suits *or otherwise*.'

"The last two words include collection by execution-process, and, while that order existed, the plaintiff was not bound to proceed by execution-process any more than she was bound to proceed by suit. If she were not bound, and, if, in consequence, no laches are to be imputed to her, all the argument by which the Bombay High Court, following the decisions in *Issurree Dassee* v. *Abdool Khalak* (3), *Hurronath Bhunjo* v. *Chunnilall Ghose* (4), *Paras Ram* v. *Gardner* (5), has evaded the perpetration of a monstrous injustice apply to this case, *i.e.*, that an application to execute made by a decree-holder after the removal of an obstacle is an application for the continuation of the former proceedings. Though it is argued that there were no former proceedings in this case, because the present applications are the first *applications for execution*, I think it unnecessary to limit the term former proceedings to proceedings in execution; the whole course of the suit from its institution to its close by satisfaction, limitation or otherwise, constitutes the proceedings in the suit, and the continuation of the proceedings is their continuation from the point at which they were brought to a standstill by the injunction.

"The ruling of the Bombay Court I regard, therefore, as holding that Section 15 of the Limitation Act only alludes to suits, because it is necessary to make a positive rule to meet cases which had not already been brought into Court, while there was no such necessity after cases had been brought into Court because time ceased to run with the stay of proceedings.

[105] "I reverse the order of the Munsif in all these cases and remand the suits to be again restored to their original numbers in the file and to be tried on their merits *de novo*."

The defendants preferred these appeals.

Ramasami Mudaliar, for appellant in appeal against order 106.

Kistnasami Chettyar, for appellant in appeals against orders 119 and 120.

Mr. *Norton*, for respondents.

The arguments adduced on these appeals appear sufficiently, for the purpose of this report, from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.).

JUDGMENT.

It is conceded that, if the time during which the injunction issued in Original Suit 17 of 1880 was in force could not be deducted, the applications for execution in the cases before us would be barred by limitation. The only section under which the time can be excluded is Section 15 of Act XV of 1877. That section is applicable only to suits and Section 3 declares that a suit does not include an appeal or an application. There can be no doubt that it is Sch. II, Art. 179, that is applicable to execution of decrees, and, even assuming that Art. 138 may apply, the period must be taken, in the absence of an express statutory direction, to continue

(1) 8 M. 229. (2) 5 B. 29. (3) 4 C. 415.
(4) 4 C. 877. (5) 1 A. 355.

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to run when the rights to apply accrues and the period once begins to run. As to the cases referred to by the District Judge, we are of opinion that they are not in point, inasmuch as there were admittedly no previous applications for execution, which those now under consideration might be taken to continue or revive.

We set aside the order of the District Judge and restore that of the District Munsif.

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11 M. 106.

[106] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MAHOMED (*Defendant No.* 50), *Appellant v.* KRISHNAN AND OTHERS (*Plaintiffs and Defendant No.* 3), *Respondents.**
[23rd November, 1886 and 16th August, 1887.]

Civil Procedure Code, Section 54—Amendment of plaint—Multifarious suit—Malabar law—Stanom.

A suit was brought by the junior members of a tarwad, which consisted of three stanoms and three tavaries, against the karnavan and others, including certain persons to whom he had alienated some tarwad property. The plaint, as originally framed, prayed (1) for the removal of the karnavan, (2) for a declaration that defendants Nos. 2 to 8, the senior anandravans, had forfeited their right of succession to him, (3) for the appointment of the plaintiff in his place, (4) for a declaration that his alienations were invalid as against the tarwad, and (5) for possession of the property alienated. Subsequently, the plaint was amended by the order of the Court by striking out items 2 and 5 of the prayer, and finally the plaintiffs further amended the plaint and sued only for a declaration that the alienations in question were invalid. The lower Court passed the declaratory decree prayed for:

Held, that the lower Court was wrong in allowing the plaint to be amended after the first hearing, because the case on which the decree was passed was essentially different from that disclosed in the plaint; and that the appeal must be allowed accordingly.

Per cur.—The suit was not bad for multifariousness—*Vasudeva Shanbahga* v. *Kuleadi Narnapai* (7 M.H.C.R., 290), considered.

The plaintiffs were competent to maintain the suit as dealt with by the lower Court if there was collusion between the senior anandravans and the alienees and the stani for the time being—*Rani Anund Koer* v. *The Court of Wards* (L.R., 8 I.A., 22), considered.

Rights of members of a stanom *inter se*, considered.

[N.F., 6 C.W.N. 585 (589); 9 C.P.L.R. 125 (126); 1 P.R. 1905=83 P.L.R. 1905; F. 11 Bom. L.R. 34=5 M.L.T. 230; R., 16 B 608 (611); 15 M. 19 (22); 25 M. 736 (746)=12 M.L.J. 103.]

APPEALS against the decree of M. C. Gopalan Nayar, Acting Subordinate Judge of North Malabar, in Original Suit No. 3 of 1883.

This suit was originally brought by the junior members of a Nayar family in North Malabar, called the Vavoth tarwad, (1) to remove defendant No. 1 from the office of karnavan, (2) to declare that defendants Nos. 2 to 8 had forfeited their right of [107] succession to him, (3) to appoint plaintiff No. 1 to succeed him, (4) to declare several alienations by defendant No. 1 invalid as against the tarwad, and (5) to get possession of certain properties.

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* Appeals Nos. 105, 106 and 116 of 1885.

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The defendants pleaded, *inter alia*, that the Vayoth tarwad was not a tarwad in the ordinary acceptance of the term, but that it consisted of three stanoms and subsidiary tarwads.

The then Subordinate Judge of North Malabar (V. P. de Rozario) framed the issues which were raised by the parties on the 3rd July 1883; but his successor (Ramachandra Ayyar) was of opinion that the suit was bad for misjoinder, and on 11th February 1884 he made an order, directing that the plaint be amended. The plaintiffs, in accordance with this order, relinquished their second and fifth claims for relief; subsequently they relinquished also the first and third claims for relief and prayed only for a declaration that some of the alienations mentioned in the original plaint were invalid as against the tarwad.

It was admitted, for the purposes of the suit, that the constitution of the tarwad was as described by the defendants.

The Subordinate Judge passed a declaratory decree as prayed in the amended plaint, and against this decree some of the defendants, whose title was affected by it, filed the present appeals.

Sankara Menon, for appellant in appeal 105.

Sankaran Nayar, for appellant in appeal 106.

Bhashyam Ayyangar and *Anantan Nayar*, for appellants in appeal 116.

Ambrose and *Gopalan Nayar*, for respondents.

The further facts of the case and the arguments adduced on these appeals appear sufficiently, for the purpose of this report, from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.)

JUDGMENT.

The respondents are the junior members of a Nayar family in North Malabar, called the Vayoth tarwad, and the appellants are persons in possession of portions of the property in suit which were demised to them, some on kanom and others on otti by the first defendant. According to the plaint, as originally framed by the respondents, their case was that the property in litigation belonged to their tarwad and that their karnavan alienated it in the appellants' favour and in favour of others who have not appealed from the decree of the Subordinate Judge otherwise than for tarwad purposes. They alleged also that the [108] first defendant was their karnavan and that defendants Nos. 2 to 8 were, though senior anandravans, inimical to their tarwad. They prayed, first, for the removal of the first defendant from the office of karnavan, secondly, for a declaration that defendants Nos. 2 to 8 had forfeited, by hostility to their tarwad, their right of succession to management, thirdly, for the appointment of the first respondent as karnavan, fourthly, for the several alienations impeached in the plaint being declared invalid as against their tarwad, and fifthly, for possession of the properties mentioned in the schedule annexed to the plaint together with future porapad, subject, however, to compensation being made for improvements if any.

The alienations which the respondents sued to set aside were 48 in number and embraced 213 items of property. Defendants Nos. 1 to 16 were members of the tarwad and defendants 17 to 46 were alienees in possession of the property mentioned in the plaint. The respondents' claim was resisted on several grounds, and one of them was that the Vayoth tarwad was not a Malabar family in the ordinary sense of the term, but that it consisted of three stanoms and three illakur houses or subsidiary tarwads.

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The plaint was filed on the 31st January 1883, and the late Subordinate Judge, Mr. de Rozario, recorded the issues which had to be determined in this case on the 3rd July 1883; but Mr. Ramachandra Ayyar, who succeeded him, considered that the suit was bad for misjoinder, and that the prayers in the plaint for a declaration that defendants 2 to 8 are not competent to succeed defendant No. 1 in management and for possession of the property in dispute rendered the claim multifarious. He held, however, on the authority of *Vasudeva Shanbhaga* v. *Kuleadi Narnapai* (1), that the alienees were properly impleaded as defendants, and directed on the 11th February 1884 that the two items of relief, mentioned above, be omitted and the plaint amended. On the 13th idem, the respondents put in a petition accordingly, giving up their claim to those items of relief and also to the removal of defendant No. 1 from his possession as karnavan. On the 19th August and 30th September they withdrew their claim as against some of the alienees and the lands in their possession. Prior to the trial, defendants Nos. 1, 2, 4, and 5 died and defendant No. 3 **[109]** succeeded the first. As amended, the suit was altered into one for a declaration that some of the alienations mentioned in the plaint, including those in the appellants' favour, were not binding on the respondents or their tarwad, but the ground of their claim remained the same. At the conclusion of the trial, however, their pleader admitted, for the purposes of the present suit and without prejudice to their right to obtain the declaration, that the suit might be proceeded with on the assumption that "Vayoth was a stanom, and that Palliyil, Kanhirot, and Kavullatan Vidu or houses are three tavarais subordinate thereto." He conceded also that the three tavarais had been managing their affairs separately and independently for the last thirty-five years.

The Subordinate Judge considered further that it was abundantly proved that such was really the case and applying to the alienations in contest the law applicable to the disposal of stanom property, as laid down by the late Sadr Court in 1853 in *Manavicrema Nalam Rajah* v. *Soobramaneyem Putter and others* (2) and by the High Court in *Chemminikara Muppil Nair* v. *Kiliyanat Ukona Menon* (3), and *Venkateswara Iyan* v. *Shekhari Varma* (4), he set aside the alienations in favour of the appellants and declared them invalid beyond the lifetime of defendant No. 1. Thus the ground of decision was that the alienations which the decree invalidated were of stanom property, and that the alienor was a stanomdar for the time being, while the respondents were members of one of the affiliated tarwads.

The appellant, in Appeal No. 105 of 1885, is defendant No. 50, who is the representative of the original defendant No. 35. On the 3rd March 1875, lands 165 to 170 were demised to him by defendant No. 1 on kanom under documents 228 and 229 for Rs. 1,500. The Subordinate Judge held that both the documents were fraudulent and collusive and declared them to be invalid.

The appellant, in Appeal No. 106 of 1885, is defendant No. 28. The respondents' claim as against him was that defendant No. 1 executed in his favour two kanom documents, 220 and 223, and that both were invalid. The Subordinate Judge upheld document 220 on the ground that it only renewed the kanom which was granted **[110]** by a former stani, Imbichunni Nayar, in 1863 under document 221. He set aside

(1) 7 M.H.C.R. 290.
(2) S. D. Mad. (1853) 214.
(3) 1 M. 88.
(4) 3 M. 384 = 8 I A. 143.

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however document 223, whereby defendant No. 1 demised in 1874 items of land 157 to 164 on kanom for Rs. 260-13-0, and considered that there was no prior kanom of Rs. 147-4-0 as alleged therein, and that no necessity was shown for the cash payment of Rs. 100.

The appellants, in Appeal No. 116 of 1885, are defendants Nos. 8 and 12 and as against them the respondents claimed to set aside five documents 39, 51, 52, and 54 executed in the name of defendant No. 8 and document 40 executed in the name of defendant No. 12. Document 39 is an otti executed by defendant No. 1 on 12th October 1878 for Rs. 7,300 in regard to items of land 54 to 75 for the term of thirty-six years. The Subordinate Judge upheld it as a simple kanom of Rs. 1,462-8-0 in regard to items of property 54 to 75 and declared it otherwise invalid. Document 51 is an otti of a perpetual character for Rs. 580 granted in June 1882 in respect of items of land 76 to 82. The Subordinate Judge upheld it as a simple kanom for Rs. 9-8-0 in regard to those lands and set it aside in other respects. Document 52 is a kanom for Rs. 400 granted on the 17th April 1880 in respect of items of land 83 and 84, and the Subordinate Judge upheld it as a valid kanom for Rs. 250 and cancelled it in other respects. Document 54 is a demise on kanom of paramba, No. 142, for Rs. 100 and purports to have been executed in April 1877 for the term of twenty-four years, and the Subordinate Judge set it aside as wholly invalid. Document 40 is an otti granted by defendant No. 1 for Rs. 550 on lands 85 and 120 to 123 in March 1881, and the Subordinate Judge upheld it as a kanom for Rs. 148-12-0 and declared it to be otherwise invalid. The several appellants contend that the decree of the Subordinate Judge ought to be set aside so far as they are against them. Several objections are taken to the decree and some of them are common to all the appeals. The first objection is that the suit is bad for misjoinder of parties. It is argued that each of the alienees has a distinct interest in some of the items of property specified in the Schedule annexed to the plaint and no interest whatever in the rest of the property in litigation, that the cause of action in regard to each is separate, and that the union of several such causes of action in one suit is contrary to Section 45 of the Code of Civil Procedure. But it was held by a Full Bench of this Court **[111]** in *Vasudeva Shanbhaga* v. *Kuleadi Narnapai and others* (1) that a similar suit brought against the alienees of a deceased member of a joint Hindu family for the recovery of family property illegally alienated was not bad for multifariousness. Assuming that the respondents are entitled to institute the present suit in respect of stanom property, we see no distinction in principle between it and the case cited above. In our judgment, it makes no difference whether the right enforced is that of a co-parcener or a reversioner, for the object in both is to reduce to possession a vested interest as well in property illegally alienated as in the property held by the managing member or by the tenant for life. In the view that the primary ground of action is the interest vested in possession as regards the whole of the property in suit, there is a unity of title, and the claim made is one in respect of the same cause of action. Taking it then that a reversioner can claim the whole property to which the reversion extends in one suit whatever may be the number of illegal alienations by the tenant for life, he must be taken to be at liberty also to sue for a declaration which is a remedy only ancillary to that right in regard to the whole. We cannot, therefore, say that the Subordinate Judge was in error in

(1) 7 M.H.C.R. 290.

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following the decision of the Full Bench of this Court in preference to the decision of a Divisional Bench of the Bombay High Court in *Kachar Bhoj Vaija* v. *Bai Rathore* (1).

The next objection is that the respondents cannot maintain the suit as finally dealt with by the decree appealed against. The respondents proceeded to trial on their averment that the property in suit was tarwad property in the ordinary sense of the expression, notwithstanding the contention on the part of the appellants in Appeal No. 116 that it was stanom property. These urged that what was termed Vayoth tarwad really consisted of three stanoms, *viz.*, (1) Vayoth Nair, (2) Koikoten Vittil Kidavu, and (3) Ayoth Kidavu, and of three illakur houses or branch tarwads, called (1) Kanhirot, (2) Kavullatan, (3) Palliyil, that each of the stanoms and branch tarwads had separate properties and separate management, and that the senior male members in all the illakurs were entitled to succeed to the first two stanoms in the order in which they are mentioned, the eldest to the stanom of the Vayoth Nair, and the next in seniority to the stanom of Koikoten Vittil Kidavu.

[112] It is urged that for the purposes of this appeal we may confine our attention to the legal relation between the stanom of the Vayoth Nair and the three branch tarwads which are affiliated to it. At the conclusion of the trial, the respondents admitted for the purposes of the present suit that the contention was well-founded. Though the admission purports to have been made without prejudice to their right to a declaration, the Subordinate Judge considered that it was abundantly proved by the evidence on the record, and decreed such relief as might, in his opinion, be decreed on the view that the property in dispute was stanom property. It becomes, therefore, necessary to consider whether there are any conditions subject to which alone a suit will lie in respect of stanom property improperly alienated. In *Venkateswara Iyan* v. *Shekhari Varma* (2), the Privy Council observed that a stanomdar represents the *corpus* of his stanom much in the same way as a Hindu widow represents the estates which have devolved upon her, and he may alienate the property for the benefit or proper expenses of the stanom. In *Chemminikara Muppil Nair* v. *Kiliyanat Ukona Menon* (3), stanom property was held liable to alienation and charge for the payment of debts incurred for the conservation of the stanom. According to the custom of Malabar, the nature of stanom property is such that the present holder has in it a life interest and the successor derives no benefit from it during the life of his predecessor, whereas in ordinary tarwad property each member of the tarwad has a concurrent interest and a joint beneficial enjoyment. Although the position of a stani is analogous to that of a childless widow, in that both have a life interest, both represent the estate or inheritance for the time being, and both have a disposing power only to a limited extent, the analogy does not extend to the estate taken by the reversioner. Each male reversioner becomes under Hindu law the full owner when the reversion falls in, whereas the person that succeeds to a stanom takes the same qualified estate that his predecessor had. The legal relation therefore between the Vayoth Nair and the other stanomdars and the karnavans of the three subsidiary tarwads is that which subsists among a group of persons entitled to succeed to the stanom property in a certain order, each having only a life interest therein and a qualified power of disposition over it. The relation between the **[113]** stani and the junior member of each subsidiary taward is that

(1) 7 B. 289. (2) 3 M. 368=8 I.A. 143. (3) 1 M. 88.

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which exists between the representative of the stanom for the time being and the class of persons who may become karnavans of their tarwads and therefore representatives of the junior and senior stanoms in the order of seniority.

With these general remarks, we shall consider whether the contention that the respondents could not maintain the suit is well-founded. The argument is that the person presumptively entitled to the stanom is alone competent to maintain the suit and that the respondents are in the position of remote reversioners.

The general rule is, no doubt, that the right to bring a declaratory suit before the reversion vests in possession is limited and belongs to the presumptive reversionary heir; but it must also be observed that a remote or contingent reversioner may be permitted to sue under special circumstances. In *Rani Anund Koer* v. *The Court of Wards* (1), the Privy Council after pointing out that if the right of suit were not limited, it would belong to every one in the line of succession, observed: "If the nearest reversionary heir refuses without sufficient cause to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue." In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue and would probably require the next reversionary heir to be made a party to the suit. Though this was a decision in regard to a remote reversioner under Hindu law, the present suit falls within its principle, *viz.*, that a suit for a declaratory decree is allowed in order that the next reversioner may remove that which would be a bar to his title when it vested in possession; but there was an allegation in the plaint in the case before us that all the senior anandravans between the plaintiff No. 1 and the original defendant No. 1, *viz.*, defendants 2—8, were hostile to the tarwad and forfeited their right of succession, and there was also a prayer for a declaration that they were debarred from such succession. Though this prayer was withdrawn on account of the order made by Mr. Ramachandra Ayyar, yet it would be necessary **[114]** to inquire for the purpose of deciding whether a suit will lie, if there was collusion between those senior anandravans and the alienees and the stani for the time being.

The third objection urged in appeal is that the Court below erred in allowing the plaint to be amended after the first hearing so as to convert a suit of one character into a suit of another and inconsistent character. Though the order made by Mr. Ramachandra Ayyar after the first hearing was apparently at variance with Section 53 of the Code of Civil Procedure, yet it had only the effect of reducing the nature and extent of relief claimed by the respondents, and on the ground that the cause of action was not altered it may be held that the appellants were not prejudiced; but the case on which the decree was passed by the present Subordinate Judge was essentially distinct from that disclosed by the plaint and on which the parties went to trial. There was no finding that all those in the line of succession to the stanom between plaintiff No. 1 and the original defendant No. 1 colluded with the alienees or were parties to the illegal alienations. Again, if plaintiff No. 1 was willing to sue, the other respondents

(1) 8 I.A. 14 (23).

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had no *locus standi* in the present suit. Defendant No. 3, who is alleged to have succeeded the first subsequently to the suit, originally resisted the respondents' claim, but there is no finding that he was guilty of any fraud or forfeited his right to the stanom, or that he desired to oust the alienees from possession during his life, nor is any specific ground shown for holding that as remote reversioners any of the respondents had acquired a right to sue by the misconduct of those who stood nearer to the stani. The former sued to have the alienations declared void on the ground that the property alienated was that of their tarwad and that its illegal alienation was an injury to their tarwad and an act in excess of their karnavan's authority. The Subordinate Judge decreed the claim substantially on the view that the property alienated was not that of their tarwad, but that it was attached to a stanom, to which the tarwad was subsidiary, and that there was an injury to the respondents because they were remote or contingent reversionary heirs to the stanom. We cannot hold then that the appellants are not right in contending that the conditions subject to which contingent reversionary heirs ought to be allowed to sue, and the life interest of the stani for the time being subject to which a decree ought to be passed, have been ignored to their prejudice. On the ground, therefore, that the case proved by the respondents is materially [115] distinct from the case disclosed by the plaint, the appeals must be allowed.

It must be noted, however, that the appellants in appeals, Nos. 105 and 106, did not allege in their written statements that the Vayoth was a stanom, or the property alienated to them was that of a stanom, their contention being that the alienations were valid and that the suit was the result of collusion between the respondents and defendants Nos. 1 to 16 ; but the finding of the Subordinate Judge is that what is called the Vayoth tarwad has been for years practically divided into three branches with separate properties and independent management and that common to these branches there are two dignities or stanoms, called Vayoth Nair and Koikoten Vittil Kidavu, which are also possessed of separate estates. He has further found that the holder of the junior stanom is the heir apparent to the senior stanom of Vayoth Nair, and that the eldest male in the three tavarais taken together succeeds to the junior stanom. There is also considerable evidence in support of the conclusion at which the Subordinate Judge has arrived. Though the appellants stated in their memoranda of appeal that the Subordinate Judge was in error in holding that Vayoth Nair was a stanom, they referred us specially to no evidence in support of their contention. On the other hand, the arguments urged in support of the appeal preferred by defendants Nos. 8 and 12 were adopted by them. As the fifth witness or defendants Nos. 8 and 12, the first plaintiff stated in his evidence that the three houses and the two alleged stanoms have had for more than thirty years properties separately assessed, that the person known as Kidavu belonging to the Koyikotu Vidu succeeds the Vayoth Nair, and that the senior next in years becomes his successor. His evidence strongly supports the conclusion at which the Subordinate Judge has arrived. Though it is urged for the respondents in appeal they never admitted that Vayoth was a regular stanom, yet the evidence shows that for more than forty years it has been treated as a stanom. We see no sufficient reason to say that the Subordinate Judge has not come to a correct finding on this point. On the facts found the respondents could not be treated as entitled to a decree on the case stated in their plaint. On this ground we set aside the decree of the Subordinate Judge so far as it relates to the appellants and dismiss the suit as against them with costs throughout.

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[116] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

SUBRAMANYAN AND OTHERS (*Defendants*), *Appellants v.* PARAMASWARAN (*Plaintiff*), *Respondent.* [17th January and 6th April, 1887.]

Malabar law—Nambudris—Marumakkatayam law—Adoption of an adult male—Form of adoption—Specific Relief Act (Act I of 1877), *Section* 42—*Declaratory decree—Evidence Act (Act I of* 1872), *Sections* 13, 35—*Limitation.*

In a suit the parties to which were Nambudri Brahmans following the Marumakkatayam law, the plaintiff sued as the adoptive son of the last member of an otherwise extinct mana for a declaration of his title to certain lands as the sole uralen of a devasom. He was in possession of the greater part of the land, but one paramba was alleged to be held adversely to him by a person not joined in the suit, and the tenants of part of the remaining land had attorned to the defendant. The plaintiff was an adult at the time of his adoption and no female was adopted at the same time with the plaintiff. In 1875 a suit was brought by the defendant's brother and others against the plaintiff and others to set aside an alienation by the present plaintiff's predecessor in title, but the suit was dismissed without any decision as to the co-uraima right of the then plaintiff; and the present plaintiff had no further notice of interference by the present defendant's mana:

Held, that the claim was not barred and that the plaintiff was entitled to the decree sued for.

The form and evidence of adoption considered.

Per cur.—The restrictions imposed under Section 42 of the Specific Relief Act must be held to refer to the consequential relief properly obtainable by the plaintiff as against the defendants in the suit and not to be extended to the case of all third parties who may possibly support some of the contentions of the defendants.

The appellants filed an application for the admission in evidence of certified copies of certain judgments and decrees rejected by the Lower Court. The appellants sought to make use of these documents not as constituting matters in dispute *res judicata*, but as containing summaries of statements made by parties concerned in the management of the plaint properties and as evidence of conduct.

Held that the documents were inadmissible in evidence.

[F., 17 M. 232 (234) ; R., 24 B. 591 (598) ; 25 M. 736 (741) ; 33 M. 452 (456) = 5 Ind. Cas. 630 = 20 M.L.J. 301 = 7 M.L.T. 311 ; 21 M.L.J. 952 (955) = 10 M.L.T. 356 = (1911) 2 M.W.N. 387 ; 1 M.L.J. 397 (400) ; 12 P.R. 1899 ; D., 15 M. 19 (23) ; 18 M. 73 (77, 78).]

APPEAL against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in Original Suit No. 6 of 1885.

The parties to this appeal were Nambudri Brahmans following the Marumakkatayam law.

[117] This was a suit for a declaration that the plaintiff was the sole uralen and manager of a certain devasom, being a member by adoption of the Thaliyil mana, in which the uraima right was vested, there being no other member of the mana alive. The plaintiff was in possession (by himself or his tenants) of all the devasom properties, excepting certain plots held by defendant No. 1 under a decree and another plot held adversely by one Vasudevan (who was not a party to the suit) ; some of the tenants, however, had attorned to defendant No. 1. The defendants denied that the adoption of the plaintiff was true in fact or valid in law, claiming, *inter alia*, that the fact that no female was alleged to have been

* Appeal No. 26 of 1886.

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adopted at the same time as the plaintiff was fatal to his case. The defendants further set up that the uraima right had been vested in their mana jointly with the Thaliyil mana, and since the extinction of the latter had vested in their mana alone. The defendants also contended that the plaintiff was not entitled to sue for a declaration, because he was not in possession of all the land to which his suit related.

The evidence most relied upon for the purpose of establishing the fact of the adoption of the plaintiff was given by an old Brahman inhabitant of the plaintiff's village. He said: "The mode of making an adoption and the mode in which plaintiff was adopted are as given below. White cloth and blanket were spread in the padinhatti (room). Lamp with wicks burning on the four sides was lighted and kept there. Raw rice was kept in a plate. The members of all the manas had come. The adoptive father said 'you are adopted to the mana because there are no heirs to the mana; you must manage everything as I managed; all rights are granted,' and put rice on plaintiff's head." The plaintiff also had contracted a marriage which would not have been in accordance with the custom observed by the parties to this suit if his adoption was invalid.

The Subordinate Judge decreed in favour of the plaintiff.

Against this decree, the defendants filed this appeal, alleging, among other grounds of appeal, that certain documents, described in the following judgment, which they tendered in evidence, had been improperly rejected.

Sankaran Nayar, for appellants.

Mr, *Wedderburn* and *Anantan Nayar*, for respondent.

The arguments adduced on this appeal and the further facts **[118]** of the case sufficiently appear, for the purpose of this report, from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.).

JUDGMENT.

This was a suit brought by the respondent, Paramaswaran Thirumumbu, claiming to be a member, by adoption, of the Thaliyil mana, in Kakkanisseri desom, Payanur amsom, and as such to be the sole uralen and manager of the Ramenthali temple in Kunnimangalam amsom, the management of which, and of all the properties belonging thereto, is alleged to pertain to the said mana, and to have been exercised from time immemorial by the karnavan of the mana for the time being.

The appellants are members of the Kunnath mana. The respondent prayed for a decree declaring that neither the appellants nor their mana have any uraima right in respect of, nor any right of management in or over the, Ramenthali temple; the cause of action alleged is that the first appellant, Kunnath Manayil Subramanian Thirumumbu, as uralen of the temple and representing the Kunnath mana, had instituted certain suits for the recovery of devasom properties and induced certain tenants of the devasom lands to attorn to him, and it is alleged that these proceedings came to the knowledge of the respondent only in 1881, and that is the date on which the cause of action is said to have arisen.

Thaliyil mana Narayana Thirumumbu was referred to in the plaint as having managed the devasom property for many years as of right and as being the karnavan of the mana for the time being, and Vasudevan Thirumumbu (of the respondent's Thayakat mana) son of Narayanan and brother to respondent's wife, was alleged to have taken part in the management with the consent of Narayanan during the lifetime of the latter, and for and with the consent of the respondent after the death of Narayanan.

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The appellants denied the fact of the respondent's adoption into the Thaliyil mana, and pleaded that if such adoption were found as a fact, it is invalid in law and not in accordance with local or other customs, and can confer no right in respect of the managment of the devasom. They alleged that such right does not and never did belong to the Thaliyil mana exclusively, but is exercised by the person appointed for the time being by the Kunnath and Thaliyil manas jointly, and that it was in virtue of such appointment that Narayanan Thirumumbu conducted the devasom affairs, the two "manas" having each of them uraima right, which right passed on the extinction of the Thaliyil mana **[119]** to the appellants' mana exclusively; that the right of appellant No. 1 as uralen and manager was judicially established in a suit in 1875 in the Court of the District Munsif of Kavai, to which representatives of appellant No. 1 and of the respondent were parties, and also in certain suits in 1881; and that those decisions render the matters now in issue *res judicata*.

The first issue was "Whether the plaintiff was properly adopted into the Thaliyil mana?" and the second "Whether by such adoption the plaintiff acquired uraima right to the Ramenthali devasom?"

The Subordinate Judge held the fact of adoption to be established beyond all question by the evidence of two Brahmans, one a pandit and the other an old resident in the gramom (village); the marriage of the respondent with one of the ladies of the Thayakat mana, which could not, it is said, have taken place unless the respondent had become a member of one of the "manas" constituting the community of the "gramom," and the absence of any evidence on the appellants' side in disproof of the alleged custom are also referred to by the Judge.

As to the invalidity of the adoption, which was asserted on the grounds that in this family or mana (in which the Marumakkatayam system obtains) the adoption of a male is impossible, that the evidence itself does not show that either in essentials, such as the giving and receiving, or in forms or ceremonies, was there any which can properly be considered an adoption in law, the Subordinate Judge ruled that there may be an adoption either of a female or of a male or of both together, and referred to the admitted facts that the father of appellant No. 1 was a member of his "mana" by adoption only, as was Narayanan Thirumumbu in the Thaliyil mana, the latter having been further an adult at the time when he was taken into that mana; that no special form of adoption is required, but that assuming that a ceremony described as "Ganapathy homam" was necessary, the evidence showed that it was performed. As to the second issue, the Judge held that if by the adoption or appointment the respondent became a member of the Thaliyil mana, there could be no doubt that as such the uraima right vested in that mana devolved upon him, and that he is entitled to exercise it; and as to this no question was raised in appeal.

[120] On the issues as to whether the right of management pertaining to the Thaliyil mana is hereditary and exclusive, or whether the Kunnath mana has a joint or other right in respect of the devasom, the finding is in favour of the respondent and against the appellants. The Subordinate Judge observes that there is no evidence whatever in support of the allegation that Narayanan Thirumumbu, who admittedly exercised sole management for upwards of thirty years until his death in 1879, exercised such exclusive management under appointment by and with the consent or permission of the Kunnath mana, and that for reasons which will be stated and considered in detail under appropriate heads, the

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appellants failed to establish that they have any uraima right, while the respondent's documents prove independent as well as exclusive management by the Thaliyil mana, and even if the appellants' mana ever had any uraima right, such right has been lost and is extinguished. An additional issue raised the question whether in any case the respondent's suit for a declaratory decree is maintainable; the ground on which this contention was put forward in the Court below appears to have been that the respondent was in a position to have demanded other and further relief in respect of possession of certain items of property belonging to the devasom obtained in execution of the decrees of the District Munsif's Court above noticed.

The Lower Court overruled the objection on the ground that the respondent having been a party to those decrees could not maintain a suit for recovery of the lands in dispute in those suits, and that in respect of land in the possession of third parties, the provisions of the Specific Relief Act, Section 42, and of the Code of Civil Procedure against the splitting of demands do not apply; and as to the contention that the respondent is barred by the decisions of the District Munsif in the suits of 1875 and 1881 in favour of the appellants' joint uraima right, that finding was held not to conclude the respondent, inasmuch as it arose incidentally, was decided by a Court which had not jurisdiction to determine it otherwise than for the immediate purposes of the matter then in dispute, and that the decrees did not dispose of the general question now raised.

The appeal was argued here on the following grounds:—

That this suit for the declaration sought is not maintainable;

[121] That the alleged adoption was not proved and is not a valid adoption; and

That the exclusive right of the Thaliyil mana to management of the temple and its properties in virtue of uraima right is not proved.

In support of the first contention, it is urged that, putting aside the respondent's own statement and evidence given by him, there is no proof that the respondent is in possession of the temple property, while, on the other hand, it is admitted that appellant No. 1 is in possession of some of the lands belonging to the temple, that tenants have attorned to him in respect of other such lands, and that the respondent's brother-in-law is in possession of one paramba, not with the consent or approval of the respondent, and it was, therefore, open to the respondent, and he was bound to ask for, further consequential relief.

A further contention now raised for the first time in appeal, is that the claim for the declaration sought is barred by time, the cause of action having arisen on, and time having commenced to run from, the date on which appellant No. 1 to the knowledge of the respondent set up his title in opposition to the respondent, *i.e.*, in 1875.

The respondent sued as being in possession of all the devasom properties, excepting the plots decreed to appellant No. 1 and the plot in the occupation of Vasudevan; such possession was not denied by appellant No. 1 in his pleadings; all the evidence tends to show that the respondent's allegation in this respect is true, and beyond the bare statement of the appellant No. 1, there is no evidence that he is not in possession.

The case of appellant No. 1 at best is that, though for upwards of sixty years his "mana" has not exercised any right of interference in, nor taken part in the management of, the devasom affairs until 1875, such right exists. Whatever possession he has, is on behalf of the devasom, and, as the respondent is undoubtedly an uralen, it cannot be said that

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he is not, in the eye of the law, in possession, for the possession of one couralen is the possession of all.

Again the objection that because Vasudevan holds a paramba adversely to the respondent, and as some tenants have attorned to appellant No. 1, the respondent was bound to sue for consequential relief as against them and for this purpose to include them as [122] parties to this suit, this might be disposed of as regards Vasudevan on the ground that there is really no evidence that his holding is adverse; the admission by the respondent that he does not altogether approve of Vasudevan's management or has had disputes with him is not evidence of adverse holding, but the objection may be overruled, both as regards him and the tenants also, on the ground that the restrictions imposed under s. 42 of the Specific Relief Act must be held to refer to the consequential relief properly obtainable by the plaintiff as against the defendant in the suit, and are not to be extended to the case of all third parties who may possibly support some of the contentions of the defendant. Where a title is in dispute there may be third parties who are honestly in doubt and ready to acknowledge the title of either of the contesting claimants, or who having attorned to one may be ready to acknowledge the person declared by the court to have the title; and the object of such a suit as the present might be practically defeated if it were necessary for the plaintiff to bring in all persons who may support the claim of the defendant; however this may be, we consider the construction which the appellants' contend should be placed upon the section of the Specific Relief Act is not the necessary or proper construction.

As to this suit being barred by time, the suit of 1875 (Exhibit II) brought by the brother of appellant No. 1 and others against the respondent and others for the purpose of having set aside an alienation made by the respondent's predecessor in title was dismissed without any decision as to the right of the then first plaintiff as co-uralen (exhibits II and III), and in the absence of notice of further interference on the part of the appellants' "mana" time would not run for the purpose of limitation as against the respondent.

Exhibits VIII and IX are judgments and decrees in suits to which the respondent was no party and are not admissible as evidence of denial of the respondent's title by appellant No. 1, and the suit is brought within the time limited from the date of the suit (exhibit VI) in which the surrender of the lands to appellant No. 1 in this suit on behalf of the devasom as co uralen with the respondent was decreed.

We may here conveniently refer to and dispose of an application made on behalf of the appellant to file certain documents which the Subordinate Judge rejected. The first brought to our [123] notice is a copy of an instrument, the original of which was not produced, and no explanation was given as to its non-production, the Lower Court rightly refused to file this. The other documents are certified copies of judgments and decrees which the appellants' sought to make use of, not as constituting matters in dispute *res judicata*, but as containing summaries of statements made by parties concerned in the management of the plaint devasom properties and as evidence of conduct. Reference was made to *Lekraj Kuar* v. *Mahpal Singh* (1) and *Parbutty Dàssi* v. *Purno Chunder Singh* (2), in which the admissibility of such documents as containing matters of the character described in Section 13, or as being documents of the nature

(1) 5 C. 744. (2) 9 C. 586.

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referred to in Section 35 of the Evidence Act, was contended for and discussed.

None of the documents here answer to the description of those admitted by the Privy Council in *Lekraj Kuar's case*, and as regards the other cases, we concur with the majority of the Full Bench of the Calcutta High Court in *Gujju Lall* v. *Fatteh Lall* (1).

In respect of another judgment which the appellants apply to file and which if proved might be relevant, this was not presented in the court below at all. Appellant No. 1 files an affidavit in which he states that the paper purporting to be a copy of the judgment came into his possession only after judgment was delivered; but there is no declaration to the effect that the appellants were not aware of the existence of the judgment: it is moreover, not admissible, not being a certified or duly authenticated copy. None of the documents, then, which we are asked to admit can be admitted.

As to the adoption, it is true that two witnesses only have given evidence in support of it and that they are not members of the Thaliyil "mana" nor of the Payanur "gramom"; but they are men of position, and, in the Subordinate Judge's opinion, worthy of credit, nor has anything been said here to induce us to think that the Subordinate Judge was wrong; on the other hand the necessity for the introduction of one not a member of the "mana" into the Thaliyil mana at this juncture, and the precedent in that and in the "mana" of appellant No. 1 also render the fact probable, while no evidence to the contrary is adduced and no member of the family, who but for this adoption would have an interest [124] in the property, appears as witness to object to the respondent's adoption. We may further refer to the judgments and decrees in Original Suit 381 of 1880 on the file of the District Munsif of Kavai and in appeal and second appeal (exhibit VII) as showing that the appellants were aware of the character of the evidence which the respondent had in support of the adoption, and that it may well be that the respondent's omission to produce a greater bulk of evidence in this case was due to calculation that the appellants would not think it worth their while again to attempt disproof of the fact; however this may be in the absence of evidence or of circumstances tending to disprove or render the fact of adoption improbable, we think the Subordinate Judge rightly decided in the respondent's favour on this point.

The taking of the respondent into and constituting him, an adult, a member of the Thaliyil family cannot be dealt with strictly on the footing of an adoption according to the Hindu law in families in which the Marumakkatayam system does not obtain, and we are of opinion that the evidence supports the finding that there was what, for the want of a more appropriate term, may be called an adoption in accordance with the form usually observed in and required by the community which includes the Thaliyil mana, nor is the omission to take or adopt a female at the same time shown to be a fatal objection to the validity of the transaction. That such taking or adoption does not carry with it the right now in dispute was not contended in appeal.

It was then contended that possession and management are not proved to have been exclusively with the Thaliyil mana, and reference is made to expressions used in various documents from which a joint right of management may be inferred or which are not incompatible with the

(1) 6 C. 171.

existence of such right, and it is urged that as the respondent is suing for a declaration that the appellants have no uraima right, the burden of proof is upon him.

It may be conceded that there is no direct evidence of active exclusion of the Kunnath family from the management, but the admitted fact that for some seventy years that family has not exercised nor claimed to exercise right of joint management is a fact of great weight as bearing on the existence of such right, nor can the appellants' claim be admitted simply because there are certain expressions used in the documents to which we shall presently refer, and which do not of necessity exclude or might even [125] be construed as indicative of the existence of more uralens than one. It may, indeed, be said that, with the exception of the entry "Thaliyil Thirumumbu, Kunnath Thirumumbu, uraima right" in the column headed "Names of uralers and particulars of rights" in the paimayish account, Exhibit XII, there is no evidence of the right for which the appellants contend. There is certainly no proof whatever of the appointment of any person as manager by the two "manas" jointly, as alleged in the plaint. It was suggested that statements appearing in paimayish accounts relating to temples are not open to the objections which have been taken to such accounts relating to lands unconnected with temples, seeing that the former were the result of inquiries made by Collectors under orders from Government and the Board of Revenue at a time when, as being responsible for the management of such property, the officers of Government needed and called for information as to such property and as to everything connected with the institutions. There being nothing in the record before us to show that the entries appearing in Exhibit XII were prepared in such circumstances, there is no force in the argument, and while we may take it as a fact that there was a "paimayish" early in the century, there are in the present case objections insisted on by the other side to this exhibit in addition to those generally applicable to such documents. The account or statement does not exhibit the signature of a Collector or other responsible officer, nor is there anything to show by whom or under whose orders or supervision it was prepared. It was no doubt filed in a suit in one of the Courts of the district in 1869, but that does not relieve us of the duty of assigning to it its proper value as a piece of evidence, nor diminish the force of the objections taken to it; and even if it were evidence, it certainly is not by itself, nor, as we shall proceed to show, in connection with other facts, sufficient to establish that the Kunnath mana ever had joint uraima right.

Exhibit H is a deed of 1816, in which a member of Thaliyil family, a lady, named Sridevi, describes herself or is described as "the governing uralen" (Koyima uralen), and it is contended that this would imply the existence of another uralen or other uralens not being governing or managing uralens; and the same in the case of Narayanan Thirumumbu in Exhibit D, a deed of 1868, in which he is described as "the uralen and the man who manages the affairs of the devasom."

[126] In Exhibits E and F, however, Narayanan is styled "uralen" simply, and, in Exhibit G, Vasudevan grants an otti demise of land, which he describes as "jenm of my devasom." Documents W (1821) and A. V. (1848) are no doubt consistent with the case of there being one or more uralens; but Exhibits E, F, and G certainly rather support the respondent's case, and we cannot admit that the mere use in one or more documents of expressions not inconsistent with the existence of more uralens than one goes far to support the appellants' case.

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On the other hand, we find the lady, Sridevi, selling absolutely in 1816 lands purpoting to be sold as the jenm of the devasom, and there seems little doubt that Exhibit A was passed by the same lady as uralen in 1819, and it is extremely difficult to understand abstention of the Kunnath mana from interference then, and subsequently until a few years back, if the right now claimėd had really been vested in it; that the management of Sridevi could have been unknown to the Kunnath family would in itself seem improbable, and we further find that Exhibit H purports to be attested by an adhikari, who was a member of the Kunnath mana.

We are no doubt confronted by the decision of the District Munsif of Kavai in original suit No. 421 of 1875 (Exhibit II), in which he decided the question now in dispute in favour of the appellant, and with the observations of the District Judge, Mr. Reid, in appeal (Exhibit III); but the latter did not dispose of the suit on the ground that the plaintiff in that suit, the appellant before us, was entitled to joint management. The Judge placed his refusal to give the plaintiff a decree setting aside a sale of the devasom property by the respondent before us on the ground that "whatever rights the first plaintiff had he could not be allowed to come in and overturn a transaction to which in the plainest manner gave his consent by abstinence from all control of the first defendant's management," which had extended over very many years.

The decision having been put on this ground, and the question as to the appellants' joint uraima right not having been finally heard and determined in that suit, we are free to say that we consider the grounds and arguments on which the District Munsif arrived at his conclusion are not sound nor sustainable; we have the less hesitation in coming to this conclusion seeing that the [127] question as to joint right of management was only incidentally before the Court of First Instance in that litigation. We are of opinion then that the Subordinate Judge came to a correct conclusion in the present case in holding that the respondent should have a declaration as prayed for, and we dismiss this appeal with costs.

We do not overlook the incongruity resulting from the existence of a decree passed by the Court of a District Munsif, the effect of which is that in respect of one or more specific pieces of devasom land the respondent and appellant No. I have jointly right of management, while under the present decree appellant No. 1 is debarred from again asserting and from exercising such right jointly with the respondent in respect of the devasom lands other than those which formed the subject of the suit or suits in the District Munsif's Court in which appellant No. 1 succeeded.

In the present case, however, the right of the party who succeeds before us has been recognized in the other suits also as uralen, but not as sole uralen, and, as the possession of one uralen is the possession of all, the result is not so incongruous as it might be in some cases.

11 M. 127.

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Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

RANGAMMA (*Plaintiff*), *Appellant v.* VOHALAYYA AND OTHERS (*Defendants*), *Respondents.** [22nd August, 1887.]

Civil Procedure Code, Section 43.

The plaintiff having obtained a decree against the defendants for the payment to her of a monthly sum for her maintenance, subsequently sued to have it constituted a charge on certain land.

Held, that the claim in both suits arose out of the same cause of action, and, therefore, the plaintiff was precluded by Section 43 of the Code of Civil Procedure from asserting in the second suit the claim which she might have asserted in the first.

[Cons., 17 M. 268 (270); R., 22 M. 175 (178).]

SECOND appeal against the decree of Venkata Rangayyar, Acting Subordinate Judge of Ellore, in Appeal Suit No. 510 of 1885, [128] reversing the decree of O. S. Kristnamma, District Munsif of Ellore, in Original Suit No. 324 of 1884.

This was a suit to set aside the Court-sale of certain property, and to declare a certain sum due to the plaintiff (under a decree) for her maintenance to be a charge upon the property.

Plaintiff and defendants Nos. 1 and 2 were members of a joint Hindu family; defendants Nos. 1 and 2 being, respectively, father and brother of the plaintiff's deceased husband. Defendant No. 3 obtained a money decree against defendant No. 1 in Original Suit No. 68 of 1876, and, subsequently, in execution of the decree, brought certain land belonging to the family to sale and purchased it himself. Before the execution of the decree the plaintiff's husband died, and the plaintiff sued defendants Nos. 1 and 2 for maintenance and obtained a decree for maintenance at the rate of Rs. 40 per annum in Original Suit No. 473 of 1878. The present suit was brought to set aside the sale in execution of the decree in Original Suit No. 68 of 1876 as collusive, and to declare the annual sum due under the decree in Original Suit No. 473 of 1878 a charge upon the land sold.

The District Munsif allowed the plaintiff's claim, but his decree was reversed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Ramachandra Rau Saheb, for appellant.

Mr. *Ramasami Raju*, for respondents.

The arguments adduced on this second appeal appear sufficiently, for the purpose of this report, from the judgment of the Court (COLLINS, C.J., and BRANDT, J.).

JUDGMENT.

In this case the third defendant, the respondent, obtained a decree in the year 1876 against the first defendant. In 1878 the appellant sued the first defendant and another member of the family for maintenance and obtained a personal decree against those two defendants, under which, they were bound to pay to the appellant for her life a sum of Rs. 3 per

* Second Appeal No. 903 of 1886.

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mensem, with an allowance for cloths. Some time in 1883 the respondent, in execution of his decree, purchased a part of the family lands belonging to the first defendant's family. The present suit was brought to set aside the sale and the purchase of the respondent, and to have the appellant's maintenance charged on the land purchased by him. The Subordinate Judge held that in no circumstances [129] could a decree be made as prayed by the appellant, having regard to Section 43 of the Code of Civil Procedure.

It is contended in appeal that a claim for maintenance to be decreed against a person and a claim to have maintenance charged upon immoveable property are different, and that they do not arise out of one and the same cause of action; and it was suggested that a widow or other female member of a family entitled to maintenance might have cause to sue for maintenance without having at the same time sufficient cause to demand that the charge be made a charge on the property or any part thereof; and that, if, subsequently, the manager of the family or others were to commit waste or alienate any part of the property, the claimant would be at liberty to come in and sue to have the maintenance already awarded made a charge upon the property. We are unable to allow this contention. The plaintiff had undoubtedly a right to a decree against the first and second defendants personally, or to a decree making the maintenance a charge on the property, and possibly to both; but it appears to us clear that, on the principle to which effect is given by the provisions of the Code of Civil Procedure, the plaintiff was bound, when she sued in 1878, to have asked, for all the remedies in respect of the right of maintenance, to which she was then entitled, and that these claims did arise out of one and the same cause of action, that cause of action being the right to maintenance.

On these grounds, we hold that the Sub-Judge is right and dismiss this second appeal with costs.

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11 M. 130.

[130] APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

PERUMAL (*Defendant No.* 1), *Petitioner v.* VENKATARAMA (*Plaintiff*), *Respondent.** [14th September, 1887.]

Civil Procedure Code. Sections 223,228,249. 622—*Mufassal Small Cause Court Act* (*Act XI of* 1865), *Sections* 20,21—*Execution proceedings—Appeal.*

The plaintiff obtained a decree in a Small Cause Suit in a Subordinate Court in the mufassal and a certificate was granted to him under Section 20 of the Mufassal Small Cause Court Act for the execution of the decree against immoveable property of the judgment-debtor in the jurisdiction of a District Munsif. He accordingly presented a petition to the District Munsif under Section 247 of the Code of Civil Procedure, but his petition was dismissed:

Held, that an appeal lay to the District Court.

PETITION under Section 622 of the Code of Civil Procedure, praying the High Court to revise the order of T. Weir, District Judge of Madura, on Civil Miscellaneous Appeal No. 29 of 1886, dismissing an appeal against

* Civil Revision Petition No. 269 of 1886.

the order of A. L. Lakshmana Chettyar, District Munsif of Tirumangalam, on Civil Miscellaneous Petition No. 401 of 1886.

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The plaintiff in a small cause suit on the file of the Subordinate Court of Madura (East) obtained a decree, which he sought to execute under a certificate granted by the Subordinate Judge under Section 20 of the Mufassal Small Cause Court Act against the immoveable property of the judgment-debtor situated within the jurisdiction of the District Munsif of Tirumangalam.

The plaintiff accordingly presented a petition to the District Munsif under Section 249 of the Code of Civil Procedure, but the District Munsif refused to grant execution on the ground that the plaintiff's claim was barred by limitation. An appeal was then preferred to the District Judge, who, however, ruled that no appeal lay from the order of the District Munsif rejecting the petition, since it was made on an application in execution of a Small Cause Court decree.

[131] The plaintiff preferred this petition on the ground that the District Judge had declined jurisdiction, since the order appealed against was not an order of a Small Cause Court.

Subramanya Ayyar, for petitioner.

Bhashyam Ayyángar, for respondent.

The further facts of this case and the arguments adduced on this petition appear sufficiently, for the purpose of this report, from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

The decree, in which execution is sought, is one passed in a Small Cause suit (2680 of 1869) on the file of the Subordinate Court of Madura (East). The decree not being satisfied by execution against the moveable property of the judgment-debtor in the jurisdiction of the Small Cause Court, a certificate was granted by that Court to the decree-holder under Section 20 (Act XI of 1865), on the strength of which he applied to attach in execution certain immoveable property within the jurisdiction of the Court of the District Munsif of Tirumangalam.

Notice was issued to the defendants, and on objections raised by them, the execution was held by the District Munsif to be barred. The judgment-creditor appealed, but the District Judge held that no appeal lay, since Section 21 of the Mufassal Small Cause Courts Act provided that in the suits tried under that Act, all decisions and orders of *the Court* shall be final. The District Judge, therefore, declined jurisdiction, and the present application is to revise his order under Section 622 of the Code of Civil Procedure.

It appears to us that the words "the Court" in Section 21 refer only to the Court constituted under that Act, that is, the Court of Small Causes which has a limited jurisdiction assigned to it under Section 6 and limited powers in execution of decrees passed by itself. Section 20 provides that if execution cannot be had against the moveable property of the judgment-debtor, the certificate granted by the Small Cause Court may be presented to "any Court of Civil Judicature having general jurisdiction in the place in which the immoveable property of the judgment-debtor is situate," and "such Court shall proceed to enforce such judgment according to its own rules and mode of procedure in like cases."

The Court of a District Munsif is such a Court of general jurisdiction as is here contemplated, and its orders are subject to appeal.

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The enactment of Section 223 of the Code of Civil Procedure has not modified Section 20 of Act XI of 1865—vide *Kahanarama* v. [132] *Ranga*(1). Sections 223 and 228 of the Code of Civil Procedure are alike applicable to Small Cause Courts (see sch. II), and under Section 228 the orders of a Court executing a decree are subject to the same rules in respect of appeal as if the decree had been passed by itself.

It is no doubt the case that no second appeal would lie from the order of the District Judge in such a case—*Gorachand Misser* v. *Raja Baykanto Narain Singh*(2); but with regard to a regular appeal the question whether it will lie seems to us to depend upon the character of the tribunal and not upon the nature of the claim.

The order of the District Judge must be set aside, and he must be directed to hear and dispose of the appeal. The costs will abide and follow the result.

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11 M. 132.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

PATUMMA (*Counter-petitioner*), *Appellant* v. MUSE BEARI (*Petitioner*), *Respondent*.* [2nd September, 1887.]

Civil Procedure Code, Section 230—*Execution proceedings*—*Limitation.*

An application was made in 1886 for execution of a decree dated 1873. In the interval, *viz.*, in October 1879, the judgment-debtor was arrested on an application in execution by the decree-holder, but execution was not proceeded with further:

Held, that the application made in 1886 was time-barred under Section 230 of the Code of Civil Procedure.

APPEAL against the order of J. W. Best, District Judge of South Canara, on Civil Miscellaneous Petition No. 308 of 1886, reversing the order of J. P. Fernandes, District Munsif of Kasargode, in execution petition No. 92 of 1886.

This was an application for execution of a decree passed in Original Suit No. 145 of 1872, dated the 9th September 1873. The present application was made on 19th March 1886. In the interval, *viz.*, in October 1879, process was issued on the application of the present petitioner, for the arrest of the judgment[133]-debtor, who was accordingly produced in custody before the Court, but the application was struck off and the judgment-debtor was released. In 1882 and 1883 also applications for execution were made, but not proceeded with.

The District Munsif dismissed the present application as barred by limitation under Section 230 of the Code of Civil Procedure, but the District Judge, on appeal, reversed this order. The judgment-debtor preferred this appeal.

Gopala Rau, for appellant.

Srinivasa Rau, for respondent.

The arguments adduced on this appeal appear sufficiently, for the purpose of this report, from the judgment of the Court (COLLINS, C.J., and BRANDT, J.).

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* Appeal against Order 33 of 1887.

(1) 8 M. 8.

(2) 12 B. L. R. 261.

JUDGMENT.

We must hold the application for execution in this case to be barred by time.

The decree, which it is sought to execute, was passed on the 9th September 1873. The present application was made on the 19th March 1886.

An application was made in October 1879, in accordance with which process for the arrest of the judgment-debtor was issued and he was produced in custody before the Court; at that time Act X of 1877 was in force.

The period prescribed for taking proceedings to execute the decree under the law in force immediately preceding the passing of the Code of 1882 expired on the 9th September 1885. If the application of October 1879 was granted, and that it was granted within the meaning of Section 230 of the Code of Civil Procedure admits of no doubt, the case is different from that in which only a notice to appear and show cause is issued. The creditor applied for an order for the arrest of the debtor, and his application was complied with; that the creditor did not proceed further cannot in any way alter the fact that his application for execution was granted.

Under the Limitation Act in force prior to the passing of Act X of 1877 no period was prescribed beyond which execution of decrees should not be allowed, provided they were kept alive in due manner; but in 1877 the legislature saw fit to enact that if once an application were made and granted under Section 230 of the Code of Civil Procedure, there should be an end to all execution proceeding on the completion of twelve years from the date of the [134] decree, (except in certain specified cases which it is not necessary here to advert to); at the same time three years' grace was given subject to the conditions stated in the last paragraph of Section 230 of Act X of 1877.

As observed in the case reported in *Kollu Shettati* v. *Manjaya* (1), the law immediately in force when Act X of 1877 was passed, and to which regard should be had in disposing of applications for execution of decrees, was the Limitation Act, and that only as regarded limitation; but when the Act of 1882 superseded the former Act, "the law in force immediately before the passing" of the Act of 1882 was the Limitation Act, *plus* the law regarding limitation contained in Section 230 of Act X of 1877; and under the latter, any application to execute the decree now in dispute was barred after the lapse of twelve years from the date of the decree, seeing that an application to execute it was made, and, as we find, granted in 1879.

We, accordingly, reverse the order of the District Judge and restore that of the District Munsif, and the appellant's costs in this Court and in the District Court will be paid by the respondent.

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(1) 9 M. 454 (456).

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11 M. 134.

11 M. 134.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KOMU (*Defendant No.* 1), *Petitioner v.* KRISHNA AND ANOTHER (*Plaintiff and Defendant No.* 2), *Respondents.** [30th September, 1887.]

Mufassal Small Cause Court Act (Act IX of 1887). *Schedule II, Article* 38—*Jurisdiction —Suit for maintenance based on a family arrangement—Malabar law.*

A suit for maintenance based on a family arrangement is within the jurisdiction of a Mufassal Small Cause Court.

A karnavan is not entitled of his own authority to set aside a family arrangement made on behalf of all the members of the tarwad.

[R., 28 M 182 (193) (F.B.)=14 M.L.J. 415; D., 16 B. 267 (268); 20 M. 29 (30.31).]

PETITION under Section 622 of the Code of Civil Procedure, praying the High Court to revise the decree of V. P. deRozario, Subordinate Judge of Palghat, in Small Cause Suit No. 790 of 1886.

[135] This was a suit on a karar, made on behalf of the members of the Malabar tarwad, securing the payment to one of the members of a certain sum by way of maintenance. The suit was filed as a Small Cause suit, and the karnavan of the tarwad was joined as defendant No. 1.

The plaintiff having obtained the decree prayed for, defendant No. 1 presented this petition to the High Court on the ground that the suit was not within the jurisdiction of Small Cause Court.

Mahadeva Ayyar, for petitioner.

Gopalan Nayar, for respondents.

The arguments adduced on this petition appear sufficiently, for the purpose of this report, from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

JUDGMENT.

The basis of the claim decreed by the Subordinate Judge in the exercise of Small Cause jurisdiction was a family arrangement in writing, and we cannot say that he had no jurisdiction to entertain the suit for maintenance. As to the contention that he did not consider the objection taken by the petitioner, *viz.*, that, as the present karnavan of the tarwad, he was entitled to set aside the karar sued upon, we are of opinion that the karnavan is not entitled of his own authority to set aside a family arrangement made on behalf of all the members of the tarwad. At the date of the suit, the karar was in force as a subsisting contract, and we must hold then that the Subordinate Judge acted neither illegally nor with material irregularity nor without jurisdiction in passing the decree which he has made.

We dismiss this petition with costs.

* Civil Revision Petition No. 307 of 1886.

11 M. 136.

[136] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

KOMARASAMI (*Plaintiff*), *Appellant v.* GOVINDU (*Defendant*), *Respondent.** [30th September, 1887.]

Civil Procedure Code. Sections 344, 588—*Appealable order—Insolvent judgment-debtor —Notice to decree-holder.*

A debtor was arrested on civil process. He presented a petition to the Court from which process issued, alleging that he was unable to pay the debt and praying to be declared insolvent and to be released. The Court passed an order on the same day, directing that he should be released and that the creditor should proceed against his property.

Held, (1) that an appeal lay against the order; (2) the order was bad for want of notice.

APPEAL against an order made by P. V. Rangacharyar, District Munsif of Sholinghur, on an application under Section 344 of the Code of Civil Procedure.

A judgment-debtor, arrested on civil process, presented a petition to the Court, which set out his circumstances and concluded as follows:—

"In the state of circumstances, I am not in position to pay the debt due under this decree. I will have no objection to pay plaintiff's debts when I may come in possession of property.

"I, therefore, pray that, on an investigation into the matter, an order may be passed, declaring me an insolvent and releasing me from the warrant."

The Court, on the same day, without notice given to the plaintiff, at whose suit the applicant had been arrested, made the following order:—

"Defendant is released. Plaintiff is to proceed against the properties of defendant, whatever they are, moveable or immoveable."

The plaintiff preferred this appeal.

Anandacharlu, for appellant.

[137] *Rangacharyar*, for respondent.

The arguments adduced on this appeal appear sufficiently, for the purpose of this report, from the judgment of the Court (COLLINS, C. J., and BRANDT, J.).

JUDGMENT.

Mr. Rangacharyar takes the preliminary objection that no appeal lies.

The objection is overruled. The order without doubt purports to be an order declaring the petitioner to be an insolvent and releasing him on that ground, but it was passed on the petition on the very day on which the application was made, and we set it aside as the notice required under chapter XX of the Code of Civil Procedure was not given. We shall not direct the District Munsif to take any further proceedings on it, as the petition does not contain the particulars required under Chapter XX.

The petitioner, if so advised, can present a fresh application.

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* Appeal against Appellate Order 78 of 1887.

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APPELLATE CRIMINAL.

11 M. 137 = 1 Weir 100.

11 M. 137 = 1 Weir 100.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KUPPAN, *in re.** [27th September, 1887.]

Act III of 1869 *(Madras), Sections* 2, 3—*Service of summons.*

Where a summons to a witness, issued under Act III of 1869 (Madras), was, shown to a person and taken back,

Held, that the summons had not been served.

[R., 13 Cr. L.J. 245 (246) = 14 Ind. Cas. 597 = 11 M.L.T. 405 = (1912) M.W.N. 528 (529).]

CASE referred by C. W. W. Martin, Sessions Judge of Salem.

The facts were stated as follows :—

The accused (Kuppan) was charged, at the instance of the Acting Tahsildar of Namkal taluk, with intentional disobedience to a summons under Section 174 of the Indian Penal Code, in that he failed to appear before the Tahsildar as a witness in a revenue inquiry, although summons had been served on him personally.

The accused denied the service of summons on him, but said that the parties to the revenue inquiry told him that he was summoned, without mentioning the date, and that he therefore did not appear.

The summons issued by the Tahsildar to the accused bears on its back the endorsement "I read this summons I will come **[138]** and appear according to the time fixed. Mark of Kuppan 22-6-87."

The sole witness examined in the case, Taluk Umedwar Hussain Sahib, who took the summons to the accused, appears to have stated that the accused's mark was taken on the back of the summons, that the summons was then taken back, and that the accused was informed of the date of the summons.

The Deputy Magistrate remarks on this evidence :—" Probably so; but if, as the law requires (Section 3 of Act III of 1869), the summons was in duplicate and a copy left with the accused as it should be, the accused could not have forgotten the date of hearing as he appears to have done, &c."

The Deputy Magistrate has not stated the law correctly. The Act does not require that the summons shall be in duplicate. It ordains personal service, with the alternative that the summons may be left with an adult member of the family or with the head of the village.

The acquittal is probably correct, since the Magistrate finds that the accused forgot the date of hearing; but the Magistrate's view of the law is wrong and requires correction.

Counsel were not retained.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

Although the Criminal Procedure Code (Section 68) enacts that a summons shall be issued in duplicate and the Civil Procedure Code (Sections 166 and 73) directs that a copy shall be delivered, or tendered to the person summoned, it does not appear that Act III of 1869 contains any express provision as to the mode in which a summons is to be personally served.

* High Court Proceedings No. 521 of 1887.

Section 2 of that Act provides that the summons shall be in writing, and Section 3 that it shall be served personally on the person summoned, or may be left with some adult male member of his family residing with him.

1887 SEP. 27. — APPELLATE CRIMINAL. — 11 M. 137 = 1 Weir 100.

The summons itself should, therefore, have been delivered and left with the accused; but it was merely shown to him and taken back. The Deputy Magistrate was, under these circumstances, entitled to hold that the summons had not been properly served. It is obvious that a man in accused's position might very probably fail to understand on what day he had to appear unless the summons was left with him for reference.

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11 M. 139 = 1 Weir 765.

[139] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS v. SIVANNA AND OTHERS.*
[14th September, 1887.]

Madras Forest Act, 1882, *Rules* 12—*Removal of leaves from classified trees no offence.*

The mere removal of leaves from classified trees on unreserved land does not constitute a breach of Rule 12 of the Madras Forest Act, 1882.

CASE referred under Section 438 of the Code of Criminal Procedure by J. W. Best, Sessions Judge of South Canara.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J. and PARKER, J.)

Counsel were not retained.

JUDGMENT.

The question raised by the Sessions Judge in this reference is one of great public importance, and we cannot but express our surprise that the Public Prosecutor, to whom notice was sent by the special order of this Court, should not have been instructed to appear.

The Deputy Magistrate, on appeal, has confirmed the conviction of the accused, observing that their offence consisted of cutting plants and leaves of classified trees for the purposes of manure. Had the evidence established the offence of cutting plants of classified trees, the conviction might apparently have been sustained on that ground; but we observe that the Second-class Magistrate convicted the accused only of removing leaves of classified trees from unreserved land, and the evidence would seem to indicate that all they did was to remove the leaves and not to cut the plants. Rule 12 (for the breach of which the accused have been convicted) makes it unlawful for any person to fell, girdle, mark, lop, tap, uproot, or burn or strip off the bark or leaves from, or otherwise [140] damage, any tree growing on reserved or unreserved land; but this prohibition is subject to the privileges, exceptions, and reservations specified in rules 7, 9, and 10. Rule 7 provides that in all unreserved lands the villagers shall continue to enjoy free of charge such privileges as they have hitherto exercised in the way of grazing cattle or of cutting, converting, and removing trees (other than reserved and classified trees) and

* Criminal Revision Case No. 285 of 1887.

1887 Sep. 14. — Appellate Criminal. — 11 M. 139 = Weir 765.

timber and other forest produce for fuel or for building or agricultural or domestic purposes. It is observed that the words "other than reserved or classified trees" in rule 7 have reference only to the cutting, converting, and removing of trees, not to the removal of other forest produce for fuel or agricultural or domestic purposes.

There is no finding that the leaves were stripped off in such a manner as to damage the trees from which they were cut, and the mere removal of leaves from classified trees would not alone appear to constitute a breach of the two rules when read together. It may be that the Deputy Magistrate confirmed the conviction under the impression that the accused were guilty of cutting the plants of classified trees, but this was not the offence charged against them. We shall, therefore, set aside his order and direct that the appeal be re-heard, after giving notice both to the appellants and to the Public Prosecutor at Mangalore.

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11 M. 140.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KHANSA BIBI (*Plaintiff*), *Appellant*, *v.* SYED ABBA AND OTHERS (*Defendants*), *Respondents*.* [2nd August, 1887.]

Madras Civil Courts Act (Act III of 1873, *Section* 12), *Jurisdiction—Suit to recover share of inheritance—Subject-matter of suit.*

The plaintiff sued to be declared an heir to a deceased Muhammadan and to recover her share of the inheritance, the share claimed being less than Rs. 2,500, while the value of the whole estate exceeded that amount:

Held, that the suit was within the jurisdiction of a District Munsif.

[R., 13 M. 25 (27); 14 M. 183 (184); D., 20 M. 289 = 7 M.L.J. 30.]

[141] APPEAL against the order of L. A. Campbell, District Judge of Nellore, returning a plaint for presentation in the Munsif's Court.

The order appealed against was as follows:—

"Returned to plaintiff for presentation in a Munsif's Court. This suit has been filed in this court with reference to the judgment of the High Court in *Vydinatha* v. *Subramanya* (1). But that was a suit for partition of family property among Hindus. Here the parties are Muhammadans, and when the person from whom plaintiff claims died, his property at once went in definite shares to his heirs. Plaintiff's claim is to be declared one of such heirs and to recover from the other heirs her inheritance.

"The value of that brings the suit within the jurisdiction of a Munsif's Court."

The plaintiff preferred this appeal.

Mr. *Parthasaradhi Ayyangar*, for appellant. The District Judge had jurisdiction to try the suit, as the value of the subject-matter exceeded Rs. 2,500.

Respondents were not represented.

The Court (COLLINS, C. J., and PARKER, J.) delivered the following

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* Appeal against Order No. 130 of 1886.

(1) 8 M. 235.

JUDGMENT.

We think that there is an essential difference between the present suit and a suit for the partition of family property amongst Hindus. In the latter case relief can be given to all co-sharers as in an administration suit, while in the present claim the plaintiff merely asks for her definite share or its money value.

On these grounds we consider the order of the District Judge was right and dismiss this appeal.

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11 M. 142=2 Weir 314.

[142] APPELLATE CRIMINAL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

QUEEN-EMPRESS v. BASAVA.* [13th September, 1887.]

Criminal Procedure Code, Sections 250, 262 – *Vexatious complaint —Compensation.*

The provisions of Section 250 of the Code of Criminal Procedure may be applied in summons cases whether tried summarily or not.

[R., U.B.R. (1906) 3rd. Qr. Cr. P.C. 51.]

PETITION under Section 435 of the Code of Criminal Procedure, praying the High Court to revise the order of W. H. Grahame, Sessions Judge of Coimbatore, on criminal revision petition No. 2 of 1887.

The Head Assistant Magistrate, Nilgiris, dismissed a complaint for breach of contract after a summary trial, and, being of opinion that the complaint was frivolous and vexatious, he ordered the complainant to pay to the accused the sum of Rs. 50 as compensation.

The order as to compensation was set aside by the Sessions Judge on revision on the view that Section 250 of the Criminal Procedure Code was not applicable in the case of summary trials, or when evidence is not recorded.

Mr. *Shaw*, for the complainant.

The facts and argument appear sufficiently, for the purpose of this report, from the judgment of the Court (COLLINS, C.J., and BRANDT, J.).

JUDGMENT.

Upon a petition presented by one Basava Maistry, the complainant in calendar case 101 of 1886 on the file of the Divisional (Head Assistant) Magistrate, Nilgiris, the Sessions Judge of Coimbatore, on the 31st March 1887, set aside the order made by that Magistrate, directing the said Basava Maistry to pay to one Joura, whom Basava had charged with breach of contract, a sum of Rs. 50 as compensation for making a frivolous and vexatious complaint.

[143] Upon this the complainant was called upon by this Court to show cause against the order made by the Sessions Judge.

The Sessions Judge does not state under what provision of law he purported to set aside the order of the Magistrate, and it is not contended that order can be supported. We must set aside the order of the Sessions Judge as passed without jurisdiction; this restores the original order

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* Criminal Revision Case No. 122 of 1887.

1887 SEP. 13. — APPELLATE CRIMINAL. — 11 M. 142 = 2 Weir 314.

awarding compensation, and that order we are now asked to set aside in revision upon this ground, that, as the case was summarily tried, it was not within the jurisdiction of the Magistrate to award compensation under Section 250, the award of compensation being part of the substantive law, while Section 262 in Chap. XXII of the Code, which provides that the procedure prescribed for summons cases (Chap. XX) shall be followed in summons cases tried summarily, affects the procedure only. We are unable to allow this contention. It appears to us that Section 262 renders applicable, in the case of summons cases tried summarily, all the provisions of Section 250, and that in all cases, whether tried summarily or not, in which the Magistrate acquits, and is also of opinion that the complaint was frivolous or vexatious, it is open to him to award compensation.

It was suggested that it could not have been the intention of the legislature that a Magistrate of the second and third class, against whose decision in any trial an appeal lies, should have the power to award compensation up to the amount of 50 rupees without the accused having it in his power to appeal. We cannot on this account refuse to give to the provisions of the Code, to which we have adverted, the effect which, as it appears to us, must be given to them when read together and reasonably construed, and we hold that Section 250 is applicable to cases tried summarily. Application can always be made for revision, and it is only in extreme cases that even Magistrates of the first class would inflict a fine of 50 rupees. We see then no reason to set aside the original order awarding compensation. There are certain statements made in an affidavit filed by the complainant to the effect that his evidence was not taken, but we decline to act on those statements, having regard to the record of the Magistrate, which shows that such evidence as there was, was taken and a finding recorded.

The order then for payment of compensation remains in force.

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11 M. 144.

[144] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RANGASAMI AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Petitioners, v.* MUTTUSAMI (*Plaintiff*), *Respondent.** [16th September, 1887.]

Civil Procedure Code, Sections 516, 622.

A District Munsif passed a decree in the terms of an award without giving notice of the filing of the award under Section 516 of the Code of Civil Procedure:

Held, that the District Munsif acted with material irregularity within the meaning of Section 622 of the Code of Civil Procedure.

[F., 20 A. 474 (475) = 18 A.W.N. 132; U.B.R. (1897—1901) 290 (291); R., 17 Ind. Cas. 430 (431) = 15 O.C. 294; 74 P.R. 1894 (F.B.); U.B.R. (1897—1901) 24 (27).]

PETITION under Section 622 of the Code of Civil Procedure, praying the High Court to revise the decree of N. Saminada Ayyar, Principal District Munsif of Trichinopoly in orginal suit, No. 116 of 1885.

The questions arising in the above suit were referred to arbitration. An award in favour of the plaintiff was returned by the arbitrators, and the

* Civil Revision Petition 94 of 1887.

1887 SEP. 16. — APPELLATE CIVIL. — 11 M. 144.

District Munsif passed a decree in the terms of the award, without giving notice to the parties that the award had been filed.

Defendants preferred this petition on the ground that the District Munsif had acted with material irregularity in not giving notice as above.

V. K. Desikacharyar, for petitioners.

Srinivasa Rau, for respondent.

The arguments adduced on this petition appear, sufficiently for the purpose of this report, from the judgment of the Court (MUTTUSAMI AYYAR and PARKER JJ.)

JUDGMENT.

We are of opinion that the decree made by the District Munsif in this case must be set aside, and that he must be directed to hear the objections which the petitioners may urge against the award and then proceed to pass a fresh decree in accordance with law. By Section 516 of the Code of Civil Procedure, he was bound to give the petitioners notice of the filing of the [145] award, and this he has failed to do. In our judgment this omission is a material irregularity. He should not have proceeded to pass a decree in conformity to the award without first hearing the petitioners' objections. The decree, as it stands, is one made without hearing the petitioners, who were entitled to be heard, and which it was not competent to the District Munsif to do. We direct him to restore the suit to the file, to give the petitioners ten days' time for filing the objections, and, after considering them, pass such orders as appear to him to be just in the circumstances of the case.

Costs will abide and follow the result.

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11 M. 145=1 Weir 498.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

QUEEN-EMPRESS *v.* NALLA.* [13th September, 1887.]

Penal Code, Sections 403, 429—Bull dedicated to an idol.

A bull dedicated to an idol and allowed to roam at large is not *fera bestia* and therefore *res nullius*, but, *prima facie*, the trustee of the temple, where the idol is worshipped, has the rights and liabilities attaching to its ownership.

[R., 17 C. 852 (860) ; U.B.R. (1892—1896) 238 (239) Cr.]

THIS was a case taken up by the High Court under Section 435 of the Code of Criminal Procedure.

The facts of this case appear sufficiently, for the purpose of this report, from the judgment of the Court (MUTTUSAMI AYYAR, and BRANDT, JJ.).

Counsel were not instructed.

JUDGMENT.

In this case two persons were charged before the Second-class Magistrate of Periyakulam, Madura district, with theft of, and mischief and criminal misappropriation in respect of, an animal described by that Magistrate as "the Kamatchi Amman temple bull."

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* Criminal Revision Case No. 178 of 1887.

1887 Sep. 13. — Appellate Criminal — 11 M. 145 = 1 Weir 498.

The Magistrate recorded no finding in respect of the theft, but convicted the accused on the other two counts under Sections 429 and [146] 403, Indian Penal Code, it appearing that they with others hamstrung the bull, killed it, and cut it up, and were caught in the act of taking away or appropriating portions of the carcass. The Magistrate referred the case to the Divisional Magistrate under Section 349, Criminal Procedure Code, being of opinion that the offences called for heavier punishment than he was competent to inflict. The Divisional Magistrate, upholding the conviction, sentenced the accused each to four months' rigorous imprisonment.

The Sessions Judge, on appeal, quashed the conviction, and the accused were set at liberty after undergoing three months of their sentences. Having regard to the principle on which the case—*Queen-Empress* v. *Bandhu* (1)—was decided, namely, that a bull set at large in accordance with Hindu religious usage, when the original owner abandons all proprietary right in such animal, cannot be the object of larceny and being of opinion that no material distinction in principle can be drawn between the case of a beast so abandoned and the case of a beast abandoned by its former owner and dedicated or attached to a temple, the Judge, not however without considerable hesitation, held the bull in the case before him to be a *fera bestia* and as *res nullius* (unappropriated by not belonging to any person) to be incapable of being the object of the offences, in respect of which the accused were convicted.

We do not consider it necessary to interfere in revision, not because we agree with the Sessions Judge that there is no material distinction in principle between the case of an animal—property in which is wholly renounced or abandoned and allowed in accordance with religious or superstitious usage to roam at large free from all control—and that of such an animal so abandoned and at large after dedication to a temple, but because the accused have undergone three months' rigorous imprisonment for the offences of which they were convicted.

We consider there is a material distinction between the two cases.

The Divisional Magistrate was, in our judgment, right in holding the bull not to be *fera bestia* and therefore *res nullius*, simply because temple bulls are, as he says, ordinarily wandering beasts, or even if it were proved, as the Second-class Magistrate found, that this bull ordinarily roamed about at large.

[147] If, on the evidence, it appeared that the animal was turned loose after dedication to the temple and that it was actually or inferentially accepted as so dedicated on behalf of the temple, then, though the animal were allowed to be at large free from all control, it would, *prima facie*, be the property of the temple.

If such animals, in their wanderings at times, trespass on, and do damage to, private property with impunity, it is because superstition induces villagers to regard them with veneration, and to endure the mischief which they commit without seeking redress as of right. If the Sessions Judge's view of the law were correct, it would seem to follow that the trustee of a temple, who accepted the dedication to the temple, of such an animal, would not be responsible for injuries caused, for example, to a child playing in the street by a bull, to his knowledge dangerous or habitually mischievous: a proposition on the face of it untenable. Even in the case of a person wholly abandoning an animal, such as a bull, without any precaution taken for its future control, it is not to be assumed that he

(1) 8 A. 51.

1887 Sep. 13. — APPELLATE CRIMINAL. — 11 M. 145 = 1 Weir 498.

would be free from liability, civil or criminal, in respect of damage done by such animal. The Sessions Judge records no distinct finding as to whether the bull in this case was in fact the property of the temple or not. The second witness, who described himself as the manager of the temple, spoke of the animal as "the temple bull;" but without a specific finding on this point, we cannot definitively say whether or not the conviction was properly reversed, and, as the Judge says, it appears unlikely that any further material or more precise evidence would be forthcoming, we shall leave the case as it stands, having above indicated sufficiently, for present purposes, the principles to which regard should be had in such cases.

Ordered accordingly.

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11 M. 148.

[148] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

SRINIVASA (*Plaintiff No.* 1), *Appellant v.* VENKATA AND OTHERS (*Defendants*), *Respondents.** [17th August, 1887.]

Court Fees Act (*Act VII of* 1870, *Schedule II, Article* 17, *cl. vi*)—*Religious Endowments Act* (*Act XX of* 1863), *Sections* 14, 18.

A and B being worshippers at a Hindu temple, obtained sanction under Section 18 of the Religious Endowments Act to sue for the removal of the managers of the temple on the ground of breach of trust and for damages.

A and B sued to remove the managers, but claimed no damages in their plaint :

Held, that, as the suit instituted differed from the one for which sanction was given, the plaint was properly rejected.

[R., 21 B. 257 (262); Doubted, 22 M. 223 (227); D., 16 Ind. Cas. 225 (234) = 23 M.L J. 134 = 12 M.L.T. 269.]

APPEAL against the order of D. Irvine, District Judge of Trichinopoly, in original suit No. 10 of 1885.

This was a suit brought under the Religious Endowments Act (XX of 1863, Section 14) by two persons, being worshippers in a Hindu temple at Srirangam, against seven persons as managers or trustees of the temple, alleging various acts of misfeasance and praying for their removal from office. No claim was made for damages, though the order sanctioning the suit sanctioned such a claim and the plaint was stamped with Rs. 10 only.

The District Judge directed that a claim for damages should be added, and an *ad valorem* stamp affixed; this, however, was not done, and he accordingly made an order rejecting the plaint under Section 54 of the Code of Civil Procedure.

One of the plaintiffs preferred this appeal against the above order.

Bhashyam Ayyangar, for appellant.

Rama Rau, for respondents.

The further facts of the case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.).

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* Appeal No. 52 of 1886.

1887 AUG. 17.

APPELLATE CIVIL.

11 M. 148.

JUDGMENT.

The appellant is a worshipper in the Hindu temple at Srirangam, in the district of Trichinopoly, and the respondents are managers or trustees of that temple. The suit from which this [149] appeal arises was instituted by the former against the latter under Section 14 of Act XX of 1863. In miscellaneous petition 585 of 1884, on the file of the District Court of Trichinopoly, the appellant applied under Section 18 of the Act for sanction to institute a suit for the removal of the respondents from their office of trustees and for recovery from their private property of the damages mentioned in the schedule attached to his petition. On the 24th January 1885, the District Judge made an order granting permission to institute the suit; he observed, however, that from the statements of the counter-petitioners themselves, it appeared very desirable that the accusations made against them should be sifted. On the 7th July 1885, the appellant and the second plaintiff presented their plaint, which prayed for a decree removing the respondents from the office of managers of the temple in question and awarding the appellant the costs of the suit. The plaint stated further that the respondents were guilty of various acts of misfeasance, breach of trust, and neglect of duty, by which the temple sustained a loss of nearly Rs. 17,000. The respondents contended, *inter alia*, that the suit was under-valued, and that the plaint, which was engrossed on a 10-rupee stamped paper was improperly stamped. The Judge considered that the plaintiffs were bound to include in their plaint a claim for damages, and, that the suit was under-valued. He also pointed out that the suit instituted was not the suit for the institution of which sanction had been given, and he directed them to amend their plaint by adding a claim for damages and to pay additional stamps in proportion. The appellant failed to comply with his order, and thereupon he rejected the plaint under Section 54, Clause (*d*) of the Code of Civil Procedure. It is argued, in support of the appeal, that the plaint was sufficiently stamped; that the suit was not under-valued; and that the sanction accorded under Section 18 of Act XX of 1863 extended also to the suit, which was actually instituted. If it were necessary to determine for the purposes of this appeal, whether the plaint was properly stamped, we should certainly follow the decision of this Court in Appeals Nos. 89 of 1881 (1) and 65 of 1884. The District Judge notices them in his [150] judgment, and observes that he is unable to take the same view, or to accept them as binding upon him; but it appears to us that his reasoning is inconclusive, and that several of his remarks are at variance with the recognized rules of judicial interpretation; nor are we prepared to accept his view as to the distinction which is said to exist between the relief asked for in a suit and its subject-matter. As, however, we come to the conclusion that this appeal must fail on another ground, which we shall presently state, we shall not dwell further on this part of the case, and state at length our reasons for holding that the decisions of this Court are right. We are of opinion that the suit actually instituted by the appellant was not the one for the institution of which sanction was accorded,

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11 M. 149 N.

(1) *Veerasami Pillay* v. *Chokappa Mudaliar and others.*—This was a suit brought under Act XX of 1863, Section 14. On appeal to the High Court (Turner, C.J. and Muttusami Ayyar, J.) in their judgment say: "The relief sought is the removal of the defendants from the offices, it is alleged, they severally hold, on the ground that they have been guilty of misfeasance; the suit is one, of which the subject-matter does not admit of valuation and the Court-fee payable on its institution is 10 rupees."

1887 AUG. 17. — APPELLATE CIVIL. — 11 M. 148.

and cannot, therefore, say that the plaint was not properly rejected. The Judge observes that sanction might not have been accorded, if, when the application was made, the intention not to claim damages had been distinctly intimated to the Court. It may be that the fact of a person not interested otherwise than as a worshipper in a temple being prepared to include a claim to damages in his suit and to pay stamp duty thereon was regarded to some exent as evidence of *bona fides* on his part. It is urged by the appellant's pleader that the words of the prayer in the application for sanction should be taken distributively, and that it was competent to the Judge, under Section 14, to award damages for the benefit of the temple, whether they were claimed in the plaint or not. In this case, the appellant distinctly asked for permission to sue both for the dismissal of the trustees and for compensation for the loss entailed on the institution, and it was open to the plaintiffs, if they changed their mind subsequently, to apply to the Court for an amendment of the order under which leave was given to them to sue. Having regard to the fact that the character of the suit, which the appellant proposed to institute, was one of the circumstances which the Judge was entitled to take into consideration in forming an opinion as to whether the application was *bona fide*, we are not prepared to hold that the appellant was entitled, as a matter of right, to give the suit a character different from that in respect of which sanction was granted. The obligation, which Section 18 imposes on the Judge to satisfy himself that there are sufficient *prima facie* grounds for the institution of a suit, and the power conferred upon him by Section 19 to call for the production of accounts of the trust before giving leave for the institution of **[151]** the suit, indicate an intention on the part of the legislature to provide an adequate protection to the trustees against vexatious suits, and, in cases of doubt, we think, we ought, so to contrue Section 18 as not to take away the protection. The contention that the plaint needs only a stamp of Rs. 10, even when damages are claimed, cannot be supported, inasmuch as the compensation claimed would then form part of the subject-matter of the suit, capable of being estimated at a money value within the meaning of the Court Fees Act. On the ground that the suit instituted was different from the one for the institution of which sanction was granted, we dismiss the appeal, but, under the circumstances, there will be no order as to costs.

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11 M. 151.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

VENKOBA (*Plaintiff*), *Appellant v.* SUBBANNA (*Defendant*), *Respondent.** [5th August, 1887.]

Civil Procedure Code, Section 43—Claim for mesne profits received prior to date of former suit for land.

Where a suit to recover land was brought and no claim was made for mesne profits received prior to date of plaint.

Held, that Section 43 of the Code of Civil Procedure was a bar to a subsequent suit for such mesne profits.

[**Diss.**, 19 C. 615 (617); **N. F.**, 31 M. 405=4 M.L.T. 192; 5 M.L.T. 220; **F.**, 17 A. 533 (536); 9 O.C. 224; **R.**, 19 B. 532 (538); 27 M. 528 (530) (**F.B.**)=13 M.L.J. 445; 8 Ind. Cas. 445; 3 L B.R. 151; 5 M.L.T. 105 (107); 9 O.C. 322.]

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* Referred Case No. 4 of 1887.

1887 AUG. 5. — APPELLATE CIVIL. — 11 M. 151.

CASE stated under Section 617 of the Code of Civil Procedure by H. R. Farmer, Acting District Judge of Kurnool, as follows:—

"The plaintiff (appellant) on the 29th of September 1885 brought suit No. 458 of 1885 on the file of the District Munsif's Court of Nandyal, and on the 8th of October 1885 suit No. 476 of 1885 on the same file, to set aside a deed of gift of certain lands and to obtain possession thereof. He obtained decrees in his favour on the 24th of November 1885. He, subsequently, on the 23rd April 1886, brought the suit No. 159 of 1886, which has [152] led to the present reference. This last-mentioned suit was for the mesne profits, which had accrued on the lands which formed the subject of the deed of gift above mentioned, and which profits accrued between the date when the defendant obtained possession of the lands by virtue of the deed of gift and the date of suit. The Munsif held that Section 43 of the Code of Civil Procedure showed that mesne profits were not recoverable in the suit now under reference (original suit 159 of 1886), inasmuch as it was obligatory on the plaintiff to have claimed them in the suits for possession. If the cause of action is held to be the same, the Munsif is apparently right, but from the wording of rule (*a*), Section 44, it seems that the cause of action in a suit for mesne profits is not always the same as the cause of action in a suit for the possession of the lands on which these profits accrued. In the present case I am of opinion—but my view is not free from doubt—that the Munsif was right in holding that the cause of action was one and the same.

"The question is whether a plaintiff, who sued for possession of land only without suing for mesne profits in respect of the same land, which he could have done in the same suit, is entitled to bring another suit to recover the said mesne profits."

Srirangacharyar, for plaintiff.

Ramachandra Rau Saheb, for respondent.

The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

JUDGMENT.

The facts of the case are sufficiently stated in the letter of reference. It appears that the plaintiff claimed possession of certain lands in suits Nos. 458 and 476 of 1885 and obtained a decree for possession; that decree was executed and he was placed in possession. He brought the suit, out of which this reference arises, to recover Rs. 120 as the amount of mesne profits due to him for the years 1883, 1884, and 1885. It is conceded for him that he was in a position to have claimed such profits when he instituted the former suits, and we agree with the referring officer that Section 43 of the Code of Civil Procedure is a bar to the present suit. That section provides that every suit shall include the whole of a claim which the plaintiff is entitled to make in respect of the cause of action on which the suit is founded, and a claim for rent due for the year 1874, whilst in a former suit the rent due for the year 1875 only was claimed, the rent for 1874 and [153] 1875 being then due, is mentioned in the illustration as barred by the section. On comparing Section 43 of Act X of 1877, as modified by Act XIV of 1882, with Section 7 of Act VIII of 1859, we find that the words "which the plaintiff is entitled to make in respect of the same cause of action" have been substituted for the words "arising out of the cause of action." We are, therefore, of opinion that the words "every suit shall include the whole of the claim in respect of the cause of action," include not only the claim arising out of that cause of action but also

any other claim founded on the same cause of action and enforcible at the date of the former suit. This view is in accordance with the decision of the Judicial Committee in *Madan Mohan Lal* v. *Lala Sheo Sankar Sahai* (1).

Our answer, therefore, to the reference is that no second suit would lie for mesne profits, which had accrued due prior to the date of the former suit and which the plaintiff was in a position to have then claimed. The plaintiff will pay the defendant's costs of this reference.

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11 M. 153.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

VITLA KAMTI (*Plaintiff*) *v.* KALEKARA (*Defendant*).*
[2nd September, 1887.]

Limitation Act, 1877, *Schedule* II, *Article* 8

Suit on an unregistered bond, whereby certain moveable property in the debtor s possession was pledged as security for the repayment of principal and interest:

Held, that the suit was governed by Article 80, Schedule II, of the Indian Limitation Act, 1877.

[**Overruled**, 27 M. 528 (**F.B.**) = 13 M.L.J. 445: **Diss.**, 22 C. 21 (24); **N.F.**, 1 L.B.R. 154 (155).]

CASE stated, under Section 617 of the Code of Civil Procedure, by P. Ram Rau, District Munsif of Kasergode, in Small Cause Suit No. 24 of 1887.

The material portion of the Munsif's judgment was as follows:—

"The suit was for Rs. 17-2-6, principal and value of arrears of interest under a bond, being a hypothecation of moveable **[154]** property (namely cattle), executed by a Tiyan, named Fakira, deceased, uncle and karnavan of the defendant. The bond is dated 31st May 1882 and is for Rs. 7. It simply pledges four head of cattle described, without giving possession, and provides that the sum shall be repaid in six months with 75 cocoanuts as interest; in default, interest is charged at the rate of 150 cocoanuts per annum, and the whole made payable on demand; this interest is alleged by plaintiff to have been paid up to 31st May 1884. The defendant is sued as the legal representative of the deceased obligor in possession of his property, including the hypothecated cattle, and decree is prayed for against him and 'on the security of the cattle.' The bond is not registered.

"Defendant denied the plaintiff's claim, ignored the bond, and contended that the suit is barred by the law of limitation. He stated that no interest was ever paid, that the obligor, Fakira, died four years ago, and that his property has not come into defendant's possession. The exhibit A executed to plaintiff by defendant's uncle Fakira, on 31st May 1882, for Rs. 7 was filed for plaintiff, and three witnesses were examined for plaintiff. The bond A was proved by the evidence of two of the plaintiff's witnesses—the writer and one of the attesting witnesses. The evidence, however, as to the payment of interest given by two of the plaintiff's witnesses, who deposed to a payment of 75 cocoanuts 'between

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* Referred Case No. 7 of 1887.

(1) 12 C. 482.

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two and three years ago' was vague and unsatisfactory, and had the appearance of having been merely got up with a view to take the case out of the statute of limitation; accordingly I have rejected it. Payment of interest being thus not proved, the question arises as to the bar of limitation and as to the article of the Limitation Act XV of 1877, which should govern this case.

"If the period of limitation applicable to the case is the ordinary limitation of three years, the suit is clearly barred, seeing that the six months' time allowed in A for payment of the debt expired at the end of November 1882 and the suit was not instituted till the 18th February 1887; but it is contended for plaintiff that A is not a mere bond but a hypothecation of moveable property, and that neither such hypothecation nor a suit for recovery of money charged on moveable property is contemplated in any of the articles of Schedule II of the Limitation Act prescribing a period of three years; and it is, therefore, argued that, in the absence of any express provision, the article applicable to the case is No. 120, **[155]** which prescribes a period of six years for cases not elsewhere provided for.

"The defendant's vakil argues, on the other hand, that the limitation applicable to the case is three years under Article 80, which refers to a 'suit on bill of exchange, promissory note, or bond not herein expressly provided for,' if not under Article 115 (for compensation for breach of contract, not in writing registered and not specially provided for); and he submits that, even if the suit were viewed as for specific performance of contract, or even if the plaintiff were to sue for possession of the specific moveable property hypothecated, the case would be governed by three years' limitation (Articles 113 and 49). Another article referred to by him, *viz.*, No. 65, I pass over as inapplicable to the present case.

"In support of the argument for plaintiff that neither Article 80 nor 115 is intended to be applicable to a suit on a hypothecation bond, the following analogy is suggested, *viz.*, while a suit against a mortgagee to redeem or recover possession of immoveable property mortgaged has a period of sixty years (Article 148), a similar suit for moveable property has thirty years (Article 145), and as a suit for money charged upon immoveable property is governed by a limitation of twelve years (Article 132)—vide *Aliba* v. *Nanu* (1)—it is submitted that it is not unreasonable to suppose that a suit for money charged upon moveable property must be governed by a limitation of six years as in Article 120, and not merely three years. It is further submitted that, when even a hypothecatee of immoveable property after the passing of the Transfer of Property Act, 1882, can sue for foreclosure or sale at any time within sixty years under Article 147 (see *Aliba* v. *Nanu*), a hypothecatee of personal property may fairly be supposed to have a longer period than the ordinary limitation of three years, but the above position of the hypothecatee of immoveable property is the outcome of the Transfer of Property Act, with which the cases of moveable property have nothing to do.

"The question for decision, then, is whether the limitation applicable to this suit is three years or six years, or, in other words, whether a suit for money due on a simple pledge, without possession of moveable property, falls under Article 120 or under Article 115 or 80.

[156] "I am of opinion that the limitation applicable is three years either under Article 80 or under Article 115; but, as the parties have

(1) 9 M. 218.

applied for the reference of the question for the decision of the High Court, and, as, under the circumstances stated, I have doubts whether such suit may not fall under Article 120, there being no decided case in point, I respectfully refer the above question, and, contingent upon the decision of the High Court, I direct that the suit be dismissed as time-barred."

Gopal Rau, for plaintiff.

Defendant did not appear.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

The bond, which is the subject of this suit, created an obligation to pay a debt on the security of certain moveable property, which the debtor retained in his possession. The question referred for our opinion is whether Article 80 or 120 of the Schedule II of the Limitation Act, 1877, applies to the suit, and whether the period of limitation prescribed for it is three or six years. There can be no doubt that a suit to recover the debt due under the bond is governed by Article 80. The power to bring the moveable property to sale is an incident in the nature of an accessory to the right to recover the debt, and, if that right becomes incapable of being enforced owing to the lapse of three years, the power to sell the security must likewise cease to be capable of being exercised. In the absence of a special provision applicable to a suit brought to enforce the sale of the security, we must hold that the period of limitation is three years and that the suit is governed by Article 80.

The question referred to us will be answered accordingly.

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11 M. 157=12 Ind. Jur. 134.

[157] APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VASUDEVAN (*Defendant No.* 2), *Appellant v.* THE SECRETARY OF STATE FOR INDIA.* [1st and 9th December, 1884, 30th August 1886 and 30th August 1887.]

Malabar law—Nambudris, their personal law—Power of disposing of tarwad property by an antharjanam—Sarvasvadhanam marriage.

Suit by the Secretary of State to declare a right of escheat of the property of a Nambudri illam. The last male member of the illam died about 1859, leaving defendant No. 1 and her mother the sole surviving members of the illam. Defendant No. 1 had previously been married to a member of another illam by a sarvasvadhanam marriage, but her husband died without issue. In 1872, defendant No. 1 and her mother—there being no attaladakkam heirs—appointed defendant No. 2, an adult member of a third illam, to be manager and heir of their illam and to marry and raise up issue for it. The mother and father of defendants Nos. 1 and 2 respectively were brother and sister:

Held (1) that Nambudri Brahmans are governed by Hindu law, as modified by special customs adopted by them since their settlement in Malabar;

(2) that defendant No. 2 had no right to the property of the illam independently of the appointment of 1872;

(3) that the property of the illam was not the soudayika of defendant No. 1, and as such at her absolute disposal;

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* Appeal No. 10 of 1884.

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APPELLATE CIVIL.

11 M. 157 = 12 Ind. Jur. 134.

(4) that a Nambudri widow, who is the sole surviving member of her illam, is not at liberty to alienate the property of the illam at her pleasure ;

(5) that there was sufficient evidence of a custom that a Nambudri widow can adopt or appoint an heir in order to perpetuate her illam in the absence of dayadies with ten or three days' pollution ; and the appointment of defendant No. 2 was valid against the Crown.

Quære.—Whether, in such appointment of an heir, it is necessary to direct that he should marry for the illam to which he is appointed as heir.

[Appl., 1 M L.J. 303 (304) ; R., 19 B. 428 (467) ; 21 B. 105 (109) ; 15 M. 333 (335) ; 19 M. 440 (444) ; 25 M. 662 (664) ; 34 M. 496 (500) = 6 Ind. Cas. 583 = 20 M. L.J. 938 = 8 M.L.T. 93 ; 3 M.L.J. 242 (246) ; 23 M.L.J. 165 (167) = 15 Ind. Cas. 100 (101) = (1912) M.W.N. 728 ; D., 5 M.L.T. 169 (175).]

APPEAL against the decree of F. Wilkinson, District Judge of South Malabar, in Original Suit No. 57 of 1882.

This was a suit to declare the Crown to be entitled to the property of the Tamarasseri illam on the death of defendant No. 1, notwithstanding the disposition made by that defendant in favour of defendant No. 2.

[158] The defendants were Nambudri Brahmans and members of different illams. In 1872, defendant No. 1 and her mother, the sole surviving members of their illam—there being no attaladakkam heirs—had appointed defendant No. 2 to be heir of their illam and to marry and raise up issue for it. Defendant No. 1 had previously been given in sarvasvadhanam marriage to a member of another illam, who, however, had died without issue.

The case for the plaintiff was that the appointment of defendant No. 2 was invalid and that defendant No. 1 was without heirs.

The District Judge passed a decree in favour of the plaintiff, and against his decree defendant No. 2 preferred this appeal.

Sankaran Nayar, for appellant.

The Government Pleader (Mr. *Shephard*), for respondent.

The further facts of the case and the arguments adduced on appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J. and MUTTUSAMI AYYAR, J.).

JUDGMENT.

The property which is the subject of this litigation is that of a Nambudri family called Tamarasseri illam in the Ernad taluk in the district of Malabar. The last male member of that family was one Sankaran Nambudri, who had an only daughter named Savitri, the first defendant in the present suit. In order to perpetuate his family, he gave her, in what is usually called, sarvasvadhanam marriage to a member of another Nambudri family called Vadakumpat illam. It is not disputed for the Crown that if she had a son he would, by the custom obtaining among Nambudri Brahmans, take the place of Sankaran Nambudri's own son and continue his family. But Savitri's husband died shortly after her marriage without issue, and her father died about the year 1859, leaving him surviving Savitri and her mother. Savitri's husband had a brother named Narayanan Bhattathiri, and from 1859 to 1872 he managed the affairs of her family on her behalf and that of her mother. A disagreement having since arisen, the two ladies removed him from management and executed document A in favor of Vasudevan Nambudri, defendant No. 2, on the 4th November 1872. Vasudevan Nambudri's father and Savitri's mother were brother and sister.

By document A he was appointed heir to the Tamarasseri illam and constituted owner of all that belonged to it. He was [159] further directed to marry for that illam, to assume management of its affairs at once in the capacity of owner, and to protect the two ladies during their life-time. It then proceeded to state that "If you die without you "or any of your brothers having issue after marrying for the Tama-"rasseri illam, or if we die before the marriage is celebrated, the said "illam, with all its properties, &c., ought to lapse to Maranat illam "wherein you were born by right of your anandravanship." According to its true construction, the right of the widows was reduced to that of maintenance; the appellant was to become at once owner and manager of the illam, to raise up an heir to it by a fresh marriage, and in case he died without begetting *issue*, the properties of the Tamarasseri illam were to vest in Maranat illam, of which he was a member. At the date of document A the appellant had already married and had issue by that marriage, and the marriage he was desired to contract was a fresh marriage designed for raising up heirs to the Tamarasseri illam according, as it is said, to the usage of Nambudri Brahmans in Malabar. According to the provisions of the document, he took possession of the properties of the Tamarasseri illam in 1872 and has since continued in management. It is also in evidence that he contracted a new marriage on account of the illam, though no child is yet born of that marriage. From 1872 to 1879 he and the two ladies were apparently on terms of cordiality, and the senior lady, Sankaran Nambudri's widow, died about the year 1879. In consequence of some misunderstanding the junior lady since brought original suit No. 1 of 1880 to set aside document A and to resume possession of the properties of her family, but the appellant resisted her claim, and it was dismissed on the ground that she was not entitled to set aside her own deed. The remarks made by the learned Judges of the High Court when the claim came under their consideration in second appeal will be found in *Vasudeva* v. *Narayana* (1), and it will be observed that in the opinion of Innes, J., document A aimed at defeating the right of escheat vesting in the Crown. The second appeal was dismissed in June 1881: and in November 1882 the present suit was brought by the Secretary of State for India to have it declared that on the death of the first defendant the Crown is entitled to the property in suit, and that document A is of no effect as against [160] it. The plaint stated that in so far as document A attempted to constitute the appellant heir to the Tamarasseri illam, it prejudiced the right of escheat which must accrue on the death of Savitri, the first defendant. The appellant resisted the claim on several grounds. He took two preliminary objections, *viz.*, (i) that the claim was barred by limitation, and (ii) that the plaint disclosed no cause of action and the suit could not be maintained. He contended further that he was the next heir to the illam irrespective of document A and by virtue of his relationship to Savitri's mother. He alleged that in consequence of the first defendant's sarvasvadhanam marriage, the property of the illam became her soudayika, and that, as such, it was at her absolute disposal. He stated also that, according to the usage of Malabar, a Nambudri widow, or antharjanam as she is usually designated, was at liberty to appoint an heir to her illam and to alienate its property at her pleasure; that Hindu law was not applicable to her, and that his appointment as heir was in accordance with local custom and ought to be upheld as equivalent to

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(1) 6 M. 121 (122, 123).

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"Kritrima" adoption known to Hindu law. Lastly, he asserted that the Crown had no right of escheat in regard to the "jenm" lands of Malabar or the property of Nambudri Brahmans.

As to the two preliminary objections, the District Judge overruled them and his decision is not questioned in appeal. We therefore dismiss them from further consideration.

As to the question, what law is to be applied to Nambudri Brahmans, the Judge has found that they are governed by Hindu law as modified by special customs which they have adopted since their settlement in Malabar. Although it was urged in appeal that they do not follow Hindu law, the contention was ultimately not seriously pressed upon us. As the question is, however, one of general importance, and as the decision of several other issues in this case depends upon its determination, we may add that in our opinion the Judge has come to a correct conclusion. According to the evidence on both sides, succession is traced among Nambudris through males and property passes from father to son, whereas among Nayars, succession is traced through females and property descends from mother to daughter. Thus, the mode of tracing succession and the devolution of property are in accordance with Hindu law and contrary to marumakkatayam usage. Again, legal marriage is the basis of the law of [161] succession among Nambudris as among Brahmans of the East Coast, whilst among Nayars there is no recognised connection between marriage and inheritance. Thus, the notion of paternal relation founded upon legal marriage as the cause of inheritance obtains both under Hindu law and among Nambudri Brahmans. Further, a Nambudri woman, in common with a Brahman on this side of the ghats, takes her husband's gotram upon her marriage and passes into his family from that of her father; and perpetual widowhood and incapacity to remarry on her husband's death are the incidents of marriage both among Nambudris and Brahmans of the East Coast. But among Nayars, a woman continues through life to belong to the family in which she is born, and the sexual relation which she forms, or her so-called marriage, operates in law neither to give her the domicile of her husband nor to create a disability in her either to remarry or to put an end to her marriage at her pleasure during her first husband's life. Moreover, the same rule of collateral succession obtains both among Nambudri Brahmans and other Brahmans in Southern India. Among the former, dayadies or distant kinsmen are divided into those who have ten and three days' impurity or pollution, and among the latter, such kinsmen are classified as gotraja sapindas and samanodakas, the sapinda and the samanodaka relationship being severally the cause of ten and three days' impurity or pollution, arising from the birth or death of any one so related. Moreover, Nambudris and Brahmans on the East Coast recognise alike the authority of the vedas and of smritis, and they have faith in the religious efficacy of ceremonial observances and of funeral and annual obsequies. We may also refer to the ceremony of investiture or upanayanam and to the notion of second birth as common to both. The view, therefore, that when Nambudris settled in Malabar they carried their personal law with them, though they changed it in some respects after their settlement on the West Coast, is supported not only by the foregoing facts, but also by the fact that gotrams of Nambudri Brahmans are said to be the same as those of Brahmans on the East Coast, indicating thereby common descent from the same original male ancestors. It was

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observed by the Privy Council in *Rutcheputty* v. *Rajunder* (1) that when a class of Hindus migrate from one place [162] to another and retain their ancient religion, the presumption is, unless the contrary is shown, that they carried their personal law with them to the new settlement. There is therefore sufficient foundation for the opinion of the Judge that Nambudris are governed *prima facie* by Hindu law; but it must be remembered that the personal law which they presumably carried with them was the Hindu law as received by Brahmans at the time of their settlement in Malabar, and that it is *not* the Hindu law as modified by customs which have since come into prevalence among Brahmans on the East Coast. For instance, the form of marriage called the sarvasvadhanam marriage, which is referable to the ancient Hindu law of putrika putra or of the appointed daughter and her son, is still in force among Nambudris as a mode of affiliation, though it is obsolete on this coast. Another qualification with which Hindu law should be applied to Nambudris consists in their adoption of the territorial or the usage of Nayars in several respects subsequent to their settlement in Malabar. Under Hindu law, both ancient and modern, partibility is an incident of ordinary Hindu property, coparcenary depending for its continuance upon the mutual consent of cosharers; but among Nambudris, as among Nayars, family property is not liable to be divided at the instance of any one of the coparceners. Again, self-acquired property merges, on the death of the person acquiring it, into family property as is the case among Nayars. It appears further that the senior male, in point of age, is entitled to management in preference to the representative of the senior branch. We may also mention that among Nambudris, the eldest brother alone usually marries, and the others, as is the case among Nayars, consort with Nayar women otherwise than with the sanction of marriage. Having regard to the evidence on both sides, the conclusion we come to is that Nambudris are governed by Hindu law, except so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the special usage being either some doctrine of Hindu law as it stood at the date of the settlement, though now obsolete, or some marumakkatayam usage.

The next question for decision is whether the property in dispute became the soudayika of the first defendant, and whether as such it was at her absolute disposal. This contention which the appellant rests on Hindu law is one which cannot at all be [163] supported. The term soudayakkam is applied to that class of "stridhanam" over which a Hindu lady has absolute power of disposition and every description of stridhanam presupposes a gift to her, but a sarvasvadhanam marriage does not necessarily imply a gift of property to the girl who is given in marriage. As pointed out by a Division Bench of this Court in *Kumaran* v. *Narayanan* (2) sarvasvadhanam marriage is referable to ancient Hindu law, which authorized the appointment of a daughter or her male child as the legitimate son of her father for purposes of funeral obsequies and of inheritance, and the formula used during that marriage is the text of Vasishta which is as follows: "I give unto thee this virgin (who has no brother) decked with ornaments, and the son who may be born of her shall be my son." It is this special agreement between the bride's father and her husband that distinguishes sarvasvadhanam from an ordinary marriage, and it suggests nothing more than a form of affiliation in use

(1) 2 M.I.A. 132. (2) 9 M. 260.

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under ancient Hindu law. If the appellant's contention were to prevail, a Nambudri would cease to own his property if he were to give his daughter in sarvasvadhanam marriage, and it would vest at once in the daughter and be divested from him and from the daughter's future son who is affiliated as his next heir at that marriage. Under ancient Hindu law, either a daughter was appointed by the father to be in the place of a legitimate son, or her future son was so appointed; if the former, there was an express stipulation to that effect, and in the latter, the special agreement took the form "that the child which shall be born of her shall be mine for the purpose of performing my obsequies." In the first case the daughter stood in the place of a legitimate son for purposes of inheritance notwithstanding her sex, and the legal relation between her son and her father was that of a son's son; but in the second case, it was her son who was appointed to be her father's legitimate son, and on his birth, his legal relation to his maternal grandfather was that of an adopted son, the difference between this form of appointment and an ordinary adoption consisting in that the affiliation was made during the daughter's marriage and in the expectation that she might have a son. (See the passage cited from Hemadri in Colebrooke's Translation of the Mitakshara, Stokes' Hindu Law Books, page 412.) In neither mode of [164] appointment is there any warrant for the contention that there was an implied gift of family property to the daughter by the father at the time of her marriage; though in both a son was affiliated. On the other hand, the formula used during the sarvasvadhanam marriage suggests that it is not the daughter but her future son that is adopted as son, and that the family property is not intended to vest in her absolutely. So long as there is the prospect of a son being born, she and, through her, her husband hold the property in the event of her parent's death in trust for the heir in expectation, and if she becomes a widow and the prospect of having a male child fails, her legal position is that of a daughter, who is retained in her father's family for the purpose of raising up an heir to it instead of, as is ordinarily the case, being transferred to her husband's family. According to ancient Hindu law, then, she never had an absolute estate either during her father's life or after his death, though when she became childless widow and the sole heir to the illam, she had the same right that the other widows of the family had.

The evidence of the fifth witness for the respondent, who is a vydika, and as such an expert, is to the same effect. He says: "The person who has accepted a girl in the sarvasvadhanam marriage has no right whatever to the property of the family into which he is married. He is maintained, however, in the illam. If he dies, the daughter becomes a widow of the illam: she is like other widows, and she is not competent to alienate the family property at her pleasure. If a son is born to her, the property goes to him; but the person who contracts the sarvasvadhanam marriage may be appointed heir to the illam. Among Nambudri women, the mother is competent to give her daughter in sarvasvadhanam marriage." His evidence as to the appointment of the son-in-law as heir by an express stipulation to that effect is supported by exhibit II. The other reliable evidence on record as to the effect of a sarvasvadhanam marriage is substantially the same. The result then is that the contention that the property in dispute became the soudayika property of the first defendant by reason of her sarvasvadhanam marriage must be overruled.

Another question raised for decision in this appeal is whether the appellant is entitled to succeed to the property in suit on Savitri's death,

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irrespective of document A. The relationship on which he rests this contention is that his father was the brother of [165] the first defendant's mother, but it does not make him Sankaran Nambudri's cognate or bandhu within the meaning of the term as explained by the author of the Mitakshara in Chapter II, Section V, Sloka 3.

The next contention is that a Nambudri widow is at liberty to alienate the property of her family at her pleasure; that she is entitled to appoint an heir to her illam, and to authorise a Nambudri Brahman to marry for the illam and thereby raise up an heir for it. There is no doubt that it cannot be supported under Hindu law as now administered on the East Coast in Southern India. That a Hindu widow takes but a qualified heritage; that her succession is only a case of interposition, and, that upon her death, the heirs of the previous male owner are entitled to the inheritance, are questions which have been set at rest by the decisions of this Court and of the Privy Council in the *Shivaganga case* (1). It was also held by the Judicial Committee in *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (2) that the restriction placed on the widow's estate is absolute; that it is due to the austere life prescribed for her with reference to her status as a Hindu widow, and that neither the estate which she takes, nor the power of alienation which she possesses, can be extended owing to the non-existence of other heirs. The substantial question then for decision in this appeal is whether, as alleged by the appellant, she has the powers claimed for her by virtue of usage having the force of law in Malabar and traceable either to some doctrine of ancient Hindu law, now obsolete on the East Coast, or to the territorial law or usage of the Nayars.

At the original trial held before the Judge, eight witnesses were examined on each side, and their evidence, being conflicting, was considered by him not sufficient to justify a finding in favour of the custom set up by the appellant. Accordingly, the Judge decreed the respondent's claim, and the second defendant appealed from his decision to the High Court.

When the appeal came on for disposal, the learned Judges who heard it considered that further inquiry was necessary and made the following order :—

" We consider that it would be unsafe in this case to apply the doctrines of Hindu law as it now obtains among the Brahmans of [166] Southern India other than Malabar and Canara to the Brahman illams in Canara and Malabar. Very wide divergences from that law are well known and recognised in the rules accepted by the illams to regulate the devolution of property and the incorporation of members in the illam. So far as the evidence goes, we consider that it rather favours the contention of the appellant; but before we pronounce an opinion, we desire that the Judge will make a more extended inquiry, and we suggest that a commission should be despatched to the several Munsifs in South Cahara and in North and South Malabar to take evidence as to what are the rights and powers of a lady in a Brahman illam who has survived all the male members of the illam, and who has no known attaladakkars, as to the disposal of property of the illam and the adoption of members to continue the family. A commission will be issued from this Court to the High Court of Travancore and the Appeal Court of Cochin for the elucidation of this question."

(1) 8 I.A. 99. (2) 8 M.I.A. 500.

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After making the further inquiry ordered by the High Court, the Judge has returned a finding to the effect that the whole evidence taken at its best is, in his opinion, far from being clear and unambiguous, and utterly insufficient to establish a special usage modifying the ordinary law of succession, and that this being his view, the rights of a Nambudri widow in the circumstances stated in the issue are the same as those of any other Hindu widow. This finding is again objected to, and what we have now to decide is whether it is opposed to the weight of evidence on the record.

The Judge speaks apparently of the modern Hindu law as received by Brahmans on this side of the Western Ghats as the personal law which Nambudris took with them when they settled in Malabar. As to the probable period of their settlement in Malabar we have no precise information; but the well-known usages of Nambudris, purporting to be derived from Hindu law and to rest on smritis, disclose considerable divergence from the doctrines of Hindu law now received on the East Coast. Sarvasvadhanam marriage is traced by Nambudris to Hindu law, and the text of Vasishta, which is adopted as the formula to be solemnly pronounced during the marriage, discloses a connection between this usage and the ancient smriti law. But this form of marriage is unknown on the East Coast, nor is it recognised as a mode of affiliation. Again, a Brahman woman becomes an outcaste on the East Coast by not marrying at all, or by marrying after she [167] attains her maturity; but in Nambudri illams women marry after they attain their maturity, and some never marry at all. Further, the adoption of a son as the son of two fathers or in the dwaya-mushyayana form is obsolete on this coast, and, according to the evidence taken on commission in Travancore and Cochin, it is the ordinary form of adoption recognised in Malabar. Further, on the East Coast, no Hindu widow is competent to adopt in the absence of express authority either from her husband or his sapindas; but according to the evidence taken in Travancore, the Nambudri widow has an implied authority to adopt in the absence of express prohibition. (See also Dattachandrika). It appears from the case of *Lakshmappa* v. *Ramava* (1) that the theory of an implied authority in the absence of express prohibition is recognised as law in Western India. It is therefore important to bear in mind that the Hindu law applicable to Nambudris was as it existed at the time of their settlement in Malabar. The appellant claimed in this case, as already remarked, three special powers for a Nambudri female, or an antharjanam as she is commonly designated, and the first of those powers is a power to alienate inherited property at her pleasure. The Judge finds that the custom urged in its support is not made out by the evidence on the record, and we see no sufficient reason to come to a different conclusion. There are, on the other hand, several facts that support the finding. It should be observed here that a childless widow never had an absolute power of disposition over property inherited from her husband under Hindu law throughout its history. The ancient Vedic law excluded her from succession altogether by reason of her sex, and the Vedic text embodying the rule of exclusion is cited in Smriti Chandrika (Kristnasamy Aiyar's Translation, p. 54). The ground on which she was permitted to inherit when she desired to raise up issue for her husband, or when niyoga (appointment to beget a son) was in vogue, was that she inherited not in her own right, but in right of the son who was to be begotten upon her. (See the argument of Dharasvara cited and

(1) 12 B.H.C.R. 364.

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discussed by the author of the Mitakshara in Chapter II, Section I, Slokas 6 to 28).

As to the Smritis of Katyayana and Brihaspati which gave her a place in the line of heirs, they also restricted the power of alienation and gave her but a qualified heritage in the nature of a [168] personal provision. (See the judgment of this Court in the *Shivaganga case* (1). There is then no foundation in the history of Hindu law for the power of alienation claimed for her. According to Nayar usage, however, women have no doubt full ownership when they are the sole members of their tarwads; but the system of law under which they have such ownership is essentially distinct from Hindu law. The status and the usage of Nambudri women in other respects are anything but similar to those of Nayar females. The restriction on the disposing power of a Hindu widow is the outcome of her status as widow and the austere life prescribed for her by her religion and of the text that Hindu property was designed for religious sacrifices and spiritual purposes. The religion and status of Nambudri widows are substantially the same, whilst widowhood and its peculiar religious obligations in the form in which they are recognised among Nambudris are wholly unknown to Nayars. It is, therefore, antecedently improbable that Nambudri women should have adopted Nayar usage in respect of the power of disposition only, notwithstanding their custom as to widowhood and its religious obligations.

Turning to the evidence in its support, we see reason to think that it is by no means weighty. Several witnesses who support the contention say that she is not competent to alienate when there are attaladakkam heirs, implying thereby that she is governed by Hindu law; that the heritage which she takes is a qualified one, and that a reversionary interest is carved out of it. Again, the law of compulsory registration has been in force in this presidency since 1864, and the absence of documentary evidence in support of the contention is an important matter for observation. Many of the witnesses examined on this point are Nambudris, and it is strange that their evidence should be conflicting in regard to what must be of frequent occurrence. The first seven witnesses who were examined for the respondent at the original trial, and who denied that an antharjanam had the unrestricted power of alienation claimed for her, are Nambudris. Two of those witnesses (Nos. 5 and 6) are vydikas, or men competent according to the caste organization obtaining among Nambudris to express an authoritative opinion on questions of religion and caste usage. Three of them refer to the text of Yajnavalkya, which declares that a [169] woman is never independent and always in a state of pupilage as applicable to her. Though the evidence of the Dewan of Cochin is apparently in the appellant's favour, yet it is not really so, for, he states that it has not been settled whether the consent of the Raja at Cochin is necessary to validate an alienation by a Nambudri widow who is the only surviving member of her illam. The only evidence recorded at the original trial in favour of the contention is that of appellant's witnesses Nos. 1, 3, 5, 6 and 7, who depose that she can alienate at pleasure and without the consent of attaladakkam or reversionary heirs. The fifth, sixth and seventh witnesses add that they or their tarwads made purchases from Nambudri women, but they produce no sale deeds, nor do they go into detail as to the circumstances in which the purchases were made. Contradicted as they are by the respondent's wittnesses, we cannot say that the Judge

(1) 3 M. 290 (331, 332).

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was in error in holding that there was no sufficient evidence to warrant a finding in appellant's favour.

As to the evidence taken on commission at the re-trial, we shall refer first to the evidence recorded at Cochin and Trevandrum. Six witnesses were examined at Cochin and five were summoned by the Commissioner himself as persons competent to give evidence as to usage of Nambudris, and one was examined as an expert at the instance of the respondent's pleader. The expert is one Tiruvengadachari, who has been a Zila Judge in Cochin territory for about seventeen years, and made local custom a subject of special study. His evidence is that a Nambudri female cannot alienate in the absence of a tarwad necessity, whether there are attaladakkam or reversionary heirs or not. Of the other five witnesses, the first, second, fourth and fifth ascribe to her an absolute power of disposition, whilst the third witness, who is a wealthy landholder, says, that she can only part with her family property from necessity or for certain charitable purposes, and that no male or female can alienate tarwad property without a tarwad necessity, or for other than a tarwad purpose. The Commissioner accepts his evidence as that of one well informed on the subject of custom under investigation, and the effect then of the better portion of the Cochin evidence is that, as a matter of actual practice, the Nambudri female does not possess the unrestricted power of alienation that is claimed for her. It is, however, no doubt open to the observation that the principal Nambudri witness, the Commissioner and the expert think that tarwad property is a perpetual entail, and **[170]** that the person owning it for the time being, whether a male or a female, is not at liberty to alienate it, except under necessity or for a proper tarwad purpose. Whatever may be the weight due to the reason which they assign and to the theory of perpetual entail, as modifying the right of property in tarwad lands, the fact is clear that the evidence is against the appellant as to actual practice, whether it is satisfactorily accounted for or not.

As to the Travancore evidence, four witnesses were examined by the Chief Justice of the High Court at Trevandrum, and the second and third witnesses are representatives of respectable Nambudri illams, while the fourth witness is an expert who has been the Accountant-General of the Travancore Government for upwards of fifteen years. Their evidence is that in the absence of dayadies or reversionary heirs, a Nambudri female can alienate her family property at her pleasure. In this connection the remark made by the Commissioner is important, *viz.*, that the Travancore Government, scrupulously following the ancient Hindu law, never claimed a Brahman's property by right of escheat, and that the natural consequence of the absence of attaladakkam heirs and of the right of escheat led to the result that the alienation by a Nambudri female was never questioned by the Travancore Government. The evidence of the Accountant-General and the expert gives an idea of the extent to which the right of escheat is asserted by the Travancore Government in connection with alienations by the last surviving female of a Nayar tarwad. "The old custom is," says the witness, "that in a Sudra house, the last survivor, whether a male or a female, cannot make a gift of tarwad properties, or do anything with them for want of heirs. But the sirkar does not interfere if documents are executed for lawful purposes: if they are executed for unlawful purposes, the government rejects them." This portion of the Travancore evidence, in common with the Cochin evidence, suggests a theory of perpetuity as a bar to the alienation of tarwad property. In *Cavaly*

Vencata Narrainapah v. *The Collector of Masulipatam* (1), the Judicial Committee overruled the notion which had prevailed till then, *viz.*, that under Hindu law, the Crown can never take the estate of a Brahman by escheat. One of the principles on which that decision rests is that when the last owner dies heirless, the per-[171]sonal law applicable to him ceases, and the public law relating to the prerogative of the Crown in regard to heirless property takes its place. The Travancore evidence as to Nambudri usage cannot then be accepted as evidence of a custom of which the validity is to be determined with reference to the law of escheat as interpreted by the Privy Council.

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As to the evidence taken in South Canara at the second trial, the Judge attached no weight to it, and our attention was not drawn at the hearing specially to any part of it. As to the evidence taken by the District Munsifs in North and South Malabar, the Judge has set it out in his finding on the issue referred for re-trial, and we agree in the conclusion at which he has arrived. As observed by him, it is not uniform, often hearsay, and generally vague as to the circumstances in which alienations were made. The reason suggested by several witnesses (for instance the witnesses examined by the District Munsif at Badagara) is that when there are no reversionary heirs, the sole surviving *female* has all the powers of the sole surviving *male*. If alienations by Hindu widows prior to the decision in *Cavaly Vencata Narrainapah* v. *The Collector of Masulipatam* on this coast, under the mistaken view of Hindu law in regard to the escheat of property belonging to Brahmans, formed no foundation for a valid custom, a similar practice, we apprehend, could not be taken to have originated a valid usage in Malabar, though some alienations might possibly have been made under its influence. The conclusion to which we then come upon the whole evidence is that we must accept the finding of the Judge that a Nambudri widow does not posses the power of alienation which is claimed for her.

So far we agree with the District Judge, but we are unable to concur in his opinion as to the effect of the evidence in regard to the other two powers which are claimed for a Nambudri female. The first of them is a power to appoint an heir to prepetuate her illam, which is otherwise likely to become extinct for want of heirs, and the second is a power to direct a Nambudri to marry again specially for her illam under the agreement that the son, if any, who may be born of that marriage shall be the heir to that illam. These powers relate rather to modes of affiliation of sons into a Nambudri family than of alienation of its property.

As to the evidence recorded at the original trial, the first, second, fifth, sixth, seventh and eighth witnesses were examined [172] on this point, and the first is one Raman Nambudripad, who is the representative of a Nambudri illam in the appellant's village. According to him an antharjanam can appoint an heir to perpetuate her illam, and he mentions three cases in which such appointments have been made. The first was an appointment made on behalf of the Manthatpuram illam, the second was made on behalf of the Kiyadath Muthadath illam and the third was made on account of Kavunkel Vellilakat illam.

The second witness is one Divakaran Nambudri of the Wallavanad taluk, and his evidence is that a Nambudri can adopt one who is even married, and that an antharjanam is competent to adopt.

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(1) 8 M.I.A. 500.

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The fifth witness is Manavikraman, the junior tirumulpad of Nilambur tarwad, which pays an assessment to Government of Rs. 7,000 per annum. His evidence is that an antharjanam is competent to appoint an heir, and that it is not necessary for her to obtain the previous consent of reversionary heirs.

The sixth witness is one Narayanan Nambudri of the Calicut taluk. He deposes that a Nambudri female is entitled to appoint an heir, and that Nanga Neeli of Chirutayur illam appointed Kiyadom Damodaran Nambudri as heir to her illam about twenty-five years ago.

The seventh witness is one Narayanan Nambudri of the Ernad taluk. He also deposes in favour of the competency of a Nambudri lady to appoint an heir, and mentions three cases in which antharjanams appointed heirs to their illams and directed them to marry specially in order to raise up heirs for those illams. Of the three instances mentioned by him, two are the same as those deposed to by the first witness. In one the witness was himself the person who was appointed and married specially to raise up heir for the Vellilakat illam, and the registered copy of a document produced by him and used in evidence corroborates his statement. Document I, which is dated August 1877, says: "As there are no heirs in my "tarwad, and as you married with my permission on the 28th Makarom "last in order to raise up issue for my tarwad, I appoint you as my repre-"sentative in interest and give you the property of my tarwad to be enjoyed "as owner." In another case mentioned by him, his own sister was the bride selected by a member of Palat illam, who was appointed heir by a female of Mepalaseri illam and directed to marry specially in order to raise [173] up heir for that illam. He stated also that his uncle accepted a girl in sarvasvadhanam marriage under exhibit II, which appointed the son-in-law as heir, and that the marriage which the witness contracted to raise up issue for the Vellilakat illam was celebrated like sarvasvadhanam marriage, though it was not a regular sarvasvadhanam.

The eighth witness is the vydikan of the appellant's village, and he deposes that by custom a Nambudri female is competent to appoint an heir to her illam, that the expression "appointed as heir" means that the person so appointed is to marry specially to raise up issue for the illam of which the female is the surviving member. The witness adds that the appellant was appointed heir under the advice of his father and in consultation with him, as he was the vydika of their village so long as he was alive.

On the other hand, eight witnesses were examined for the respondent, but some of them support the evidence for the appellant, whilst several do not contradict it. The eighth witness is the Dewan of Cochin, and his evidence is that a Nambudri female who is the only surviving member of her family may appoint an heir; that the person so appointed may be an adult; that, though the sanction of the Raja is obtained, it is obtained to ensure public recognition of the heir, and that the appointment is valid by custom.

The fifth and sixth witnesses are vydikans, and as such, experts. The sixth witness does not refer to appointment of heir by a Nambudri widow, but mentions a case in Cochin in which, on the death of the last female of a Nambudri illam, the Raja took the property of that illam, and gave it to a Nambudri Brahman. This evidence does not necessarily negative her power to appoint an heir, and the Cochin evidence to which we shall presently refer supports that view. The fifth witness states

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that a widow *alone* cannot appoint an heir; but in his cross-examination he admits that among Nambudri women the mother has the authority to give the daughter in sarvasvadhanam marriage, and that the person who marries in sarvasvadhanam may be appointed heir of the illam. He adds that an adult and a person who has even married may be appointed heir; that even in cases other than those of sarvasvadhanam marriage, a married man may be appointed heir, irrespective of age, and that no ceremonies whatever are necessary when such appointment is made. He states further that the last [174] surviving antharjanam can authorise a Nambudri to perform funeral obsequies and sradhas. In his re-examination, he says also, that a Nambudri woman may make a kritrima adoption; that it is in accordance with acharam or custom; and that in Cochin and Travancore the kritrima adoption must be made with the consent of the Raja.

This witness does not realise the fact that there is no substantial distinction between the power to make a kritrima adoption and the power to appoint an heir, and on this point the evidence of the Cochin expert, Tiruvengadachari, is material. After referring to "pattukayyal adoption," or to adoption with ten hands as it is commonly called, the Cochin witness goes on to say: "There may be cases which are not pattukayyal dattu; for instance, the adoption of a boy whose natural parents are dead, or the adoption of a boy by a widow or a widower; but the latter instance cannot be called dattu, as no dattahomam can be performed. It is only appointing an heir to the illam." Sutherland describes the form prescribed for kritrima adoption by Rudra-dhara in Sudhi Viveka, Note XVI of his Synopsis (Stokes' H. L. Books, page 676), and it consists in the adopter saying: 'Be my son,' and in the adopted replying, 'I am become your son,' and the consent of both parties is the only requisite, neither any ceremony nor any set form of speech being an essential as in the case of a regular adoption. This form of adoption does not sever him from his natural family, and this is precisely the effect of appointing a person as heir. Reading the evidence of the fifth witness in the light thrown upon it by the nature of the kritrima adoption, which, according to him, a Nambudri widow is competent to make, it is clearly in support of her power to appoint an heir to her illam, and in saying in another portion of his evidence that she *alone* cannot appoint an heir, the witness did not perhaps intend to deny her power, but intended to add that she should do so in consultation with reversionary or attaladakkam heirs, if any.

The seventh witness, Raman Nambudripad, deposes that "if a woman or a widow alone survive in an illam, a person used to be adopted in Ayatha Vidhi for performing her funeral obsequies." But this witness adds that he can ask for his share in the property of his illam, and his evidence is not of much value.

As to the first three witnesses for the respondent, two of them do not deny the power of a Nambudri woman to appoint an heir, [175] but they say that the power should be exercised with the consent of attaladakkam heirs. As to what should be done if there are no attaladakkam heirs, their evidence is discrepant. The third witness states that if there are no attaladakkam heirs, she cannot at all appoint an heir, and the second witness says that the sovereign used to appoint an heir in former times. The first witness refers to Yajnyavalkya's text in regard to want of independence on the part of a woman, and says, if she alone survives in her illam, no heirs can be created. None of them has been asked whether kritrima

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adoption can be made. The first witness states that there may be several kinds of adoption, and that he cannot say what the nature of each is, and none of the three witnesses is either an expert or of high social position. Among those who support the appellant's case there are experts and men of high social position.

The oral evidence recorded for the appellant at the original hearing is supported by several witnesses for the respondent and by document I. Several specific cases of appointment are mentioned by appellant's witnesses, and they are not shown to be fictitious. Again, the evidence receives considerable accession of strength from the decision of the late Sadr Court in the case of *Tottakara Alluttar Manakal Narrain Nambudripad and another* v. *T. M. Trivikrama Nambudripad and others*. In that case a Nambudri illam, called Kypenjeri illam, vested in a female named Savitri, and in order to continue succession in the illam, she, according to the custom of the caste of Nambudris, introduced the then defendant's father to beget a son in and for that illam. He accordingly contracted a marriage, the fruit of which was a son named Kelan. The property then vested in Kelan, but, on his death without issue, reverted to Savitri. On her death, the next-of-kin of Savitri's husband and the half-brothers of Kelan severally claimed the right of succession. In August 1855, the Court of Sadr Adalat, acting on the opinion of the then senior pandit, decided in favour of the former. The senior pandit viewed the introduction of Kelan into the family as that of a son obtained by gift, and the succession to him of Savitri as that of an adoptive mother, and observed that "Kelan coming in thus as a gift was cut off from alliance with his natural kindred." The appointment was made in 1805 and the decision was passed in 1855. It is clearly an authority for the position that the custom of a Nambudri widow directing a person to marry to raise up issue for her **[176]** illam was in vogue in 1805, that the succession of the son raised up by that marriage to the illam was held to be valid according to custom, and that the status of the son in the illam for which he is begotten is that of a son obtained in gift by adoption. The reasons assigned by the Judge for not attaching weight to that decision are not satisfactory. He says that he cannot act on one decided case, but there can be no doubt that it is important evidence of the custom set up by the appellant both in regard to its truth and validity. Another reason mentioned by the Judge is that the first defendant's father in the reported case was entitled in his own right to succeed to the Kypenjeri illam; but this is a mistake, and the ground of decision was that the custom was true and operated to transfer Kelan from his natural family into that of Savitri's illam. Again, the Judge says that in the reported case the marriage authorized was contracted and that a son was born of that marriage; but even supposing that no marriage was contracted in this case as directed, it by no means negatives the custom pleaded by the appellant. The appellant's fifth witness said in his evidence: Vasudevan Nambudri had married on behalf of Tamarasseri illam, and the fact was not disputed at the hearing of the appeal before us. It is true that there has been no issue of the marriage contracted by the appellant, but if a son is hereafter born, that son will be the lawful heir according to custom and the property in suit cannot then be said to be heirless for the Crown to step in and claim it as an escheat.

In these circumstances, we consider that, as observed by the Division Bench at the former hearing, the evidence recorded at the first trial was

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more in favour of the appellant's than of the respondent's contention. We shall now proceed to consider whether the evidence taken at the second trial supports the custom set up in this case.

The six witnesses examined at Cochin state that a Nambudri widow may appoint an heir. They say that she cannot make the "Pattukayyal" adoption, but that she can make an adoption to prevent the extinction of her illam, that no ceremony is needed for it, and that the person adopted may be an adult and even a married man. This is also the evidence of the expert cited for the respondent and of the Dewan examined at the original trial. The Commissioner accepts the evidence as substantially correct and observes that, though an antharjanam cannot make an adoption [177] in the religious form, called pattukayyal dattu, she can appoint a male as heir to succeed to the property of her illam subject to the sanction of the sovereign. He observes, further, that, according to the practice of the Cochin State, sanction is not applied for, as a rule, before making the appointment, but it is subsequently obtained to give the appointment retrospective effect, such sanction being given generally on payment to the Raja of 20 per cent. of the value of the property. The Dewan states in his evidence that the sanction is obtained only to ensure public recognition of the heir. The effect of the Cochin evidence then is that the sole surviving antharjanam of a Nambudri family is competent to appoint an heir, that the heir appointed may be a married man, that the sanction of the Raja is usually obtained after the appointment on payment of one-fifth of the value of the property, and that, according to the Dewan, the sanction is obtained only to ensure public recognition of the heir.

In Travancore four witnesses were examined and the effect of their evidence, as stated by the Commissioner, is that a lady in a Brahman illam, in the absence of attaladakkam heirs or dayadies, is competent to adopt a son. In that State, the Raja does not claim by escheat the property of a Brahman, so much so that, if the last surviving female does not appoint an heir to her illam, Nambudri Brahmans living in the neighbourhood inform the Raja of the fact, and, after obtaining his consent, appoint an heir to continue the illam (see the evidence of Muttukumarasami Thiraviyam, Accountant-General).

But the Cochin and the Travancore evidence does not show, and was not considered, as to whether the person appointed as heir might be authorized to contract a marriage specially to raise up a son. As to the form in which the power of appointing an heir is exercised by an antharjanam, it is said to consist in adopting the person, who may be an adult or a married man, without any ceremony and by simply giving a writing to the heir appointed or sending written information to the Raja. It shows further that the adoption or appointment by a widow to perpetuate the illam is called kritrima adoption in contradistinction to the pattukayyal dattu, which is the regular and religious adoption prevalent among Nambudris. It is called pattukayyal dattu, or adoption with ten hands, the hands of both the natural and adoptive parents who must be alive and the hands of the boy being joined when the [178] gift is made. Dattahomam is performed, but the adoption is in the dwayamushyayana form which is obsolete on this coast (see the evidence of Tiruvengadachari, the Zilla Judge of Trichur, examined at Cochin); but the appointment made by a widow is called kritrima adoption, because there is no ceremony, the agreement to take and to become heir being all that is considered necessary. Although the person appointing the heir is a widow, still the

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Travancore witness, Brahma Dattan Nambudripad, refers to a rule of Hindu law, which may account for its being accepted as a valid affiliation. He says in his evidence: "The Sastra followed by Nambudris is that which is adopted by all Hindus, but there are some points of difference. In a common Hindu household, the adopted son is entitled to the property of his adoptive father alone, but among Nambudris, the adopted son is entitled to the properties of both his natural and adoptive fathers. The said adoption is known as dwayamushyayana adoption. There is another kind of adoption called the chanchamatha adoption. Either the father or the mother of the adopted son gives away by himself or herself the son to be adopted and a male or female by himself or herself accepts the son in adoption. Dattahomam is performed in connection with this adoption also. If a female is the sole survivor of her illam, no male members being left, that female has the power to adopt. She can adopt either if her husband gives his consent before his death, or if he dies without prohibiting it. Another Travancore witness, Damodaran Sankaran Nambudripad, adverting to the widow's power to adopt, observes, a widow who has neither issue nor dayadies can adopt if she has obtained the permission of her husband. If the husband has died without raising any objection to it, his silence is taken to imply consent. The evidence of the Trichur Judge at Cochin as to the several forms of adoption is to the same effect. Adverting to the sole surviving lady in a Nambudri illam, he says: "in either case (whether unmarried or a widow) she cannot adopt a son according to the pattukayyal dattu, but she can appoint an heir to the illam; but in such a case, the heir appointed cannot enter upon the management of the illam properties before he obtains what is called a theetooram (writing) from His Highness the Maharaja, allowing him to do so. He has to pay a fee of 20 per cent. on the value of the illam property, but the Maharaja may forego the whole or part of it. I know of no limit to the age or quali-[179]fication of the person appointed as heir. He may be a married man with children, but, I think, he must be of the same caste with the lady appointing him as heir." We have already referred to that portion of the witness' evidence in which he said that the adoption by a widow in which dattahomam can be performed amounts only to appointing an heir. Several of the witnesses examined at Cochin and of the experts examined at the original trial call the person appointed, kritrima son, and the appointment made, kritrima adoption, for, in that form of adoption, there is no religious ceremony necessary.

We shall next compare these modes of affiliation with those now current on the East Coast and see whether they have a place in the history of Hindu law. Pattukayyal dattu or adoption with ten hands as a dwayamushyayana adoption is obsolete on this coast, but we need hardly cite texts or do more than refer to Datta Chandrika, Section II, 41 and 42, in order to show that dwayamushyayana adoption was well known to ancient Hindu law, though the form in which adoption now prevails on this side of the ghats is what is called sudha dattu, or adoption pure and simple, that is to say, an adoption which completely severs the person adopted from his natural family and fixes him in the adoptive family. As to a widow's power to adopt so as to perpetuate her husband's family, it is necessary that she should be expressly authorised on the East Coast either by her husband or his sapindas, and the theory is that the adoption is made not for herself but for her husband. The practice among Nambudris is otherwise. The theory is the same among them also, but in its application the husband's authority is presumed unless there is an express

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prohibition. In the case of *Lakshmappa* v. *Ramava* (1), which was referred to by this Court in R. A., 90 of 1885, reference is made to the same doctrine as a rule of law still prevalent in Western India. We may here refer to a passage in Datta Chandrika, Section I, 32, in which the theory of an implied assent in the absence of an express prohibition is mentioned in connection with the power of a widow to give a son in adoption. The commentator says: "Now, if there be no prohibition even, there is assent. The intention of another not prohibited is sanctioned. Yajnyavalkya suggests the independency of the woman—' He whom his father or **[180]** mother gives is a son given.' Also in another place, ' deserted by his father or mother or either of them.' " In the previous paragraph 31, a text of Vasishta is cited to the effect " let not a woman either give or receive a son unless with the consent of her husband." It is clear also from the Bombay case that adoption which is made for securing an heir competent to perform funeral and annual obsequies is regarded as a religious and meritorious act and that assent on the part of the husband is therefore presumed in Western India in the absence of an express prohibition.

As to the evidence that the person adopted may be an adult and even a married person, the author of the Datta Chandrika, after referring to several texts, says in S. II, para. 33 : " And thus the practice of all the ancients even in respect to the adoption of a son unlimited to any particular time is upheld." Again the author of the Vyavahara Mayukha observes in Chap. IV, S. V, para. 19 : "And my father has said that ' a married man who has even had a son born may become an adopted son.' " There is thus no ground for the suggestion that, because the modes of affiliation said to be current among Nambudris are not now recognised on the East Coast, they cannot be referred to ancient Hindu law, or the personal law which they carried with them when they settled in Malabar.

It may not be amiss here to allude to the probable date when Nambudris settled in Malabar. There is internal evidence to show that the event must have occurred before the Mitakshara was written. The sarvasvadhanam marriage is recognised in Malabar, and, as far as we are aware, there is no allusion to it in the Mitakshara as a form of marriage in use. According to the latter, daughters are in the line of heirs and the Cochin expert, Tiruvengadachari, and several other witnesses say that they are not heirs among Nambudris unless they are given in sarvasvadhanam marriages and thereby retained in their father's family. We may also state that the migration must have taken place prior to the time of Sankaracharyar, the founder of the Adwaita or non-dualistic school of Vedic philosophy. It is in evidence that the acharams or practices of Nambudris are believed to have been regulated by him, and he is known to have lived about the fifth or seventh century. Again, according to tradition, Parasurama was the first king who introduced Brahmans into Malabar as an organised community, and a considerable period of time must have intervened **[181]** between him and Sankaracharyar. Further, niyoga or inviting a Brahman to beget a son upon a childless widow for her husband was in use among Brahmans in early times, but, at a later period, several Smritis reproved the practice as " fit only for cattle," and under their influence, various forms of adoption gradually took the place of niyoga, which was ultimately forbidden. The direction to marry specially for an illam, which is said to be founded on analogy to sarvasvadhanam

(1) 12 B.H.C.R. 364.

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marriage, conveys the impression that the girl selected for the marriage is by special agreement substituted for the daughter born in the family into which she is married, so that her son and his descendants, like the son of the appointed daughter and his descendants, become the representatives of that illam. This is an indication that Nambudris settled in Malabar at a time when niyoga was in disrepute so far as it authorised sexual intercourse between a woman and a person who was not her husband, and when there was a tendency to substitute a form of adoption for it, so that its value as a mode of affiliation might be retained. We can only say upon the evidence that Nambudris must have settled in Malabar more than 1,200 or 1,500 years ago. It may not be out of place to refer in connection with this historical fact to the interesting account given by Mr. Logan of the probable mode and time of settlement in Appendix I to his report on Malabar Land Tenures. The conclusion to which he has come is stated by him, in paragraph 64, as follows: "I think there is enough to show that Nambudris entered and settled in Malabar in large numbers and as an organised body precisely at the time (end of seventh and first half of eighth century) when the extinction of the Perumal's authority was for the first time menaced by the Western Chalukiyas. It is reasonable to conclude that the Perumals received them with open arms at a time, when, as shown by the Jewish and Syrian deeds, they were seeking succour from every quarter; and it is also reasonable to conclude that they in some way managed to do the Perumals some friendly office, for we find, from the Syrian grant, that they had already in A. D. 774 obtained commanding influence in the country." However this may be and whether there was one migration or whether there were successive migrations, whether the first migration was in the seventh century or several centuries before it, there is enough to show that the personal law which they carried with them is not Hindu law as expounded by the authors of the Mitakshara, [182] Smriti Chandrika, and Madhavya, but the ancient Hindu law as it was probably understood and followed about the commencement of the Christian era.

Before we pass on to the other evidence, we may state that the modes of affiliation in use among Nambudris, according to the evidence we have hitherto mentioned, are in accordance with those mentioned in two recent manuals written by Messrs. Wigram and Ramachandra Aiyar, who have been for several years District Judge and Subordinate Judge of Malabar. Both refer to the appointment of heir as an adoption and as akin to the kritrima form of adoption in force in the Mithila country (see Wigram on Malabar Law and Custom, Chapter I, and Ramachandra Aiyar on Malabar Law and Custom, Chapter VI). It is clear then that the appointment of an heir is regarded as a mode of affiliation and not as a form of alienation, and, though it is valid, it is called kritrima adoption not in the sense that it is unauthorised as on the East Coast, but in the sense that it takes place without any ceremony as in the case of the other two forms of adoption, namely, adoption by ten hands or pattukayyal dattu and adoption by chamatha, that is, by burning a pan of sacred grass. Keeping in view, therefore, the connection between adoption and what is loosely called appointment of heir and the fact that it was the ancient Hindu law, which the Nambudris presumably carried with them as their personal law, we proceed to consider the evidence recorded in North and South Malabar at the second trial.

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More than 100 witnesses were examined by District Munsifs in Malabar.

At Calicut, though forty witnesses were examined, nine alone gave evidence on the point now under consideration. As observed by the Judge, seven deposed that a widow could adopt an heir. Two denied her power, though the first witness said that if the widow could adopt, she should have obtained her husband's consent. He was not asked whether he referred to ceremonial adoption or kritrima adoption, and whether such consent might not be presumed in the absence of prohibition. The witnesses do not mention specific cases of appointments in support of their evidence. Several Nambudri witnesses say that they do not know whether she can adopt.

As for the six witnesses examined at Tellicherry, their evidence [183] is stated by the Judge to be that the widow must have the consent of her husband or his near relatives. No explanation was given as to this at the hearing of the appeal, but it seems they were not cross-examined.

At Ernad, fourteen witnesses were examined, and though the Judge refers only to eight, our attention was called to twelve witnesses as giving evidence on adoption.

The first witness is one Jata Vedan Nambudripad. His evidence is that a widow is at liberty to adopt or appoint an heir, and he names four specific instances in which a widow appointed an heir and directed him to marry in order to raise up issue for the illam. He adds that his own maternal grandfather and the appellant's paternal grandfather were so appointed.

The next witness, Vasudevan Nambudri, states that the widow is competent to adopt an heir and that it is an ancient custom. He mentions the appointment of Alayi Nambudri to Muthudeth illam as an instance. He adds also that if a maiden alone survives in an illam, she may be married in sarvasvadhanam form to raise up an heir for it, and that if there are dayadies having ten or three days' pollution, their consent is necessary to the appointment of an heir. In cross-examination he says also that he does not fully know the custom of Malabar.

Vamanan Elayad is the third witness, to whose evidence our attention was called. According to him also the widow is competent to appoint an heir, and if there is an unmarried girl in the illam, she may be married for that illam and kept in it. He observes that the widow is empowered to appoint an heir because there is no salvation unless there is male issue to perform funeral ceremonies. He mentions two cases of appointment of heir, and says that he had personal knowledge of one of them. In cross-examination, he adds that when there are attaladakkam heirs, no heir can be appointed by a widow in violation of their rights.

The fourth witness is one Kesavan Nambudri. He also deposes to the custom, but mentions no specific instances.

The fifth witness is one Narayanamangalath Chingan Nambudri. His evidence is that, according to ancient custom, a widow of an illam can appoint an heir when there are no dayadies having ten days' pollution. He mentions, however, no specific cases of appointment as being within his personal knowledge.

The sixth witness, Sankaran Nambudri, deposes to appointment [184] of heir by a widow and to causing him to marry for the illam as an ancient practice. He says there are stanams and positions of honor to be held by certain tarwads, and that, as these have existed from generation to generation, the power to keep up tarwads is vested in women.

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The seventh witness is one Keshavan Somayajipad. He says, if a mother and daughter survive in an illam, issue used to be raised for the illam by giving the daughter in sarvasvadhanam marriage, and similarly, if if there be no maiden, the widow has power to raise up issue by appointing a person as heir for the illam. He mentions two cases of appointments and adds that in one of them his uncle was appointed heir and authorized to marry for Manthatpurath illam and that he married for that illam in 1860. In cross-examination, he says that a widow cannot adopt without the consent of the husband, but she has power to constitute a person as heir. The witness is referring here probably to ceremonial adoption, for we have already shown that kritrima adoption and the appointment of an heir are, as explained by the Cochin witness, substantially the same.

The eighth witness is one Narayanan Nambudri. He also states that a widow is competent to constitute another person as heir to her illam and make him marry for that illam and perpetuate the lineage. He mentions the appointment of Kiyakkedoth Nambudri as heir to Manthatpurath illam as an instance in his village and as within his personal knowledge. In cross-examination he says that the widow has no power to appoint an heir without the consent of dayadies having ten and three days' pollution, if any.

The ninth witness is one Narayanan Mussad and owns land yielding 50,000 paras of paddy. He says if there are males and no attaladakkam heirs, the widow is entitled to adopt for the perpetuation of the lineage, though without the consent of her husband. He adds that it is customary to do so, that he cannot mention the principle from which the custom has originated, that among Nambudris the eldest brother alone marries, and that, in order that illams may not become extinct from this cause, widows have this power. In cross-examination he states that constituting an heir and adoption are the same. When he was pressed to name instances, he named three as having occurred within a period of thirty years, adding that he had personal knowledge of one, *viz.*, the appointment of Mayerkare Mussad as the heir of Chombatte illam.

[185] The tenth witness is a Nambi. He gives similar evidence and names the appointment of Meleteth Nambudri as heir by a widow in Mannil illam in Panniyur desham.

The eleventh witness, Subramanian Nambudripad, and the twelfth witness, Narayanan Nambudripad, give similar evidence, and they mention specific cases of appointment. They say that this power is vested in Nambudris, lest their illams in which the eldest alone marries may become extinct. The former named two instances, of which he had personal knowledge of one. They say that they have seen no instance in which a widow has made an adoption without the consent of her husband.

All the twelve witnesses agree that a widow can appoint an heir to perpetuate the illam in the absence of dayadies or reversionary heirs. Most of them mention specific cases of appointments made by widows. In accounting for the custom, some refer to the spiritual benefit accruing from the existence of a male heir, some to the practice prevailing in Malabar according to which the eldest brother alone marries, and some to the fact that ancient stanams and offices are held by several illams which it is necessary to perpetuate.

The Angadipuram District Munsif examined two witnesses, and it appears that they said that a widow can only adopt with her husband's sanction. No special explanation is offered as to this evidence in appeal.

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The Chowghat District Munsif examined two witnesses. Both of them state that a widow could make an adoption for the illam. The first witness added that the absence of any objection on the part of her husband was sufficient and that his express consent was not necessary. The second witness stated that it used to be said that the husband's consent was necessary; but that he had seen adoptions made by widows, but that he did not know whether it was with or without such consent.

There were three witnesses examined by the Betutnad District Munsif. The first alone gave evidence about adoption, and he deposed that a widow is competent to adopt an heir without her husband's consent.

Two witnesses were examined by the Nedunganad District Munsif. They both state that a widow can adopt without her husband's consent.

[186] One witness was examined by the District Munsif of Kutnad. He gives similar evidence and cites Datta Chandrika as an authority.

Eight witnesses were examined by the District Munsif of Pynad and seven say that a widow can adopt. As to the necessity for the husband's sanction, the first witness states that a widow can adopt if there is no prohibition from the husband and refers to Yajnavalkya's text, cited in Datta Chandrika. The second witness, Purushothaman Nambudri, says that the husband's consent is not necessary, and mentions a case in which a widow adopted without such consent. The third witness, Damodaran Nambudri, states that if there be no attaladakkam heirs or dayadies, a widow can make an adoption for purposes of issue for her illam without any one's consent. Another witness, Govindan Nambudri, says that a widow cannot make an adoption without her husband's consent; but, in the absence of such consent or of a maiden in the family, who can be given in sarvasvadhanam marriage, the illam properties may be given to a Nambudri on condition of her being protected and her funeral obsequies being performed. Another witness, named Bramhananda Bhutasami, says that he is not much conversant with the law of adoption, that a widow cannot perform dattahomam, and that the husband's sanction is necessary. Two more witnesses were also examined, and one of them, Krishnan Nambudri, states that she can make the adoption without the husband's consent and that he has heard so. And the other, Narayanan Nambudri, considers husband's sanction is necessary, and that the sanction, if any, given by his kinsmen is not sufficient. The result is that, out of eight witnesses, seven say that she can adopt, though one denies her power, and that the majority say that the husband's sanction is not necessary, those well read in the shastras accounting for it; whilst those who say that such consent is necessary refer to no instance in which the adoption was set aside for want of the sanction.

Thirteen witnesses were examined by the District Munsif at Badagara, and, though four of them only are Nambudris, there are several vakils, among others, who have practised in that Court for more than fifteen years. Ten of them say that a widow can adopt either with or without the sanction of her husband, and three state that such sanction is necessary, but several of the former mention specific instances in which widows constituted others as [187] heirs in view to perpetuate their illams. It appears that the witnesses were not cross-examined, though there was an opportunity for doing so.

Two witnesses were examined at Cannanore and they say that a widow can only adopt with the sanction of the husband. The first witness refers to the text of Yajnavalkya, which states that a woman is never

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independent, and that she is protected by her father in her youth, by her husband during womanhood, and by her son in old age.

Four witnesses were examined at Nadapuram, and two of them, who alone give evidence in regard to adoption, say that a widow can adopt. Specific instances are mentioned in their evidence.

Seven witnesses were examined at Kavai. The first, third, fourth, and seventh state that a widow can adopt, though the second and sixth appear to have denied her power to adopt.

The evidence recorded by theDistrict Munsifs in South Canara is considered by the Judge to be of no importance, and our attention is not drawn in appeal to any portion of it.

The foregoing is the evidence recorded at the second trial. It appears to us that the large majority of witnesses examined at various stations in North and South Malabar support the case that a widow can adopt in view to perpetuate her illam. Though at Tellicherry and in a few stations some witnesses deny her power, their evidence furnishes no satisfactory answer to a number of specific instances mentioned by the others, and the evidence of the large majority is in accord with the evidence taken in Cochin, in Travancore, and at the original trial. Having regard to the fact that the witnesses belong to various places, we see no reason to hesitate to accept their evidence as *bona fide*.

The points about which there is conflict are two, namely, whether her husband's sanction is necessary and whether she can adopt when there are attaladakkam or reversionary heirs. As to the first we have already remarked that the true Hindu theory is that no widow can adopt except for her husband, and that, on the East Coast, his express authority or that of his kinsmen is held to be necessary, whilst in Western India it is presumed in the absence of an express prohibition. We have also shown that there is a text of Yajnavalkya, which bears out this theory, and [188] that the very same interpretation is placed upon it by the author of Datta Chandrika in regard to a widow's power to give in adoption. The allusion to this special text by several of the witnesses learned in the shastras appears to us to show that the practice has a legal origin. On a point like this it is by no means a matter for surprise that there is a conflict between those who are well read and those who are not. As to the text of Yajnavalkya on the subject of want of independence in woman generally, it must be taken together with the special text, which declares her independence in respect of adoption on the ground that it is a religious and meritorious act. In dealing with this part of the case, the Judge takes the Hindu law as now administered in this Court as the law that applied to Nambudris when they migrated to Malabar and treats the practice spoken to as an innovation; but before doing so it is necessary to see whether the practice is one which is inconsistent either with ancient Hindu law or with a different interpretation of a text received as law, and whether there is ground for the presumption that the practice is the outcome of the Hindu law or interpretation which prevailed when Nambudris settled in Malabar, especially when several experts refer the practice to Hindu law and to a special interpretation. The Judge had not before him the evidence taken at Cochin and Trivandrum, which, as coming from disinterested persons residing in foreign territory, where the law of escheat as administered in British Courts is not in force, has a special probative value.

As to the second point, namely, whether a widow can adopt when there are attaladakkam heirs, it is not necessary to determine it for the

purposes of this appeal. It is not suggested that there are attaladakkam heirs in this case. The bulk of the evidence is in favor of her power, though, as observed by Mr. Wigram in his manual, the selection is usually made from them. It may be an open question whether a stranger can be adopted, but it is not necessary to decide it for the purposes of this appeal, and we do intend to decide that a widow is entitled to adopt a stranger in supersession of her husband's divided kinsmen or attaladakkam heirs. In our judgment, there is sufficient evidence to the effect that a widow can adopt or appoint an heir in order to perpetuate her illam in the absence of dayadies with ten or three days' pollution.

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[189] There is one other point, in respect of which there is a conflict in the evidence. The Ernad and several Pynad witnesses state that when an heir is appointed there must be a direction that he should marry for the illam. There was also some oral evidence to that effect at the original trial; but in the case before us the appellant was directed to marry for the Tamarasseri illam in order to raise up heir for it. The evidence appears to be reasonable, when regard is had to the fact that the heir is appointed to continue the illam and not to absorb it into the illam in which the person appointed is born; but the Cochin, Travancore, and other evidence does not show that this direction is indispensable. There is this reason in support of it, namely, that the affiliation of a son is complete when he is appointed by reason of the mutual agreement implied by kritrima adoption and that any further direction is not a pre-requisite, though it may be a matter of preference.

Document A appoints the appellant as heir and directs him to raise up heir for the Tamarasseri illam. There is reliable evidence showing that in the case of sarvasvadhanam marriage, the son-in-law may be appointed heir to the illam by a special provision to that effect. It may well be that the power to appoint an heir is equivalent to kritrima adoption, and that the direction to marry specially for the illam is a graft upon it designed on the analogy of sarvasvadhanam to secure the issue of such marriage, if any, as a class of heirs exclusively entitled to the illam, and thereby to prevent its ultimate absorption into the illam to which the person who is appointed heir belongs. That it is usual to direct that a special marriage be contracted in order to raise up heir for an illam is also shown by the decision of the Sadr Court in 1855. That its peculiarity as a mode of perpetuating the illam is some guarantee for its being regarded *bona fide* as a special mode of affiliation.

In the case before us, the appellant was appointed heir and he was also directed to contract a special marriage for the illam which he has done. His position and that of the future issue of the special marriage, if any, are same as that of a son adopted on this coast by a Hindu widow with the sanction of her husband and his issue, if any, and on this ground the property in suit cannot be treated as heirless property which the crown may claim by right of escheat.

As to the objection that there can be no such right in regard [190] to jenm lands of Malabar, or the property of Nambudri Brahmans even in the absence of legal heirs, it is on its face frivolous.

But for the other reasons mentioned above we are of opinion that the appeal must be allowed and the suit dismissed with costs throughout.

We order accordingly.

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AUG. 10.

APPELLATE CIVIL.

11 M. 190.

11 M. 190.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SHRAJUDIN AND OTHERS (*Appellants*), *Petitioners v.* KRISHNA AND ANOTHER (*Respondents*), *Respondents.** [10th August, 1887.]

Civil Procedure Code, Section 549—No extension of period for finding security for costs of appeal after default.

Section 549 of the Code of Civil Procedure being imperative, the time cannot be extended after the expiry of the period fixed in the order directing the appellant to find security for the costs of an appeal.

Haidri Bai v. *East Indian Railway Company*, I.L.R., 1 All., 687, followed.

[N.F., 16 B. 263 (266); R., 21 B. 576 (579).]

APPLICATION by the appellants in appeal No. 101 of 1886 on the file of the High Court for an extension of the time fixed by an order of the Court within which they were bound to give security for costs.

The appellants alleged that they had been ordered to find security by the 12th July 1887 for the costs of the appeal: that on 2nd July they lodged security in the lower court and the Judge passed an order stating that the security was insufficient: that they, believing the security was sufficient, were not prepared to furnish fresh security on the same day and that the Judge refused to allow them to furnish security after the 12th.

Srinivasa Rau, for petitioners.

Anantan Nayar, for respondents.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

[191] The Subordinate Judge's Court reopened on the 21st June last and the appellants tendered security on the 2nd July. The application for its acceptance was posted to the 12th July, when the appellants did not appear either in person or by pleader. The Subordinate Judge was not satisfied with the security tendered and rejected it. It is alleged that a representation was made that sufficient security would be given, but it is not stated when and by whom. We are not satisfied that the petitioners did what they were bound to do, *viz.*, to attend the court on the day on which the sufficiency of the security was inquired into either in person or by pleader. Nor did they tender other security at once. We have no power to extend the time granted after the expiration of the period mentioned in the original order. Section 549 is imperative. See *Haidri Bai* v. *East Indian Railway Company* (1).

We dismiss this petition with costs.

* Civil Miscellaneous Petition No. 411 of 1887.

(1) 1 A. 687.

11 M. 191.

1887 SEP. 30. — APPELLATE CIVIL. — 11 M. 191.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

MADHAVAN (*Plaintiff*), *Appellant v.* KESHAVAN AND OTHERS (*Defendants*), *Respondents.** [30th August and 30th September, 1887.]

Civil Procedure Code, Section 13, *expl. V.*

Where the uraima right over a certain devasam was vested in five trustees representing different illams, and a suit was brought by one of the trustees to recover certain property alleged to have been illegally alienated by three other trustees to a stranger and dismissed :

Held, that the decree in such suit was a bar to a second suit brought for the same purpose by the fifth trustee, who had not been a party to the former suit, on the ground that he must be deemed to claim under the plaintiffs in the former suit within the meaning of Section 13, expl. v of the Code of Civil Procedure.

[D., 28 M. 457 (465, (F.B.) = 14 M.L.J. 404.]

APPEAL from the decree of W. P. Austin, District Judge of North Malabar, confirming the decree of D. D'Cruz, District Munsif of Chavacherry, in suit No. 199 of 1883.

The plaintiff, one of five uralars or trustees of a devasam, sued [192] to recover certain land which had been alienated by the other four uralars, defendants Nos. 1 to 4, to defendant No. 5.

Defendant No. 5 pleaded, *inter alia*, that the suit was barred by Section 13 of the Code of Civil Procedure, inasmuch as a former suit, to which plaintiff was no party, brought against him for the same purpose by another of the trustees, had been dismissed.

The lower courts held that the present suit was barred.

Plaintiff appealed.

Sankaran Nayar, for appellant.

Srinivasa Rau, for respondents.

The Court (KERNAN and PARKER, JJ.) delivered the following

JUDGMENT.

It appears to us that the uraima right over the devasam was a private right vested in certain illams, one uralar representing each illam. All of the illams except that of plaintiff were represented in the litigation with defendant No. 5 in 1881 (suit No. 337 of 1881 on the file of the Chavacherry District Munsif's Court). At that time plaintiff's adoption was not recognized by the other uralars, but he succeeded in establishing it in December, 1882. The uralars are trustees and have no personal pecuniary interest in the devasam or its properties.

There are no grounds for supposing that the litigation of the uralars with fifth defendant was not *bona fide*, and therefore we think that the matter is *res judicata* under Section 13, cl. 5, of the Civil Procedure Code.

It might of course be open to plaintiff to sue to set aside the decree on the ground of fraud and collusion, but that is not the cause of action put forward in the present plaint, and from the attitude of his co-uralars in this suit it might be gathered that they were now in the same interest with the plaintiff and making another attempt to upset a decree given against the devasam in previous litigation.

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* Second Appeal No. 710 of 1886.

1887 SEP. 30. — APPELLATE CIVIL. — 11 M. 191.

K. P. Kanna Pisharody v. *V. M. Narayanan Somayajipad* (1) does not apply. In that case there were several co-owners of a sabha; only some of them sued in respect of the property, and the rest of the co-owners, who were living, were not parties to the suit. Objection was taken on that ground and the objection was allowed. No objection was made in suit No. 337 of 1881 by reason that plaintiff's illam was not represented in the suit. We have no [193] doubt, however, that plaintiff's illam was sufficiently represented by the uralars of the other illams, who had a common interest with plaintiff's illam.

The second appeal, therefore, fails and must be dismissed with costs.

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11 M. 193.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

MADAYYA (*Plaintiff*) v. YENKATA (*Defendant*).* [15th July, 1887.]

Civil Procedure Code, Section 266—Attachment—Standing crops—Immovable property.

Standing crops are, for the purposes of the Code of Civil Procedure, immovable property.

[F., 15 A. 394 (395)=13 A.W.N. 145; 1 N.L.R. 121 (124); Appr., 14 A. 30 (34)= 11 A.W N. 417; R., 22 C. 877 (888); 7 C.L J. 152: 16 C.W N. 540 (547)= 14 C.L.J. 515=11 Ind.Cas. 729; 11 C.P.L.R. 89 (90).]

CASE stated by T. Sami Rau, District Munsif of Kurnool, under Section 617 of the Code of Civil Procedure as follows:—

"In Small Cause Suit No. 120 of 1886, the plaintiff applied for execution of the decree and asked standing crops to be attached. I objected to order their attachment, saying that they must be regarded as immoveable property. The plaintiff's pleader urged that they were moveable property, that they had always been sold as such, and that this had been the practice of this Court. There is no ruling of the Madras High Court either way, and there are conflicting decisions of the other High Courts. I have the honor, under Section 617 of the Code of Civil Procedure, to submit for decision the question whether standing crops are moveable or immovable property for the purposes of the Code of Civil Procedure."

"As standing crops adhere to the land, they must, under the General Clauses Act, be considered as immoveable property. In the same way, fruits upon growing trees must be considered as immoveable property as they form part of the trees which are attached to the land, and they become moveable property only when they are picked from the trees, but the Allahabad High Court have held, in *Nasir Khan, in re* (2), that fruits adhering to trees are moveable property. Under this ruling ears of corn adhering to standing stalks [194] can be considered as moveable property. The Registration Act expressly declares that growing crops are moveable property; but this is for the purposes of registration only. It has been held in *Pandah Gazi* v. *Jennuddi* (3) that they are immoveable property for the purposes of the Limitation Act, and again they have been held in *Sadu* v. *Sambhu* (4), to be immoveable property for the purposes of the Civil Procedure Code also. It is argued for the plaintiff that, if crops be regarded as immoveable property, there will be a great deal of loss to parties in regard to their attachment. The following circumstances have been urged. Under the rules for

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* Referred Case No. 5 of 1887.

(1) 3 M. 234. (2) 3 A. 168. (3) 4 C. 665. (4) 6 B. 592.

the attachment and sale of immoveable property prescribed by the Civil Procedure Code and by the High Court, a long time elapses between the date of attachment and the date of sale, and the period is generally three months. Certainly, the crops cannot remain on the ground so long a time without being spoiled. Agricultural operations must be carried on to make them grow properly, such as weeding, &c. They must be protected from being browsed by cattle and from being trodden upon by cattle and men. When they are in ear, men must be employed to watch them and to prevent them from being removed by thieves, or eaten by birds, &c. In the case of wet crops they must be watered, and a great deal of work must be done. There is no provision in the Code of Civil Procedure or in the High Court Rules to get this work done, and even if there is a provision, it is almost impossible to get it done satisfactorily and without causing loss. Sometimes a crop is asked to be attached when it is a month old. In that case, it has to be taken care of till it is brought to sale, which will be under the rules about three months after. An enormous cost will entail upon parties to protect the crops for so long a time. Sometimes attachment is asked for when the crop is in ear and is fit to be reaped in a week or fortnight. If crops are attached as immoveable property, they must be kept on the ground until they are brought to sale and will be spoiled if they are retained so long. The judgment-debtor cannot be allowed to interfere with the crops, for, if he does so, he will neglect to take care of them, and they will be spoiled. Moreover, the moment the attachment is made, he will cease to look after the crops, thinking they will be sold. Whereas, if they are sold at once, they will fetch a good price. It is **[195]** impossible for a Court amin or peon to watch the crops and to take the same care of them as if the owner would take. If they are attached as immoveable property, they cannot be brought to sale immediately under Section 269 of the Code of Civil Procedure, as that section applies to moveable property only. If growing crops be treated as immoveable property, the provision in the Code of Civil Procedure must be altered so as to confer some power on the Courts as in the cases mentioned in Section 269 of the Code of Civil Procedure. It is argued that, in consideration of these difficulties, the legislature could never have intended to class growing crops as immoveable property for the purposes of the Code of Civil Procedure. I may mention other facts in connection with this matter. The town of Kurnool is situated on the banks of the river Toongabadra, and water melons, called kurbuch, are extensively grown in the bed of the river in the hot weather. I have received applications for the execution of decrees in which the water-melon crops have been asked to be attached and sold at once. They cannot be left unsold for more than two or three days after attachment, for either they will be spoiled or stolen. In one case there was objection to the attachment of cholum crop, and about three weeks' time was required to inquire into and decide the objection. There was difficulty in watching the crops for such a long time.

" A. Subba Rau, first-grade pleader, argued as *amicus curiæ* whether Section 503 of the Code of Civil Procedure applied to the attachment of crops. I ruled that, under that section, I had to submit nomination of receiver to the District Court for sanction in each suit, and that it would tend to delay and to cause loss to parties. I do not think it advisable to apply Section 503 to cases of attachment of crops in execution of decrees. My opinion is that, under the definition of immovable property given in the General Clauses Act, growing crops must be held as immovable property.

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At the same time, I beg to suggest the advisability of altering the provisions of the Code of Civil Procedure relating to attachment and sale of standing crops if they are to be treated as immoveable property."

Counsel did not appear.

The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

JUDGMENT.

On referring to the cases cited by the District Munsif, we do not find that there is any conflict. The case of [196] *Nasir Khan* v. *Karamat Khan* (1) referred to by a Full Bench of that Court in *Umed Ram* v. *Daulat Ram* (2) was apparently distinguished, on the ground that it was not held in the former case that the trees themselves but that the fruit of the trees (for the wrongful taking and removal of which compensation was claimed) constituted movable property.

There is a direct decision in *Sadu* v. *Sambhu* (3) that the words "immoveable property," as used in the Code of Civil Procedure, include standing crops.

We agree in that conclusion and consider that it may be supported upon the principle indicated in the Full Bench case of the Allahabad Court above cited, *viz.*, that, in the absence of any specific definition of immoveable property in the Code of Civil Procedure, regard is properly had to the General Clauses Act, in which growing crops come within the definition of immoveable property. To the question stated by the District Munsif, our answer is that standing crops are, for the purposes of the Code of Civil Procedure, immoveable property.

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11 M. 196.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

SUBBARAYADU (*Plaintiff*), *Appellant v.* GANGARAJU (*Defendant No.* 2), *Respondent.** [18th July, 1887.]

Regulation XXIX of 1802, *Section* 7—*Karnam in zamindari Village—Title to Office.*

The holder of a karnam's office in a zamindari village being incapacitated, resigned the office in 1863, leaving a minor son, the plaintiff. The brother of the late holder was then appointed to the office, and held it till 1877, when he died. Plaintiff was then nominated by the zamindar, but did not enter on the office. In 1879 the zamindar being dead, defendant No. 2 was appointed by the zamindar's widow and entered on the office:

Held, that under Regulation XXIX of 1802, Section 7, defendant No. 2 being the heir of the last holder was the lawful holder of the office.

APPEAL from the decree of T. Ramasami Ayyangar, Subordinate [197] Judge of Cocanada, reversing the decree of A. F. Elliot, District Munsif of Cocanada, in Suit No. 324 of 1884.

Suit to recover the office of karnam in a zamindari village.

The facts appear from the judgment of the Court (COLLINS, C. J., and MUTTUSAMI AYYAR, J.).

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* Second Appeal No. 662 of 1886.

(1) 3 A. 168. (2) 5 A. 564. (3) 6 B. 592.

Mr. *Norton*, for appellant. 1887
Ramasami Mudaliar, for respondent. JULY 18.

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11 M. 196

JUDGMENT.

The plaintiff's father resigned the office of karnam in 1863, being incapacitated, the plaintiff then being a minor. The plaintiff's uncle was then lawfully appointed and continued to hold the office until 1877, when he died. The plaintiff was nominated by the zemindar, the husband of defendant No. 1 in 1877, but never took upon himself the duties of the office. The zemindar died in 1877. Defendant No 2, the son and heir of the late karnam, was appointed in 1879, and defendant No. 1 has held the office since that year. It seems clear that under Regulation XXIX of 1802, Section 7, the heir of the preceding karnam must be chosen. Defendant No. 2 was the heir of the late karnam and is the lawful holder of the office.

The second appeal must be dismissed with costs.

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11 M. 197.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

NAGAMMA (*Plaintiff*), *Appellant v.* SUBBA AND OTHERS (*Defendants*), *Respondents*.* [22nd August, 1887.]

Civil Courts Act (*Madras*), 1873—*Jurisdiction*—*Suit for partition and mesne profits*—*Civil Procedure Code*, *Section* 544.

N. sued S. and others for partition of a share of certain land and claimed mesne profits from other defendants who were tenants of the land. S. obtained a decree by consent for her share and a sum of 99 rupees was decreed to her against the tenants for mesne profits. Against this decree the tenants appealed.

The Subordinate Judge finding that the subject-matter of the suit, the land of which partition was claimed, exceeded the jurisdiction of the Munsif, reversed the [198] decree of the Munsif and directed the plaint to be returned for presentation in the proper Court. It was contended, on appeal to the High Court, that the Subordinate Judge could not set aside the decree against the tenants for mesne profits:

Held that, as the Munsif's Court had no jurisdiction to entertain the suit for partition, it could make no decree for mesne profits.

[R., 1 C.W.N. 136 (137) ; D., 17 M. 265 (266).]

APPEAL against the decree of Venkata Rangayyar, Acting Subordinate Judge at Ellore, reversing the decree of M. Ramayya, District Munsif of Tanuku, in Suit No. 328 of 1879.

The facts are set out in the judgment of the Court (COLLINS, C.J., and BRANDT, J.).

Subba Rau, for appellant.

Respondents did not appear.

JUDGMENT.

In this case, the plaintiff, one of a large number of agraharamdars, sued for the ascertainment, partition, and delivery to him of his share, and eventually all those who had any interest were made parties to

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* Second Appeal No. 918 of 1886.

1887 AUG. 22. — APPELLATE CIVIL. — 11 M. 197.

the suit. Some of the defendants were sued as in possession as tenants liable to pay rent to the agraharamdars. During the course of the trial, it appears that some amicable arrangement was come to among the agraharamdars between themselves, the result of which was that a decree was made for the plaintiff, without further resistance on their part, for some 7 or 8 acres of land. Decree was also made in her favour for 99 rupees, the value of mesne profits, as against the defendant tenants. Against that part of the decree the latter appealed. In the Lower Appellate Court, it was contended that the value of the entire property exceeded the pecuniary jurisdiction, and that this is so was admitted. On the authority of *Vydinatha* v. *Subramanya* (1), the Subordinate Judge held that the District Munsif had no jurisdiction in the suit, and, therefore, set aside the decree and directed the plaint to be returned to the plaintiff to be presented in the proper Court, ordering the parties to bear their own costs throughout. In this appeal, presented by the plaintiff, it is contended that the Subordinate Judge was wrong in holding that the decision of this Court above referred to applies in the present case, but we can draw no distinction between the one case and the other. The principle is that, where it is necessary to ascertain and decree to a plaintiff a share in undivided property, it is necessary that the Court should have before it, and at its disposal for the purposes of the suit, the whole property, in order to adjudicate upon the claim to [199] the share claimed, and, if the claim is allowed, to separate and give possession of such share, and this is necessary no less in the case before us than in a suit for partition of family property.

It is then urged that in any case it was not open to the Subordinate Judge to set aside the decree in so far as it awarded mesne profits to the appellant, the only parties to the appeal being the tenants on the one side and the plaintiff and the decree-holder on the other. A reference is made to Section 544 of the Code of Civil Procedure and certain cases bearing upon this section were cited, but none of the authorities referred to touch the question—What is to be done when neither the Court of first instance nor the Court of appeal has jurisdiction to try the case at all? It appears to us clear that the Subordinate Judge could not, even to the limited extent contended for, support the decree in favour of the plaintiff. If the Court of first instance had no jurisdiction to make a decree for the appellant's share, it had no jurisdiction to make a decree for mesne profits, the one being, for the purposes of this suit, subsidiary to, and dependent on, the other; and if the Court of first instance had no jurisdiction, the course adopted by the Lower Appellate Court was the proper course for it to adopt.

We dismiss the appeal without costs, no one appearing for the respondents.

(1) 8 M. 235.

11 M. 199=2 Weir 628.

1887 JULY 6.

APPELLATE CRIMINAL.

11 M. 199= 2 Weir 628.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

VENKATA *v.* PARAMMA.* [6th July, 1887.]

Criminal Procedure Code, Section 488—Maintenance order passed on report of Subordinate Magistrate, illegal.

Under Section 488 of the Code of Criminal Procedure a Magistrate of the first class may, upon proof of neglect or refusal by a person having sufficient means to support his wife, order such person to make a monthly allowance for the maintenance of his wife: a First-class Magistrate having referred a complaint by a wife for maintenance to a Subordinate Magistrate to take evidence and report upon the facts [200] stated in the petition of complainant, passed an order upon such report in the absence of the husband for payment of maintenance:

Held, that the order was illegal.

[R., 29 P.R. 1905=90 P.L.R. 1905=2 Cr.L.J. 421.]

APPLICATION under Sections 435 and 439 of the Code of Criminal Procedure to revise the order of F. D. O. Wolfe-Murray, Acting Principal Assistant Magistrate of Vizagapatam District, in maintenance case No. 5 of 1887.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C. J., and PARKER, J.).

Mr. *Michell*, for defendant.

Mr. *Subramanyam*, for complainant.

JUDGMENT.

The petition by the complainant was put in on 26th January 1886, and was referred to the Second-class Magistrate for inquiry and report on 28th January. This was irregular, as the Principal Assistant Magistrate was bound to make the inquiry himself. The defendant expressed to the Second-class Magistrate his willingness to pay to the complainant the maintenance fixed by the Court on his share of the property, and the order of 22nd January 1887 was apparently passed on this report.

There is nothing to show that defendant had even an opportunity of appearing before the Principal Assistant Magistrate, and the record would appear to show that he had no such opportunity.

We set aside the order and direct the Principal Assistant Magistrate to hear the case himself without further delay.

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11 M. 200.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

RAMASAMI (*Defendant*), *Appellant* *v.* RAJAGOPALA (*Plaintiff*), *Respondent.*† [8th August, 1887.]

Rent Recovery Act, 1865, *Section 4—Patta—Uncertainty as to amount of rent.*

An agreement in a patta to pay whatever rent the landlord may impose for any land not assessed which the tenant may take up is bad for uncertainty.

[D., 13 M. 271 (272); 27 M. 332=13 M.L.J. 429.]

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* Criminal Revision Case No. 138 of 1887.

† Second Appeal No. 786 of 1886.

1887
AUG. 8.
APPELLATE CIVIL.
11 M. 200.

APPEAL from the decree of S. T. McCarthy, Acting District Judge [201] of Chingleput, reversing the decree of C. M. Mullaly, Acting Sub-Collector of Chingleput, in a revenue suit.

The facts appear from the judgment of the Court (KERNAN and BRANDT, JJ.).

Mr. *Norton* and *Ramachandra Rau Saheb*, for appellant.

Mr. *Subramanyam*, for respondent.

JUDGMENT.

The Judge held that the condition that if defendant took up (presumably without permission) land not assessed, he should pay whatever tirva the sirkar (landlord) should fix, was bad for uncertainty, and that the patta tendered containing such clause was bad. In this opinion we agree. The tenant accepted for thirteen years a patta containing a similar condition; but we do not consider that the tenant was thereby precluded from objecting that the clause rendered the tendered patta illegal, because as the latter stands now it is uncertain what rent the landlord might fix, and the tenant, if bound, might be liable for an unreasonable rent beyond the value of the land.

This appeal is dismissed with costs.

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11 M. 201.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

THE MADRAS DEPOSIT AND BENEFIT SOCIETY (*Plaintiffs*) *v.* PASSANHA (*Defendant*).* [25th July, 1885.]

Transfer of Property Act, Section 69 (1)—Mortgage—Invalid condition as to notice of sale—Sale valid.

In a deed of mortgage of property, situate within the town of Madras, it was provided that a power of sale might be exercised after fifteen days' notice. The property was sold:

Held that, (Section 69 of the Transfer of Property Act, 1882, requiring three months' notice before such a power of sale shall be exercised,) the condition as to notice was invalid, but that the sale was nevertheless valid.

CASE stated, under Section 69 of the Presidency Small Cause Courts Act, 1882, by J. W. Handley, Chief Judge of the Madras Court of Small Causes.

[202] The case was stated as follows:—

"This was a suit to recover Rs. 1,149-2-2, being the balance of principal and interest on a mortgage bond, dated 24th August 1883, after giving credit for the sale-proceeds of the mortgaged premises and for payments made by, and on behalf of, defendant. The mortgaged property had been sold in execution of a power of sale contained in the mortgage deed. The mortgage deed is filed as exhibit C.

At the hearing, defendant's attorney raised the preliminary objection that the power of sale in the mortgage deed is invalid as it provided for only fifteen days' notice, whereas the Transfer of Property Act, Section 69, proviso (1), requires three months' notice, and that, therefore, the sale made

* Special Case No. 82 of 1887.

1885 JULY 25. — APPELLATE CIVIL. — 11 M. 201.

under that power was bad and the right to sue for the balance had therefore not arisen. I hold that the power of sale was not invalidated altogether by reason of its providing for notice in contravention of the terms of the Act, but that only the provision as to notice was invalid, and that, notwithstanding that provision, notice in accordance with the Act was necessary; and that, if such notice was not given by Section 69 of the Act, the sale still held good and the mortgagor's remedy was by suit for damages. I, therefore, overruled the preliminary objection.

"Defendant's attorney requested me to state a case upon the point under Section 69 of the Presidency Small Cause Courts Act.

"The following question is, therefore, submitted for the opinion of the High Court:—Is the fact that the power of sale in question in this suit does not provide for such notice as is required by Section 69 of the Transfer of Property Act a bar to the present suit? I may mention that it is alleged on behalf of plaintiff that three months' notice was in fact given."

Mr. *Michell*, for plaintiffs.

Grant & Lajng, for defendant.

The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

JUDGMENT.

The question referred to us is whether the fact that the power of sale in question in this suit does not provide for such notice as is required by Section 69 of the Transfer of Property Act is a bar to the present suit.

The facts are that, under a mortgage instrument, dated 24th August 1883, there was a power of sale conferred on the mortgagee. Such a power is valid in the case before us, as the property mort-[203]gaged is situated in the Presidency town—Section 69 (*c*); but it is contended that the provision which the mortgage instrument contains, namely, that fifteen days' notice should be given of intention to sell before the power of sale is exercised, invalidates the sale.

It is conceded that, if there were no provisions at all for any notice of intention to sell, contained in the instrument, the sale might perhaps be upheld. We fail, however, to see any distinction between a case in which there is no provision as to the length of notice to be given and a case in which the notice provided to be given is insufficient in law.

In both cases, Section 69, sub-section 1, of the Transfer of Property Act, should be read as if it formed part of the contract. The proviso in regard to notice is not a condition, which, as suggested, either suspends or defeats the power to sell, but contains only a direction in regard to its exercise, the infringement of which affords a ground for damages, if any, to the person or persons damnified by the sale. Nothing can be clearer than the terms of the proviso, which express an intent to protect the purchaser and to confine the remedy of the mortgagor to a suit for damages when due notice is not given.

It was suggested that the words "such a power" in Clause 2, Section 69, should be taken to mean a power exercised after three months' notice, but we are of opinion that the words "such a power" refer simply to the power of sale mentioned in the first clause of the section, and have no reference whatever to the period for which notice of sale is to be given.

Our answer then to the question stated is that the present suit is not barred by reason of the power of sale contained in the instrument of

mortgage, providing a period of notice shorter than that prescribed by Section 69 of the Transfer of Property Act.

The costs of the plaintiffs in this reference will be borne by the defendant.

Solicitors for the plaintiffs : *Barclay & Morgan.*

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11 M. 204.

[204] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

VENKAYYA (*Defendant No.* 3), *Appellant v.* NARASAMMA (*Plaintiff*), *Respondent.** [5th December, 1887.]

Civil Procedure Code, Section 13—Res judicata—*Issue decided in former suit, in which parties were rival defendants claiming under different titles.*

B. sued L.N. and P.V. to recover certain property claimed under a nuncupative will of his father N. P.V. denied the will and alleged that the property was ancestral and had vested in him by survivorship. L.N. set up title to the property under a will in writing executed by N. and denied the title both of B. and of P.V. The question whether P.V. was divided or not from N. was tried. It was found that the will in writing was valid, that P.V. was divided, and that B's title was not proved. In a suit by L.N. against P.V. to recover certain land granted to her by the will executed by N. :

Held, that the question whether P.V. was divided from N. was *res judicata* under Section 13 of the Code of Civil Procedure by reason of the decision in the former suit, although in that suit P.V. and L N. were both defendants.

[F., 15 M. 264 (265); 16 Ind. Cas. 80 = 103 P.R. 1912 = 188 P.L.R. 1912 = 157 P.W.R. 1912; R., 14 M. 324 (327); 33 M. 112 = 5 Ind. Cas. 760 (761) = 7 M.L.T. 89; 79 P.R. 1905.]

APPEAL from the decree of T. Ramasami Ayyangar, Subordinate Judge at Cocanada, confirming the decree of A. F. Elliot, District Munsif of Cocanada, in suit No. 373 of 1883.

The facts of this case appear sufficiently, for the purpose of this report, from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ).

Bhashyam Ayyangar, for appellant.

Subba Rau, for respondent.

JUDGMENT.

The respondent's mother, Lakshmi Narasamma, the original plaintiff, instituted the present suit to recover certain property under a will left by her late father, Narasayya. The appellant, Venkayya, resisted her claim on the grounds that he was the undivided nephew of Narasayya and that the property in suit was ancestral property. The Lower Courts have found that the will set up by the respondent's mother is true and that the contention that the appellant was undivided could not be set up in this suit, he being concluded by the decision in Original Suit No. 314 of 1878.

[205] It is urged, in second appeal, that the appellant and the respondent's mother were only defendants in that suit and that the adjudication on the question of division or non-division as between the then

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* Second Appeal No. 397 of 1886.

plaintiff and the present appellant was not material to the decision in that suit. 1887 DEC. 5.

Original suit 314 of 1878 was brought by Bapanamma, another daughter of Narasayya, against the respondent's mother, the present appellant, and others, to recover certain property on the ground that it had been orally devised to her by her father. Her claim was resisted both by the present appellant and by the respondent's mother, the former alleging, *inter alia*, that the property then in suit was ancestral and that Narasayya was his undivided uncle; and the latter that a written will had been left by her father and that the lands claimed in that suit had not been devised to the then plaintiff, that the nuncupative will or oral testamentary disposition of property was untrue. She further pleaded generally that the present appellant was in no way entitled to the property. APPEL-LATE CIVIL. 11 M. 204.

It is clear that, although the appellant and the respondent's mother were co-defendants in the former suit, their contentions were hostile to one another, the daughters, on the one hand, claiming to take under their father's will; whilst the nephew, on the other hand, denied both the *factum* of the will and its validity on the grounds that there was a subsisting coparcenary and that the property was ancestral. The second issue recorded in the previous suit, namely, whether the appellant before us was divided from Narasayya was material to the joint contentions of the plaintiff and the present respondent's mother. Our attention was also drawn to the fact that the respondent's mother produced certain pattas standing in the name of her late father which were relied on by the District Munsif in his judgment as some evidence of partition.

Upon these facts, we are of opinion that the Subordinate Judge was right in holding the appellant to be debarred from raising in the present suit the question of division or non-division and that the appellant is concluded by the finding on that issue in the previous suit.

Two objections are urged in appeal against that decision by the appellant's pleader. The first is that, inasmuch as the former suit was dismissed and there was a finding that the oral will set up by the plaintiff in that suit was not true, the finding that **[206]** Venkayya was divided nephew was not necessary to the decision in that suit. The second objection is that, as the present appellant and the respondent's mother were only co-defendants, there was no trial as between them with reference to that issue.

As to the first objection, it is provided by Section 13 of the Civil Procedure Code that no Court shall try . . . . any *issue* in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties "litigating under the same title."

It was incumbent on the plaintiff in the former suit to show, before she could claim a decree, that there was an oral will, as alleged by her, that her father was divided from his brother and that there was no written will, or that the oral will prevailed against the written will; and we cannot say that the issue as to division or non-division was not material to the ground of claim in that suit, nor are we prepared to adopt the suggestion that it was not material to the decision actually recorded in that suit, for the Subordinate Judge based his decision in appeal on the grounds that the written will was proved, that the oral will was not proved, that division was proved, and that the written will was valid, and that the property then in suit was not devised under it to the then plaintiff.

1887 DEC. 5. — APPELLATE CIVIL. — 11 M. 204.

As to the second objection, it is not disputed that, although a plaintiff and a defendant may have been co-defendants in a former suit, a matter in dispute between them in a subsequent suit may have formed the subject of active controversy in the former suit so as to preclude them from raising the same question in the subsequent suit.

In the case before us, the question whether the respondent's mother's father and the appellant were divided or undivided was a matter directly and substantially in issue in the former suit, regard being had to the title then litigated as between the appellant and the respondent's mother, and it is also in evidence that the latter took an active part in making good her contention by producing in evidence documents which were used as evidence of partition.

We are of opinion then that the position of the respondent's mother in the former suit, though formally defendant in that suit, was not that of a party taking no active part in the contest between the then plaintiff and the appellant before us.

[207] As to the contention that the finding in the former suit against the truth and validity of the oral will was sufficient for the dismissal of that suit, there is nothing before us to show that the claim was disallowed on that ground only. In *Krishna Behari Roy* v. *Brojeswari Chowdranee* (1), the Judicial Committee of the Privy Council observed that the adjudication on the question of adoption in a previous suit concluded the party claiming to be adopted in a subsequent suit, although the decision in the former suit proceeded on the finding that a patni lease granted by the mother of the plaintiff was not in excess of her powers as a widow, and although the determination that the adoption was true was not necessary to the dismissal of the claim, though it would certainly be material to the ground of claim.

We are, therefore, of opinion that this second appeal must fail, and we dismiss it with costs.

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11 M. 207 = 12 Ind. Jur. 257.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

VENKATACHALAM (*Plaintiff*), *Appellant v.* VENKATAYYA AND OTHERS (*Defendants*), *Respondents.** [6th and 13th September, 1887.]

Limitation Act XIV of 1859, *Section* 1, *Cls.* 9, 10, 16.

The period of limitation applicable under Act XIV of 1859 to suits upon written instruments which could not have been registered under the law in force at the time of execution of such instruments is six years under clause 16 of Section 1 of the said Act.

APPEAL from the decree of W. F. Grahame, Acting District Judge of Cuddapah, confirming the decree of S. Dorasami Ayyangar, District Munsif of Cuddapah, in suit No. 176 of 1884.

This appeal was reheard after an application for review of judgment had been granted on 1st February 1886.

The Acting Advocate-General (Mr. *Spring Branson*) and *Balaji Rau*, for appellant.

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* Second Appeal No. 483 of 1885.

(1) 2 I.A. 283.

Rama Rau, for respondents.

1887 SEP. 13. — APPELLATE CIVIL. — 11 M. 207 = 12 Ind. Jur. 257.

The facts necessary for the purpose of this report, appear from the judgments of the Court (BRANDT and PARKER, JJ.).

JUDGMENTS.

[208] BRANDT, J.—A suit brought upon the bond, dated the 13th April, 1848 (Exhibit III), would not have been barred under the law of limitation then in force, *viz.*, Regulation II of 1802 (Madras) at the time when the bond was renewed under Exhibit vii, *viz.*, the 15th January, 1858.

And in the case of the bond of the 28th May, 1848 (Eexhibit XII) it also was renewed within twelve years from the date on which the sum secured became payable on default of payment of instalments as agreed, *viz.*, the 20th May 1850, the renewed bond (Exhibit IX) bearing date the 26th January 1862, and a suit might, therefore, have been instituted upon the latter bond within three years from the date of the passing of the Act of 1859, *viz.*, the 5th May, 1859.

The question, then, is whether the renewals in 1869 of the debt secured by Exhibit VIII (dated the 17th October 1863), which latter was in renewal of Exhibit III, and in 1867 of Exhibit IX by other documents, being within six years, but in excess of three years, suits upon the bonds of 1862 and 1863 were or were not barred in 1867 and 1869 respectively?

I am of opinion that the six years' rule must be held to apply.

The law as to registration in force up to the 1st January 1865 was contained in Regulation XVII of 1802 (Madras) and Act XIX of 1843. Under that law the only deeds which the registering officer was "authorized and required" to register were deeds relating to real property, wills and authorities to adopt. The bonds (Exhibits VIII and IX) could not then have been registered under the law then in force.

Whether it might be possible to put some other construction upon clauses 9, 10, and 16 of Section 1 of the Limitation Act of 1859 I do not think it necessary to consider. These provisions have been, on several occasions, the subject of judicial decision by this Court—*Gurivi Chetty* v. *P. Aiyappa Naidu* (1), *Y. Venkatachalam* v. *Mala Kasigadu* (2), and we should follow those decisions, unless strong reasons appear for doubting them, and to me no such reasons appear.

A clear distinction was intended to be drawn between suits for money lent and on contracts not evidenced in writing, and suits in which the loan or contract was evidenced in writing, and it [209] would seem that the general rule aimed at was to allow three years in case of the former class of suits and six years in the case of the latter, an exception being, however, made in the case of the latter to this extent that, where the instrument could have been, but was not, registered, or was registered, but not within six months from the date of its execution, the creditor should be in no better position than if he held no security in writing. Section 10 does not expressly deal with the case of writings which could not be registered, but, unless by implication suits on such writings are taken to fall within cl. 16 of the section, a suitor in a suit based upon such an instrument would stand on the same footing as regards limitation as one bringing a suit under cl. 9.

(1) 2 M.H.C.R. 329. (2) 5 M.H.C.R. 68.

1887 SEP. 13. — APPELLATE CIVIL. — 11 M. 207 = 12 Ind. Jur. 257.

It is more reasonable to infer an intention to place the holder of an instrument which he could not register on the footing of the holder of a registered instrument.

The result is that, in my opinion, our decision in second appeal No. 483 of 1885, should be set aside and the decree of the Lower Appellate Court restored, the second appeal being dismissed with costs. I would allow no costs in the matter of this application for review as the exception to the plea of bar by limitation was not fully argued in the second appeal on the point on which we now allow the appeal.

PARKER, J.—I agree with my learned colleague that the debts secured by the renewals of 1869 and 1867 (Exhibits XI, XIV, XV, and XVI) were not barred.

The bonds then renewed were Exhibit VIII executed in 1863 and Exhibit IX executed in 1862, and the question is whether the period of limitation for suits on these bonds was three years or six.

The Limitation Act applicable was Act XIV of 1859 and the bonds viii and ix could not have been registered by virrue of any law or regulation then in force. The period of limitation was, therefore, six years under Section 1, Clause 16.

It was argued by the learned Advocate-General that Act XIV of 1859 made no distinction between loans and loans evidenced by writing, but that the only distinction was between (loans whether in writing or not) and loans of which the registration was compulsory. This view, however, is not in accordance with the rulings of this Court reported at II. Madras High Court Reports, 329 and 401, by which we are bound.

[210] When the appeal was before us for the first time the point was not taken as to what was the right period of limitation calculated under Act XIV of 1859, and hence there was an oversight in assuming that the time was three years as under the present law.

The second appeal must, therefore, be dismissed with costs, but we make no order as to costs in the review.

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11 M. 210.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

TIRUPATI AND OTHERS (*Defendants*), *Appellants v.* NARASIMHA (*Plaintiff*), *Respondent.** [31st August, 1887.]

Civil Procedure Code, Section 43.

A leased certain land to B. The lease expired in 1877. B continued to hold over and refused to accept a fresh lease from A. A sued B in 1882 for mesne profits for three years, but did not claim possession of the land. The suit was dismissed on a preliminary point. A then sued B to recover possession of the land and mesne profits. It was argued that A's claim to the land was barred by Section 43 of the Code of Civil Procedure, because he omitted to claim the land in the former suit for mesne profits:

Held, that the suit was not barred.

[N.F., 5 M.L.T. 220; Appl., 31 M. 405 = 4 M.L.T. 192; R., 5 M.L.T. 105; 78 P.R. 1902 = 137 P.L.R. 1902; 28 P.R. 1907 = 93 P.L.R. 1908 = 140 P.W.R. 1907.]

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* Second Appeal No. 908 of 1886.

APPEAL from the decree of Venkata Rangayar, Acting Subordinate Judge at Ellore, confirming the decree of M. Ramayya, District Munsif of Tanuku, in Suit No. 139 of 1884.

Bhashyam Ayyangar, for appellants.

Rama Rau, for respondent.

The facts appear from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.)

JUDGMENT.

The land in dispute, which is in the appellants' possession, belongs to the respondent. The appellants originally entered into possession under a lease which expired in 1877. They continued, however, to hold over, and refused to accept a fresh lease from the respondent. In 1882 the landlord claimed mesne profits for three years, but did not claim possession of the land on the ground that the appellants were liable to be evicted. The District [211] Munsif, who tried the suit of 1882, considered that he could not adjudicate upon it until the respondent set aside a lease granted by his uncle for a term of 25 years, and which the appellants then contended was binding upon the respondent. The latter then brought the suit, out of which this second appeal arises, to recover possession of the land and mesne profits for five years, namely, Bahudhanya, Pramadi, Vikrama, Vishu and Chitrabhanu, at the rate of Rs. 25 per annum. The Courts below disallowed the claim to mesne profits for the year Bahudhanya as barred by limitation, and in other respects passed a decree in favour of the respondent. Two questions are argued in appeal. The first of them is that the respondent's claim to possession of the land is barred by Section 43 of the Code of Civil Procedure, inasmuch as he omitted to include that claim in the suit which he instituted in 1882 to recover mesne profits for three previous years. It is urged that, if the former suit had been instituted for the recovery of the land and if the respondent omitted to claim mesne profits, which had then accrued due, he could not again be permitted to institute a second suit for the recovery of such mesne profits, and that the case before us is only its converse. Reliance is placed on *Debi Dial Singh* v. *Ajaib Singh* (1). In that case the defendants interfered with the plaintiff's possession of certain trees and wrongfully took their fruit at the same time, *viz.*, on the 19th June 1879, and it was held that the claim to mesne profits was one which the plaintiffs were bound to have included in the suit for possession of the land on which the trees stood, and that both claims arose out of the same wrong or cause of action. In the case before us it is argued by the appellants' pleader that, when a tenant holds over in opposition to the landlord, the latter is under an obligation to eject him at once and has not the option of suing simply for mesne profits on the ground of adverse occupancy until either the tenant gives up possession or he desires to eject him; but in applying Section 43, it should be remembered that there is a distinction between splitting of the same cause of action into two or more suits and instituting different suits upon distinct causes of action. Though it is true that claims, such as those mentioned in the illustration to Section 43, are referable to the same cause of action on the ground that, when the rent remains unpaid for several years, the debts due, though consisting of several items, are so connected [212] as to form one entire demand, yet it cannot be held that, when the causes of action are distinct and independent, the plaintiff is bound to unite all the claims founded

(1) 3 A. 543.

1887 AUG. 31. — APPELLATE CIVIL. — 11 M. 210.

upon them in one suit. We are of opinion that the suit to recover mesne profits and the suit to eject are not parts of a claim founded on the identical cause of action within the meaning of Section 43, and that if mesne profits are alone claimed in the first suit as damages due for adverse occupancy, a second suit can be maintained to recover possession of the land.

It was held in *Monohur Lall* v. *Gouri Sunkar* (1) that a plaintiff suing for possession of land was not precluded from maintaining a second suit for mesne profits. Although that case was decided with reference to Act VIII of 1859, we do not consider that the difference in the language of Section 43 of the present Act and Sections 7, 9 and 10 of Act VIII of 1859 warrants the appellants' contention. The only alteration consists in the substitution of the words "which the plaintiff is entitled to make" for the words "arising out of the cause of action." It would be preposterous to say, as is suggested for the appellants, that, assuming that the respondent succeeded in the former suit and obtained a decree for mesne profits, he would still be precluded from claiming possession of the land. The first contention must, therefore, be overruled. As to the second contention, it is conceded by the respondent's pleader that the claim to mesne profits due for the year Pramadi is barred, and the decree appealed against must be modified by diminishing the amount allowed by the Judge for mesne profits by Rs. 25. As to the mesne profits claimed for the other three years, the question of limitation does not arise, inasmuch as they accrued due within three years prior to the date of the suit. In the former suit there was a refusal to adjudicate upon the rerpondent's claim to mesne profits claimed for Vikrama, but whether the refusal was right or wrong the claim is not barred by Section 13 as there was no adjudication on the merits. Upon the facts found, we are of opinion that the appellants must be taken to be trespassers or in possession in opposition to their landlord, and that they are not entitled to any notice. We modify the decree of thc Lower Appellate Court as indicated above and confirm it in other respects. The appeal has sustantially failed, and we direct that the appellants do pay the respondent's costs in this Court.

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11 M. 213 = 12 Ind. Jur. 217 = 12 Ind. Jur. 384.

[213] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KUMARA (*Plaintiff*), *Appellant v.* SRINIVASA (*Defendant*), *Respondent.**
[28th October, and 20th December, 1887.]

Evidence Act, Section 92—*Civil Procedure Code, Section* 317.

By an agreement in writing, A, after reciting that he bid for certain property sold in execution of a decree benami for B and paid the deposit amount into Court for B and that B paid the balance, promised to convey the property to B. In a suit by B to recover the property from A:

Held that, under Section 92 of the Evidence Act, B was not debarred from proving that A bought the property for himself and not benami for B.

[F., 33 M. 159 = 5 Ind. Cas. 754 (755) = 7 M.L T. 81.]

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* Second Appeal No. 87 of 1887.
(1) 9 C. 283.

APPEAL from the decree of J. Hope, District Judge of South Arcot, confirming the decree of Appavayyar, District Munsif of Chidambaram, in Suit No. 559 of 1885.

1887 DEC. 29.

APPELLATE CIVIL.

11 M. 213 = 12 Ind. Jur. 217 = 12 Ind Jur. 384.

The plaintiff sued to compel the defendant to execute to him a conveyance of certain property and to recover the same and mense profits. He alleged in his plaint that defendant bought the land at a Court-sale and promised to convey the same to plaintiff. The plaintiff filed the following agreement (Exhibit A) :—"In the Court-sale (held) in Suit No. 275 of 1881 on the file of District Munsif's Court at Chidambaram, I bid for the property, which is the subject of sale, for Rs. 771, for you as a name-lender, received from you Rs. 200, the deposit money, on the date of sale, and paid for you. As the balance of Rs. 571, after deducting this, was paid by yourself in Court this day, I shall obtain the sale-certificate for the said property as soon as the sale is confirmed, sell it to you and put in a petition to the Court to deliver the said property to you. Thus was this agreement executed by me out of my consent."

The Munsif, from the terms of Exhibit A, held that the suit was really one to recover property from a certified purchaser contrary to the provisions of Section 317 of the Code of Civil Procedure, and dismissed the suit.

[214] *Subramanya Ayyar*, for appellant.

Bhashyam Ayyangar, for respondents.

The further facts necessary, for the purpose of this report, appear from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

The case set forth in the plaint is that defendant really intended at first to purchase the land for himself and borrowed Rs. 200 of plaintiff for that purpose in order to make the deposit required by law; that defendant did bid and make that deposit on his own account, but that, when he afterwards found himself unable to complete the purchase, he executed Exhibit A to the plaintiff, asking plaintiff to pay the balance of the purchase money into Court and contracting on his part to convey the property to plaintiff on confirmation of the sale.

The recitals of Exhibit A are no doubt inconsistent with this plaint, but the suit, as it is disclosed in the plaint, is one for specific performance of a promise to convey and is not one against the certified purchaser on the ground that the purchase was made on behalf of the plaintiff.

The allegations made in the plaint may or may not be true, but on the cause of action there disclosed it cannot be said that the suit is barred under Section 317, Code of Civil Procedure. The rule laid down in that section is, we may observe, a rule of procedure only, and there is nothing in itself illegal in one man buying property in the name of another.

The real question is whether plaintiff is precluded by Section 92 of the Evidence Act from giving evidence, which will be inconsistent with Exhibit A. It is urged that a suit based upon the state of facts recited in Exhibit A, would be clearly prohibited under Section 317 of the Code of Civil Procedure, and that plaintiff cannot show that the agreement was of a different character.

In order to determine this question, it is necessary to consider what a contract really is. It is defined in Section 2 (*b*) of the Indian Contract Act as an agreement enforceable by law, and an agreement is defined

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as "every promise and every set of promises forming the consideration for each other."

If the agreement was that expressed in Exhibit A, the promise was to convey the land to the plaintiff. No consideration is alleged, and the writing could add no force to the promise implied by law to convey to a person the property purchased on his behalf.

[215] If, on the other hand, the agreement was that set up in the plaint, the promise was the same, *viz.*, to convey the land to plaintiff; but the consideration for the promise was the payment of Rs. 571 into Court by plaintiff in order to enable defendant to complete the purchase which he had made for himself and save the forfeiture of the deposit money.

In each case, therefore, the promise was the same, *viz*, to convey to plaintiff, but the reason or the consideration for the promise is different. It has been held that Section 92 of the Evidence Act does not prevent a party to a contract from showing that the consideration was different to that described in the contract—*Hukum Chand* v. *Hiralal* (1)—and the Madras High Court has held in *Vasudeva* v. *Narasamma* (2) that Section 92 does not prevent the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different from that alleged.

Here the difference is between the actual promise to pay money into Court and the promise legally implied as the consideration for the promise to convey, but whichever of them was the consideration the terms and character of the agreement, *viz.*, that defendant shall convey to plaintiff, are neither contradicted nor varied.

We think, therefore, that plaintiff is not precluded by Section 92 from bringing evidence in support of the case put forward in his plaint, and we will, therefore, reverse the decrees of the Courts below and remand the suit to the Court of first instance for a decision upon the facts. We do not wish, at the present time, to express any opinion upon the merits. The appellant should have his costs in this and in the Lower Appellate Court, and the costs in the Court of first instance should abide and follow the result.

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11 M. 216 (F.B.).

[216] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Juttice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt and Mr. Justice Parker.

REFERENCE FROM THE BOARD OF REVENUE, UNDER S. 46 OF THE INDIAN STAMP ACT, 1879.* [29th July, 1887.]

Stamp Act, Section 2 (13)—*Specified property—Schedule I, Article* 25—*Declaration of trust—Schedule I, Article* 5 (*c*)—*Agreement.*

An agreement was made between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement:

Held, that the agreement was liable to stamp duty as a declaration of trust under the Indian Stamp Act, 1879, Schedule I, Article 25, and as an agreement under Artcle 5 (*c*):

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* Referred Case No. 2 of 1887.

(1) 3 B. 159. (2) 5 M. 6.

Held, also, that the fund intended to be created under the agreement was not "specified property" within the meaning of Section 2 (13) of the said Act.

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11 M. 216 (F.B.).

CASE referred to the High Court by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.

On 5th February, 1887, this case was referred to the Board of Revenue by the Collector of Madras under Section 45 of the Stamp Act, and stated in the following letter:—

"I have the honor to request that the Board of Revenue will be so good as to favour me with their decision as to the amount of stamp duty chargeable on the enclosed document (styled "memorandum of agreement") presented by Messrs. Dymes and Co. for my adjudication under Section 30.

"The agreement has been made among certain cotton press companies, who mutually agree, among other conditions, to make over certain surplus receipts from their respective presses to a trustee, nominated under the deed, in view to such trustee holding the accumulations of such receipts from time to time until they amount to, at least, Rs. 50,000—after deducting certain expenses—as security for the 'due maintenance and observance of the conditions of the agreement.'

"I feel a doubt as to whether the instrument should be treated as an 'agreement not otherwise provided for by the Act,' so as to be chargeable with a duty of annas 8 under Article 5 (*c*), Schedule I, [217] or as a mortgage under Article 44 (*a*) of the same Schedule with reference to Board's Proceedings, No. 371, dated 4th February, 1884. I am, however, inclined to view it as falling under the latter head 'Mortgage' (*vide* Cl. 13, Section 3, and Article 44 (*a*), Schedule I), inasmuch as it stipulates for certain monies made over from time to time to the trustee by the parties to the deed, being formed into a fund to be held by him as security for performance of the conditions of the engagement entered into. If the Board agree with me in this view, then the question arises as to what amount should be taken as the consideration for the mortgage for the purposes of calculating stamp duty. Although the amount, existing at the time of execution of the document, and over which a right is created thereby at that time in favour of the trustee for the performance of the engagement (*vide* Cl. 13, Section 3), is almost nothing, and will not be so much as Rs. 50,000 for some time hereafter, still, as the document is intended to cover at least that sum ultimately as the amount of security, provided the combination continues till the accumulations reach that figure and does not cease meanwhile owing to the arising of a contingency specified, I would take that sum (Rs. 50,000) as the consideration money, and levy the stamp duty accordingly under Article 21, Schedule I."

The Board's resolution on the letter was as follows:—

"The Collector of Madras forwards a certain document to the Board of Revenue under Section 45 of the Stamp Act, and asks

"(i) under what Article of Schedule I of that Act, it should be stamped; and

"(ii) if at an *ad valorem* rate, on what amount.

"The Board themselves are not unanimous in the matter, and, under Section 46, they beg, therefore, to refer the Collector's questions to the High Court for an authoritatve answer.

"The document evidences an agreement which certain cotton press companies at Tinnevelly have made with each other to prevent underbidding and competition. Its main condition is that all the profits, which each individual member may make, are to be shared in fixed and rigid

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proportions by all; but, incidentally, a proviso has been inserted that, before any distribution of profits at all is permitted, a sum of Rs. 50,000 shall accumulate in the hands of trustees to be held as security for the due maintenance and observance of this agreement."

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

The judgment of the Full Bench (COLLINS, C. J., KERNAN, MUTTUSAMI AYYAR, BRANDT and PARKER, JJ.) was delivered by

JUDGMENT.

COLLINS, C. J —We are of opinion that the instrument in question is a declaration of trust and an agreement not otherwise provided for, and that the intended fund, indicated as security, is in this case not specified property within the meaning of Section 2, clause (13).

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11 M. 218=12 Ind. Jur. 176.

[218] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VENKATARATNAM AND OTHERS (*Defendants*), *Appellants v.* KAMAYYA (*Plaintiff*), *Respondent*.* [21st October, 1887.]

Limitation Act, Section 20—Payment of interest—Prescribed period—Extension of period.

The words "prescribed period," used in Section 20 of the Limitation Act, 1877, mean the period prescribed by the Act.

The contention that only one extension of the period of limitation is given by payment of interest is unfounded.

APPEAL from the decree of J. Thomson, Acting District Judge of Ganjam reversing the decree of M. Visvanatha Ayyar, Acting District Munsif of Berhampore, in suit No. 128 of 1886.

Plaintiff sued to recover Rs. 1,169-2-8 the balance due on an unregistered bond, dated 14th March 1879, payable on the 26th March 1880.

The Munsif dismissed the suit on the ground that, although the suit was instituted within three years from the date of the last payment of interest, such payment was not made within the prescrided period, *i. e.*, three years from 26th March 1880.

On appeal, the District Judge remanded the suit, holding that as each payment of interest had been made within three years of the last preceding it, the suit was not barred.

Defendants appealed.

[219] Mr. *Michell*, for appellants.

Bhashyam Ayyangar, for respondent.

The Court (COLLINS C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

The bond A was executed in 1879 and the date fixed for repayment was the 26th March 1880. Interest was paid in June 1880, in November 1882, and in March 1884. The present suit was brought in 1886. It is

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* Appeal against Order No. 103 of 1887.

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contended by the defendants' counsel that the words "prescribed period" in Section 20, Act XV of 1877, mean the period prescribed in the contract for repayment, and it is also contended by the defendants' counsel that the debt is barred by limitation, that Section 20 of Act XV of 1877 only gives one new period of limitation of three years, and that, as the last payment within the three years was made in November 1882, the debt was time-barred in November 1885.

Section 20 provides that, when interest on a debt is paid before the expiration of the prescribed period, a new period of limitation shall be computed from the time when such payment was made, and there is no doubt but that the prescribed period is the period prescribed by the Act and not by the contract. It is also clear that each payment of interest gives a fresh starting point, and neither the language of the section nor the intention which may reasonably be inferred from it affords ground for the contention that the section has application to only one payment of interest.

We also find the same view had been taken by the High Courts of Calcutta and Bombay—see *Mohesh Lal* v. *Busunt Kumaree* (1) and *Atmaram* v. *Govind* (2).

The claim is, therefore, not barred by limitation, and the appeal is dismissed with costs.

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11 M.220 (F.B.) = 12 Ind. Jur. 49.

[220] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

MANISHA ERADI (*Defendant No.* 2), *Petitioner v.* SIYALI KOYA (*Plaintiff*), *Respondent.** [15th April and 27th November, 1887.]

Civil Procedure Code, Section 622—*Court acting without jurisdiction.*

A Small Cause Court, which had jurisdiction under Act XI of 1865 to entertain suits for rent only where the claim was founded on contract, erroneously assumed that a sub-tenant, by entering on land with notice that his lessor was bound to pay rent to the landlord, became liable by an implied contract to pay the rent to the landlord, and passed a decree against the sub-tenant for the rent in arrears :

Held, that, under Section 622 of the Code of Civil Procedure, the High Court had power to set aside the decree—*Amir Hassan Khan* v. *Sheo Baksh Singh* (I.L.R., 11 Cal., 6) discussed and explained.

[**F.**, 15 M. 372 (376) ; 16 M. 454 (455) ; 12 C.P.L.R. 112 (113); **R.**, 25 A. 509 (524, 525) (**F.B.**) = 23 A.W.N. 104 ; 31 C. 385 (387) ; 27 M. 504 (509) ; 16 Ind. Cas. 933; 2 L.B.R. 333 (340); 24 M.L.J. 205 = 13 M.L.T. 123 = (1913) M.W.N. 101(105); 24 M.L.J. 112 (120) = 13 M.L.T. 60 ; 4 N.L.R. 184 ; **Disapr.**, 17 M. 410 (420) (**F.B.**); **D.**, 22 M. 149 (151).]

APPLICATION, under Section 622 of the Code of Civil Procedure, to set aside the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in Small Cause suit No. 446 of 1886.

On the 16th April 1887, the Court (MUTTUSAMI AYYAR and BRANDT, JJ.) referred the case to a Full Bench.

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* Civil Revision Petition No. 321 of 1886.

(1) 6 C. 340. (2) 11 B. 282.

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The facts are set out in the order of reference, which was as follows :—

" The plaintiff sued one Tharaka Peetikayil Assen Koya as defendant No. 1, the petitioner, Eradi, as defendant No. 2, and another (who was exonerated), for rent claimed as due from the defendants.

" Defendant No. 1 allowed the suit to go *ex parte*. The petitioner did not dispute the liability of defendant No. 1 to pay rent to the plaintiff, but pleaded that, whatever the petitioner's liability to the defendant No. 1, there was no privity of contract between him, the petitioner, and the plaintiff, the petitioner having contracted to pay, and having, as he alleged, paid rent to defendant No. 1.

" The 'pattam-chit,' on which the suit was based, was executed by the defendant No. 1 alone.

[221]" The Subordinate Judge gave decree against defendant No. 1 and the petitioner with costs, on the ground that ' though there was no privity of contract between defendant No. 2 and the plaintiff,' the petitioner must be held to have taken the land on lease from defendant No. 1, with notice of the liability of defendant No. 1 for the rent sued for, and that there was an implied contract on the part of the petitioner to see that the rent payable by defendant No. 1 was paid.

' There is no foundation in law for implying any contract, such as is suggested, but the error is an error of law as applied to the facts of the case.

" It is contended that the proceedings of the Subordinate Judge should be revised on the ground that, but for the mistake in law, the Subordinate Judge had no jurisdiction to make a decree against the petitioner, and we are referred to a case decided by a Divisional Bench of this Court —*Rama* v. *Kunji* (1), which appears to afford some ground for the contention in the case before us ; but having regard to *Amir Hassan Khan's case* (2), decided by the Privy Council, and to a more recent case by this Court —*Jivraji* v. *Pragji* (3)—it appears to us desirable to have an authoritative decision on the point, which is one of importance and of frequent occurrence.

" The questions referred may be stated as follows :—Does a Judge act without jurisdiction, within the meaning of the word 'jurisdiction,' as used in Section 622 of the Code of Civil Procedure, when he passes a decree against a party on the basis of a decision which is the result of an error of law applied to the facts of the case ? Does a Judge in such case ' act illegally or with material irregularity ' in the sense in which those words are used in the said section ?"

Sankara Menon, for petitioner.

The Acting Advocate-General (Mr. *Spring Branson*), for respondent.

On the 22nd November 1887, the Full Bench (COLLINS, C. J., KERNAN, MUTTUSAMI AYYAR, BRANDT and PARKER JJ.) delivered the following

JUDGMENTS.

COLLINS, C. J.—This was a case decided by the Subordinate Judge of South Malabar in a Small Cause suit No. 446 of 1886. **[222]** The decision of the Subordinate Judge is manifestly bad in law, but the question to be decided is—" Has the High Court power to interfere under

(1) 9 M. 375. (2) 11 C. 6. (3) 10 M. 51.

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Section 622 of the Civil Procedure Code?" It becomes, therefore, necessary to consider if the Court has exercised a jurisdiction not vested in it by law, or has acted in the exercise of its jurisdiction illegally, or with material irregularity. The facts of the case, so far as they are material, are as follows. The plaintiff brought a suit against the first and second defendants for arrears of rent. It appears that the first defendant executed a pattam-chit on the 22nd February 1878, agreeing to pay a certain rent to the plaintiff. The second defendant is a sub-mortgagee under the first defendant and is in possession of the property. He has paid the rent agreed upon to the first defendant, who, however, has not paid his rent to the plaintiff. The Subordinate Judge held that, although there was no privity of contract between the second defendant and the plaintiff, the second defendant took the property from the first defendant with notice of the first defendant's liability for the rent, and that there was an implied contract on his part, as the party in beneficial occupation of the property is bound to see that the burden of paying rent is fully discharged, and he, therefore, held that both the first and second defendants were jointly liable for the rent.

It is clear that, under Act XI of 1865 (Small Cause Court Act), Section 6, the Subordinate Judge sitting in a Small Cause Court has jurisdiction to deal with claims for arrears of rent only when the claim was founded on contract—*K. Venkatachala* v. *Narayana* (1). The Subordinate Judge has found that no privity of contract existed between plaintiff and second defendant, but has erroneously assumed, as a matter of law, that there was an implied contract between the parties on the ground that, as the second defendant is in possession, he is bound to see that the burden of paying the rent, which is admittedly due by the first defendant, is discharged. The question then is—"Can the Subordinate Judge by taking an erroneous view of the law (in this case by assuming that a contract existed between plaintiff and second defendant) give himself jurisdiction over the cause?"

No contract, either in fact or in law, existed between the plaintiff and second defendant. Without such contract a Small Cause Court had no jurisdiction to try the cause. Can it be said, there-[223]fore, that, because the Subordinate Judge assumed, as a matter of law, that which in fact had no existence in law, he could give himself jurisdiction over the matter of the suit. I am of opinion that the Subordinate Judge had no jurisdiction to try the cause and that the High Court has power to interfere under Section 622, Civil Procedure Code.

KERNAN, J.—The questions referred to the Full Bench are—" Does a Judge act without jurisdiction, within the meaning of the word 'jurisdiction,' as used in Section 622, Civil Procedure Code, when he passes a decree against a party on the basis of a decision which is the result of an error of law applied to the facts of the case? Does a Judge in such case 'act illegally or with material irregularity' in the sense in which those words are used in the said section?"

The plaint in the referred case did not show on the face of it that the Small Cause Court had jurisdiction to entertain the suit as against the second defendant. In the plaint, it was alleged that the plaintiff made a lease to the first defendant at a certain rent and that a sum specified was due as arrears of rent. It then alleged that the second defendant was a

(1) 4 M.H.C.R. 393.

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mortgagee of the interest of the lessee and alleged that the second defendant thereby became liable to pay the rent claimed. It was further alleged that the first defendant's interest in the lease was set up for sale and was purchased by the third defendant, and rent was claimed against the third defendant. A decree for payment was made against the second defendant. A plaint filed within any limited jurisdiction should on the face of it show the jurisdiction of the Court to entertain the suit. As the plaint did not show jurisdiction in the Small Cause Court to entertain the suit against the second defendant, the Small Cause Judge had no jurisdiction to act, except to have returned the plaint for amendment by omission of the name of the second defendant, or at the hearing to dismiss the suit as against the second defendant, on the ground that he had not jurisdiction to try the case as against the second defendant. The Small Cause Judge acted without jurisdiction in entertaining the suit against the second defendant, and his decree was made without jurisdiction and was a nullity, and it may be revised under Section 622, Civil Procedure Code. The case is entirely different from many cases that might be cited where a Small Cause Court *having jurisdiction* to entertain a suit made a decision erroneous in point of law, but did [224] not exceed its jurisdiction. The above being my opinion in this case, it is not probably necessary to answer the abstract questions referred.

MUTTUSAMI AYYAR, J.—The facts of the case, which has given rise to this reference, are sufficiently stated in the order recorded by the Divisional Bench, by which the reference has been made. The petitioner was the second defendant in the suit, which the respondent instituted on the small cause side of the Subordinate Court at Calicut to recover certain arrears of rent due under a pattam or rent-chit executed by the first defendant in favor of the plaintiff—respondent on the 22nd February 1878. The plaint contained no specific averment as to the liability of the petitioner for the rent due by the first defendant. It appears, however, that the former was a sub-kanamdar and a sub-tenant under the latter to whom the respondent (plaintiff) had previously demised his land on kanam. The petitioner's defence was that he had paid rent to the first defendant due up to the year 1059 or 1884, and that he was ready and willing to pay rent for 1060 and 1061 or 1885 and 1886. The facts found by the Small Cause Judge were that there was no privity of contract between the petitioner and the respondent, but that the former took the property from the first defendant with notice of his liability to pay the rent sued for. He then observed that the obligation to pay rent was correlated to the right of beneficial enjoyment and that there was, therefore, an implied contract whereby the second defendant was bound, as the party in beneficial occupation, to see that "the burden of paying rent which was correlative to the right of beneficial enjoyment was fully discharged." He observed also that the petitioner or sub-tenant "might well have withheld payment of rent to his own landlord, the first defendant, in view of the respondent, the superior landlord, coming upon him for rent." He remarked further that the first defendant had been insolvent for some time and that "it was, therefore, more than under ordinary circumstances the petitioner's duty to see that the janmi's dues on the regular payment, of which his security was dependant, were discharged." In advertence to the foregoing observations, he passed a decree for the rent sued for with costs as well against the petitioner as against the first defendant. It was argued for the petitioner that admittedly there was no contract between him and the respondent, that,

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unless there was a contract, express or implied, the Small Cause Court had no jurisdiction to [225] entertain a suit for arrears of rent, and that under Section 622 of the Code of Civil Procedure the decree should be set aside so far as it relates to the petitioner as one made without jurisdiction. There is no doubt that, under Section 6, Act XI of 1865, which constituted Small Cause Courts, it was not competent to the Subordinate Judge to take cognizance of a claim for arrears of rent in the exercise of small cause jurisdiction unless the claim rested on a contract. This was decided so early as 1869 in *K. Venkatachala* v. *Narayana.* In the case before us there was admittedly no contract by the petitioner to pay rent to the respondent, It is not alleged, and there is no evidence on the record to show, that there was any communication before suit between the petitioner and the respondent in regard to payment of rent, or that the former attorned to the latter by reason of the first defendant's insolvency or any other circumstance. It is clear then that the Subordinate Judge considered that a contract might be implied, as a matter of law, on the part of the sub-tenant to see that rent was duly paid by his own landlord to the superior landlord. The statement by the petitioner that he was willing to pay rent for 1060 and 1061 did not amount, upon the facts found, to an admission of a prior contract, but it was intended to be a promise to obey the decree of Court, if one should be made as the rent due for those years had not been previously paid to the first defendant. The material question then is whether in cases which a Small Cause Court in erroneously implies a contract as a matter of law and over which, but for that error, it would have no jurisdiction, the High Court may interfere as a Court of Revision under Section 622. It is provided by that section that the High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case is decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally, or with material irregularity, and may pass such order in the case as the High Court thinks fit.

Three questions require to be considered for the purposes of this reference in connection with the interpretation which has to be placed on this section, *viz.*, (1) What is the sense in which the term "jurisdiction" is used? (2) What is the scope of the words "act illegally or with material irregularity in the exercise of juris-[226] diction?" (3) How is it to be decided in particular cases that jurisdiction is or is not vested by law?

As to the first question, it is clear that the term "jurisdiction" is used in contradistinction to the "merits," and that it denotes a tribunal designated by the legislature as competent to entertain the case under reference. The course of legislation in India is conclusive on this point.

The first provision of law to which I may refer is Section 350, Act VIII of 1859. In regulating the powers of the appellate Courts it provided that no decree should be interfered with for any error, defect or irregularity not affecting the merits of the case or the jurisdiction of the courts. This is a clear indication that the legislature used in that enactment the term "jurisdiction" in contradistinction to the expression, "the merits of the case."

I shall next refer to Section 35, Act XXIII of 1861. It enabled the late Sadr Court to call for the record of any case decided on appeal by any subordinate Court, in which no further appeal lay to the Sadr Court, and to set aside its decision or pass any other order if the subordinate court appeared, in hearing the appeal, to have exercised a jurisdiction not

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vested in it by law. This is important as the first section in the Code of Civil Procedure, which created a power of revision when no appeal was allowed by law and limited it to cases in which the lower appellate Court exercised a jurisdiction not vested in it by law.

The third provision of law on the subject is Section 622 of Act X of 1877 as amended by Act XII of 1879, Section 92. Section 35 of Act XXIII of 1861 was not only re-enacted but also amplified. The power of revision was extended to three classes of cases, *viz* , (1) when the Court by which the case was decided exercised a jurisdiction which was not vested in it by law; (2) when it failed to exercise a jurisdiction so vested; and (3) when the subordinate court acted in the exercise of its jurisdiction illegally or with material irregularity.

The power was further extended to cases decided by every Subordinate Court in which no appeal lay to the High Court. I do not here refer to Section 15 of the Charter Act, 24 & 25 Vic., c. 104, or to Section 25 of the recent Small Causes Court Act of 1886 as it is not necessary for my present purpose to do so. I may also add [227] that the last clause in Section 622 "acts illegally or with material irregularity" was first introduced by Act XII of 1879.

According to the course of decisions in this Presidency, no doubt was ever entertained as to the sense in which the term "jurisdiction" is to be understood. It was always taken to refer to the *status* of a tribunal as the proper *forum* designated by the legislature to adjudicate on the case under reference. It is evident then that a Court has or has not jurisdiction according as, upon the facts found, the conditions specified in the enactment which gave the jurisdiction are or are not satisfied. Doubt was, however, entertained as to the scope of the words "acted illegally or with material irregularity in the exercise of its jurisdiction." It was said that it was not enough to show that there was an error of law or a material irregularity in the exercise of jurisdiction, but it was necessary to go further and prove that such error or irregularity crept in otherwise than in good faith, or as the result of arbitrary action on the part of the Subordinate Court in a case which it had jurisdiction to decide. It was also urged that, unless the words were so limited, there would practically be a second appeal in every case in which the law does not allow an appeal to the High Court. This view led to the Full Bench decision of this Court in Civil Revision Petition No. 255 of 1882. It was held in that case that, according to the plain meaning of the words, the legislature gave the High Court a discretionary power of revision in every case in which the subordinate Court had jurisdiction and in which there was an error of law, or a material irregularity which affected the decision on the merits. See also the decision in *Pugardin* v. *Moidin* (1). As to the objection that such construction would practically allow a second appeal in every case in which an appeal was not allowed by law, it was held that the power of revision was a discretionary power and that the legislature considered it probably necessary to confer such power upon the High Court in order to prevent injustice in the very large number of small causes finally decided by inferior Courts. In this connection it may not be amiss to draw attention to Section 25 of the recent Mufassal Small Cause Court Act, which gives the High Court a power of revision in order to enable it to see that the decision of the Small Cause Courts is in accordance with law. [228] It is clear then that the words "in the exercise of

(1) 6 M. 414.

its jurisdiction" were taken by the Full Bench to refer to a case over which the subordinate Court had jurisdiction.

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After the Full Bench decision, the scope of Section 622 was considered by the Privy Council in *Amir Hassan* v. *Sheo Baksh Singh*. The facts of that case were shortly these. Raja Amir Hassan Khan sued Theo Baksh to redeem the mortgage of a three-quarter share in the taluk of Khanpur. The suit was commenced in the Court of the Extra Assistant Commissioner in Oude. The questions raised for decision were whether the suit was not barred by Sections 13 and 43 of Act X of 1877, whether the plaintiff was entitled to represent the mortgagors, and whether it was competent to him to claim to redeem the mortgaged property. There was no dispute as to the jurisdiction of the Assistant Commissioner to take cognizance of the suit. He decided the case in favour of the plaintiff therein. On appeal, the District Judge of Sitapur confirmed his decision. As no further appeal was allowed under the Oude Civil Courts Act, the Judicial Commissioner called for the record under Section 622 and reversed the decisions of the Courts below on the ground that they were erroneous. It was argued before the Privy Council that the words "act illegally or with material irregularity in the exercise of its jurisdiction" did not comprehend cases of "erroneous decision." The Judicial Committee upheld this contention and said: "The question then is—Did the Judges of the Lower Courts in this case in the exercise of their jurisdiction act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case, and even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity. The Judicial Commissioner had no jurisdiction in the case under Section 622." What class of cases was then intended to be comprehended by the words "act illegally or with material irregularity" was not explained by the Privy Council in that judgment, but it was distinctly observed that "even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity." As some effect must have been intended to be given to those words, which are to be found in Section 622, the reasonable inference is that the words "act illegally or with material irregu-**[229]** larity" were not considered by the Judicial Committee to presuppose a case as was considered by the Full Bench of this Court which the lower Court had jurisdiction to decide, but in which its decision on the other questions raised therein was tainted with illegality or material irregularity; but that those words were taken to have reference to the mode in which the lower Court came to the conclusion that it had jurisdiction over the case.

If this view is correct, the words "act illegally or with material irregularity" apply to those cases only in which there is an error of law or a material irregularity in the procedure by reason of which the subordinate Court concludes that it has or has not jurisdiction. The majority of the decisions passed in this Presidency, subsequent to the decision of the Privy Council, are in accordance with that view, though it cannot be said that there are no decisions in conflict with it. In *Erajabi* v. *Mayan* (1), a Divisional Bench of this Court set aside in September 1885 the decision of a Village Munsif on the ground that the Village Munsif failed to consider that the suit was barred by limitation. It is difficult to reconcile this

(1) 9 M. 118.

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decision with that of the Privy Council. In *Kunhamed* v. *Chathu*, decided in April 1886, the High Court set aside an order made under Section 315 of the Code of Civil Procedure, directing a refund of the purchase money, on the ground that the judgment-debtor had some saleable interest and that the District Munsif was in error in supposing that in such a case he had power to order a refund. The principle it suggests is that the District Munsif concluded by an error of law that he was competent to order a refund, though, upon the facts found, he was not competent to do so. In *Rama* v. *Kunji* (1), the High Court set aside the decree of a Subordinate Judge dismissing a suit by a pleader to recover his fee and directed him to decide the case on the merits on the ground that he was in error in supposing that a contract in writing was necessary to sustain such suit under the Legal Practitioner's Act, while upon its true construction it was not necessary. I may also refer to *Jivraji* v. *Pragji* (2), *Seshadri* v. *Krishnan* (3), *Sanjivi* v. *Ramasami* (4).

There is no reason then to doubt that the term "jurisdiction" is intended to denote the competent *forum*. There is also no doubt **[230]** that the words, "act illegally or with material irregularity in the exercise of its jurisdiction," must be taken on the authority of the Privy Council, not to comprehend erroneous decision in cases which the subordinate Court has jurisdiction to decide, but to refer to what goes before and to the mode in which the lower Court comes to the conclusion either that it has or that it has not jurisdiction.

As to the third question how is it to be decided whether jurisdiction is or is not vested in a Court by law, it is important to bear in mind that the Civil Courts derive their jurisdiction from general law or a special enactment, and that in the case of a Small Cause Court or any other Court of limited jurisdiction, the jurisdiction must appear upon the facts found to be exercised within the limits prescribed by the enactment which gave jurisdiction. In revision we are no doubt bound to accept the facts as found by the subordinate Court, provided that they are so found upon legal evidence and there is no material irregularity in the procedure, but at the same time we are not bound to accept their errors of law or to overlook any material irregularity affecting their decision on the question of jurisdiction. The decision in *D. Tilakchand* v. *B Govind Shet* (5) takes the same view of the scope of Section 622.

The law then as now applicable may be thus formulated. In cases in which the subordinate Court exercises a jurisdiction which is not vested in it by law, or fails to exercise a jurisdiction which is vested in it by law, or assumes or declines jurisdiction in consequence of some error of law or of some material irregularity in its procedure, the High Court may interfere under Section 622. In cases in which, upon the facts found by the subordinate Court that Court has jurisdiction according to law and there is no material irregularity in its procedure affecting the question of jurisdiction, the High Court is not competent to interfere, though its decision on the merits or on any other preliminary question is erroneous in law.

Applying these principles to the case before us, I consider that it is one in which it is competent to us to interfere under Section 622. The fact found by the Subordinate Judge is that there was no contract and there was therefore no privity of contract between **[231]** the

(1) 9 M. 375. (2) 10 M. 51. (3) 8 M. 192. (4) 8 M. 494. (5) 9 B. 82.

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petitioner and the respondent. This being so he had no inherent jurisdiction to entertain the suit for arrears of rent against the petitioner. It must also be observed that, as a matter of law, no contract can be implied on the part of a sub-tenant to see that his own landlord punctually pays the rent due by him to his superior landlord, and on default to pay it himself. In implying such a contract the Subordinate Judge has, by an error of law, supposed that an implied contract existed and thereby acted illegally in regard to a matter which is the basis of his jurisdiction. The Subordinate Judge having no inherent jurisdiction upon the facts as stated by him, he cannot give himself a jurisdiction which the law does not give him by an erroneous statement of their result in law. Nor can a party give jurisdiction by consent to a tribunal which has no inherent jurisdiction. The observations of the Privy Council in regard to the right of a party to waive his objection to jurisdiction in the case of *Minakshe* v. *Subramanya* (1) decided on the 16th June last are pertinent. In that case the Judicial Committee held that no appeal lay to the High Court from the order made by the District Judge under Act XX of 1863, but it was urged by Counsel that by reason of the course pursued by the parties in the High Court they waived the right which they might otherwise have had to raise the question of want of jurisdiction. The Judicial Committee observed that the view suggested was untenable, that no amount of consent could confer jurisdiction where none existed, that, when the Court had no jurisdiction over the subject-matter of a suit, the parties could not by their mutual consent convert it into a Court of competent jurisdiction, though they might constitute the Judge their arbitrator. The conclusion I come to is that no error of law, as applied to the facts found by the sudordinate Court, no misstatements in the plaint, no waiver of the objection to want of jurisdiction in a Small Cause Court, which, upon the facts found, has no inherent jurisdiction over the subject-matter of the suit so far as it relates to a particular defendant, can convert it into a proper *forum*. The reason is that the Small Cause Court is a Court of limited jurisdiction, that it has or has not jurisdiction according as the conditions designated by the legislature do or do not exist, and that when a contract is necessary, and when there is none, it can have no jurisdiction.

[232] It remains for me to notice the objection that was referred to at the hearing. It was said that we might hold the Subordinate Judge considered that there was an implied contract and accept it as a finding on a question of fact by a Court of final jurisdiction. This view appears to me to be untenable for several reasons. In the first place, the Subordinate Judge did not intend to find an implied contract as a matter of fact, but stated expressly that there was no privity of contract. Again, he propounded a theory of an obligation on the part of the sub-tenant to see that his landlord paid rent to the superior landlord as arising from the relation supposed to exist between rent and beneficial enjoyment. This makes it clear that he intended to infer an implied obligation from a rule of law which had no existence. Further knowledge by the sub-tenant that his landlord was in arrear of rent, or that he was in insolvent circumstances and his omission to withhold payment of rent which he was bound to pay constitute together no legal evidence of a contract by the sub-tenant to pay rent to the superior landlord in any event, and the absence of legal evidence in support of a finding is a legitimate ground

(1) 14 I.A. 160 = 11 M. 26.

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for interference, though, when there is some legal evidence, neither the weight due to it nor its sufficiency is a ground for interference.

For these reasons, I am of opinion that the case under reference is one in which we may interfere under Section 622.

BRANDT, J.—The question, which the order of reference in this case raises, is whether the High Court has or has not power under Section 622 to revise the decree made by the Subordinate Judge on the ground that the latter had not jurisdiction within the meaning of the word as used in that section.

It is, I think, clear that the word "jurisdiction," as used by the Privy Council in *Amir Hassan Khan's case*, in the sentences—"The question then is did the Judges of the Lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity," and "it appears they had perfect jurisdiction to decide the question before them," was used in the sense that the court of first instance and the Appellate Court had legal authority to hear and determine the suit; but unreservedly accepting that decision as determining that, when a Court is duly invested with such authority, the High Court is not empowered to inquire into the correctness of the law with reference to which the decision is given, or of the findings on the facts, is the question **[233]** now before us expressly or by implication determined by that case? I think not.

In that case the Lower Courts unquestionably had jurisdiction, that is to say, they had authority both in respect of territorial and pecuniary jurisdiction properly so called, and in respect of the subject-matter of the suit, the suit was of a class properly instituted in those Courts and they had authority to hear and determine the matters in dispute. In the case before us, it may be assumed—it is indeed apparent—that as regards the second defendant the plaintiff's suit was one, which, as disclosed in the plaint, the Subordinate Judge could not legally entertain on the small cause side of his Court. The material allegations in the plaint are that the plaintiff demised certain land to the first defendant on kanam; that rent was due in arrears; that the second defendant was in possession as a kanamdar or sub-mortgagee under the first defendant; and that the defendants are liable for the rent. The second defendant said that he held under, and was responsible to, the first defendant only for rent due from him to the latter. The Subordinate Judge found, as a fact, that there was no privity of contract between the second defendant and the plaintiff; the plaint disclosing nothing to constitute a suit for rent by the plaintiff as against the second defendant, maintainable in a Court of Small Causes, the Subordinate Judge had not jurisdiction in the suit as a small cause suit; but he proceeded, for reasons stated by him, to give a decree against the second defendant as well as against the first defendant. To determine the question, whether the allegations contained in a plaint constitute a case which a Judge is empowered by law to try, is a question which the Judge has no doubt jurisdiction to determine, jurisdiction, that is, in the sense that he is empowered and bound by law to receive all plaints (subject to certain conditions as to value, class of suits, &c.), purporting to show a cause of action upon which the plaintiff is entitled, and in some cases, if entitled, is required to sue in his Court; and in respect of plaints so filed, the Judge must determine whether the plaint discloses *prima facie* a case, in respect of which the plaintiff is entitled to relief, and which he may or must bring in the Judge's Court, but it is not this

power and correlative duty on the part of the Judge which gives jurisdiction; the jurisdiction is conferred on him by superior authority, while the duty of determining, *e.g.*, whether a suit is one of a class triable by him on the small cause side, is the [234] result of having been invested with such authority, and must be exercised before he proceeds to deal with the case further in the exercise of his jurisdiction.

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It appears to me then that a Judge cannot give himself jurisdiction by wrongly determining the preliminary question, and that the High Court has authority to inquire whether such preliminary question is rightly or wrongly decided, and, if wrongly decided against the plaintiff, to direct the Judge to exercise his jurisdiction, and if wrongly decided in the plaintiff's favour, to set aside the decree or order as passed without jurisdiction.

PARKER, J.—I concur with the judgment of MUTTUSAMI AYYAR, J.

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11 M. 234.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

MONAPPA (*Appellant*) v. SURAPPA (*Respondent*).*
[13th September, 1886, and 14th November, 1887.]

Civil Procedure Code, Section 317—Suit against benami purchaser at Court-sale, by owner, to recover the land after ejectment.

If after obtaining a certificate of sale in execution of a decree, the purchaser acknowledges that his purchase is benami and gives up possession, or does some act which clearly indicates an intention to waive his right, or restores the property to the real owner, such act may, by reason of the antecedent relation of the parties, operate as a valid transfer of property. Defendant acted benami in buying certain land at a Court sale for plaintiff, paid part of the purchase money for plaintiff, and allowed plaintiff to remain in possession on the understanding that defendant was to transfer the property on repayment of the balance of the purchase money. Defendant having ejected plaintiff, plaintiff sued to recover the land:

Held, that Section 317 of the Code of Civil Procedure was no bar to plaintiff's suit.

[**F.**, 18 M. 436 (437); **Appl.**, 13 M.L.J. 354 (355); **Appr.**, 10 A.L.J. 97=16 Ind.Cas. 489 (491); **R.**, 23 A. 34 (36); 16 Ind.Cas. 30 (32)=23 M.L.J. 301 (305)=12 M.L.T. 211=(1912) M.W.N. 882; 4 P.R. 1904=28 P.L.R. 1904; **D.** 22 A. 434 (439); 23 A, 175 (179)=21 A.W.N. 44 (46).]

APPEAL from the decree of H. M. Winterbotham, Acting District Judge of South Canara, confirming the decree of U. Babu Rau, District Munsif of Kandapur, in suit No. 73 of 1884.

The plaintiff sued to recover from the defendant certain land. She alleged that the defendant had purchased the land on her account on the 14th September 1876 at a sale in execution of a decree, and that she had obtained possession, and that the defend- [235] ant being certified purchaser had brought a suit in 1880 and ejected her. Defendant denied that the purchase was on plaintiff's behalf and plaintiff's dispossession, and pleaded that plaintiff was barred from maintaining suit by Section 317 and also by Section 13 of the Code of Civil Procedure, inasmuch as she was a party to the suit of 1880.

The suit was dismissed, the District Judge holding that it was barred by Section 317 of the Code of Civil Procedure.

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* Second Appeal No. 1058 of 1885.

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Plaintiff appealed. She died, and the appeal was prosecuted by her brother and representative, Monappa.

Mr. *Subramanyam* and *Srinivasa Rau*, for appellant.

Ramachandra Rau Saheb, for respondent.

On the 13th September 1886, the Court (MUTTUSAMI AYYAR and BRANDT, JJ.) directed the District Court to return a finding on the issue—

"Did the defendant's conduct ever amount to a transfer or waiver in favour of plaintiff, of his title and possession under the purchase, before he got possession under the ejectment decrees of 1880?"

The District Court having returned a finding on this issue, the Court delivered the following

JUDGMENT.

The respondent purchased the land in dispute at a court-sale in September 1876, and the appellant's case was that the purchase was made benami for Lingamma Shettati, his sister, and with her money. He alleged further that, though the respondent obtained the sale certificate, he agreed to transfer it to Lingamma Shettati and allowed her to continue in possession though he obtained formal delivery until he ejected her in March 1883. The third issue recorded for decision was whether the purchase was benami. whether it was made with the plaintiff's money, and whether the respondent's conduct amounted to a transfer to Lingamma Shettati of his title as purchaser. It is found by the Judge that the respondent acted benami for the appellant's sister in buying the property, that Rs. 600 paid as deposit belonged to her, that the respondent paid himself the balance of the purchase money (Rs. 1,650), and that the appellant's sister was allowed to continue in possession until March 1883 on the understanding that the respondent was to transfer the property back on his being paid the balance of the purchase money.

Though the respondent objects to the finding and contends that he only agreed to resell for Rs. 3,600, we see no sufficient [236] reason to doubt the correctness of the conclusion at which the Judge has arrived. It must be observed that the facts, as now found, support neither the appellant's nor the respondent's case. According to the appellant, the purchase was benami and it was paid for with his sister's money; and, according to the respondent, there was only an agreement to resell for Rs. 3,600 and that the purchase was made on his own account and with his own money, The question which we have to decide is whether the appellant is entitled to any and what relief upon the facts actually found, regard being had to Section 317 of the Code of Civil Procedure. That section enacts that no suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims. There is thus a statutory direction that a benami purchase at an auction sale in execution of a decree shall not be accepted as the sole ground of a suit against the certified purchaser. In *Mussumat Buhuns Kowur* v. *Buhooree Lall* (1), the Judicial Committee observed, with reference to the corresponding Section 260 of Act VIII of 1859, that it should be construed strictly and literally, and that it was applicable only to a suit brought *against* a certified purchaser to assert the benami title against him; that the statute did not make benami purchases illegal; and that the real owner for whom the purchase was made, if in possession, might defend a suit brought

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(1) 14 M.I.A. 496.

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by the holder of the certificate and show that the latter was an apparent owner only and a mere trustee. The Judicial Committee referred with approval to a passage in the judgment of the High Court at Calcutta (11 Suth., W.R.F.B., 20), in which the learned Chief Justice Sir Barnes Peacock, in delivering judgment of the High Court, held in effect that if the certified purchaser was really a benamidar or trustee for another person, and after the certificate of sale did some fresh act to put the purchaser in possession, that might operate as a transfer of the property to him. The Court observed that "if a person who has gained a title by limitation waives that title in favour of the real owner and gives up possession to him as the rightful owner, such act would probably be held to amount to a waiver of the right, which he had gained by limitation, and to confer it upon the real owner. In like manner, if a benamidar should acknowledge the purchase to have been made [237] benami and waive the right conferred upon him by Sections 259 and 260, and give up possession to the real purchaser as the rightful owner, such act would probably amount to a transfer of the title as well as of possession to the real purchaser." The Judicial Committee observed, with reference to the foregoing passage, that when possession is given by one party to another, it is material to inquire whether by reason of the antecedent relation between the parties, it was meant to operate as a transfer of the property. It is obvious, therefore, that, when after obtaining the certificate of sale, the purchaser acknowledges that his purchase is benami and gives up possession, or does some act which unequivocally indicates an intention to waive his right, or to restore the property to the real owner, the fresh act might, by reason of the antecedent relation between the parties, operate as a valid transfer of property, the reason being that benami purchases are not made illegal, though the real purchaser is disabled from maintaining a suit against the certified purchaser at an auction sale in execution of a decree on the sole ground that he was only a benamidar.

We accept the finding of the Judge and decree that, on payment of Rs. 1,650 by the appellant to the respondent within three months from the date of receipt by the Lower Appellate Court of a certified copy of the decree of this Court, the respondent do deliver up possession to appellant of the property in suit, and, failing such payment, that this suit do stand dismissed; and we allow mesne profits only from date of our decree, the amount to be determined in execution; and there will be no costs throughout as the case of neither party is wholly true.

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11 M. 238 = 11 Ind. Jur. 373.

[238] APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

MADRAS EQUITABLE ASSURANCE COMPANY (*Appellant*) v. THE PRESIDENT, MUNICIPAL COMMISSION, MADRAS (*Respondent*).*
[20th September, 1887.]

City of Madras Municipal Act, Schedule A—Liability of Mutual Assurance Company to taxation.

The investment for interest of the funds of a Mutual Insurance Company by its directors constitutes "carrying on business for gain" and the premia paid by

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* Referred Case No. 2 of 1887.

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insurers and the profits from investments thereof constitute the "capital" of the company within the meaning of Schedule A of the City of Madras Municipal Act, 1884.

[R., 18 M.L.J. 349 (352) = 3 M.L.T. 400.]

CASE stated, under Section 193 of the City of Madras Municipal Act, by the Presidency Magistrates, Black Town, as follows:—

"This appeal was preferred by the Madras Equitable Assurance Society, under Section 192 of the City of Madras Municipal Act I of 1884, from the decision of the President of the Madras Municipality passed on the 10th December 1886 under Section 190, assessing it to the payment of a tax of Rs. 175 for the first half of the year 1886-87 under class I (B) of Schedule A.

"The appeal was heard by us, and, after taking time to consider the facts of the case and the arguments of counsel, we delivered judgment, modifying the decision of the President by declaring that the Madras Equitable Assurance Society was liable to be taxed under class I (C), Schedule A.

"After the ajudication of the appeal, the appellants through their solicitors intimated their desire in writing that a case should be stated to the High Court under Section 193 of the said Act. In compliance with such desire, we beg to submit, for the decision of the Honourable Judges of the High Court, the following points which were raised on the hearing of the appeal before us:—

"(*a*) Whether the society is liable to be taxed under the Madras Municipal Act, 1884 ?

[239] "(*b*) If so, on what capital, whether on Rs. 16,64,439, which sum represents the general fund as it stood on the 1st January 1886, or on that sum, less Rs. 6,75,744, the amount apportioned amongst the policy-holders ?

"For reasons given at length in our judgment, we found that (*a*) the society was liable to be taxed, and that (*b*) the tax should be levied on Rs. 9,88,665, being the difference between Rs. 16,64,439, which represents the entire general fund, and Rs. 6,75,744, the amount divided amongst the policy-holders in accordance with the recommendation of the actuary."

The material portion of the judgment of the Magistrates (Mir Ansur-ud-din and J. M. Maskell) was as follows:—

"Before entering upon the grounds of this appeal, it is necessary to look at the constitution of the society, its funds, and the mode in which they are administered. The affairs of the society are regulated by Madras Act VI of 1869. In the preamble of this Act, it is stated that the society was formed on the 1st January 1842 for the purpose of mutual assurance of lives, and that it took over the business of the Fifth Madras Laudable Assurance Society, together with a sum of Rs. 29,979 belonging to that society. Under Section 4, a 'general fund' was created, consisting of the sums standing in the books of the society to the credit of the premium fund and of the reserve fund, respectively, at the date when the Act came into operation, and also of the sums from time to time received by the society on account of premiums on policies, or from any other source. This fund is to be applied in discharging the expenses of conducting the society and to the payment of the claims from time to time falling due upon, and to the purchase of, policies; and after retaining out of the said general fund so much as shall, in the discretion of the directors, be deemed from time to time necessary to defray the matters aforesaid, the remainder of the said fund is to be invested

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in the names of three of the directors of the society in certain securities therein particularised, such securities or the proceeds thereof being applied, under the order of the directors, to any of the purposes to which the said general fund is applicable. Under Section 5, the affairs of the society are, at the expiration of every five years, to be submitted to an actuary of London for the purpose of valuing its assets and liabilities. The balance of profit appearing upon every such valuation, or so much thereof as the directors shall deem expedient, is to be divided [240] among the holders of policies subsisting on the last day of the period embraced in every such valuation, according to the amount of premium paid on such policies, respectively, within such period; and the proportion of profit so apportioned to each policy is to be applied in reduction of the premiums accruing due during the succeeding period of five years. From the last actuarial report on the society's affairs (Exhibit S), for the quinquennium (1880-85), which has been published by the Secretaries and Treasurers, Messrs. Arbuthnot and Company, it is shown that the lives in force on the 31st December 1885 numbered 737; that the sum assured was Rs. 40,40,270; that the annual premium payable in respect of the aforesaid lives amounted to Rs. 2,20,306; and that the General fund had risen to Rs. 16,64,439. In accordance with the recommendation of the actuary, the directors apportioned the sum of Rupees 6,75,744 out of the general fund amongst the policy-holders, whose policies were in force on the 31st day of December 1885 as profits under Section 5.

"Having set out briefly the main principles under which the equitable is worked, we shall next proceed to the questions calling for a decision in this appeal which are as follows:—

"(1) Whether the society is liable to be taxed under the Madras Municipal Act I of 1884?

"(2) If so, on what capital, whether on Rs. 16,64,439, which sum represents the entire general fund as it stood on the 1st of January 1886, or on that sum, less Rs. 6,75,744, the amount apportioned amongst the policy-holders.

"Upon the first point, it has been argued by Mr. Michell, counsel for the appellant, that, in the first place, the society possesses no 'capital' in the sense in which that word is used in company law; that the capital of a company is the aggregate of the sums paid by the shareholders of that Company; that the society has no share-holders; and that its general fund being made up of the contributions of the policy-holders, cannot be regarded in any sense as 'capital'." It is to be regretted that no definition of 'capital' is given in the Municipal Act, neither are we aware of any such definition being given in any other Indian Act; but it appears to us that the word, as used in Madras Act I of 1884 has a more extended and comprehensive meaning than the restricted definition contended for by Mr. Michell. It seems [241] to be used in Schedule A as a general term to signify the paid-up capital, or the funds of the several joint stock companies and other companies described therein used in the business of the association, upon which the profits may be said to arise. In other words, and considering that we are dealing with a fiscal Act, it may be described as a term used to express or include the money-value of a company for the purposes of taxation. In short, the term capital is so appropriate to designate in one word the other expressions, money-value, funds, &c., that one can understand its being used in the schedule, and it must, accordingly, be treated to have a very general significance for the

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purposes of the Act. In this sense, we also find an eminent actuary, Mr. Peter Hardy, employing it in the preamble of the Society's Act (VI of 1869) in reference to the general fund. He says the society "is during its infancy too largely dissipating those funds, which ought to form an accumulating capital, in order to provide for the ultimate payment of the sums assured." We are, therefore, of opinion in regard to Mr. Michell's first argument that the general fund of the society must be regarded as capital within the meaning of the Madras Municipal Act.

"Secondly, it is contended that the society is an association for the mutual assurance of lives, in which there are no shareholders, and in which the assurers and the assured are the same, and that it is not a joint stock company or other company within Schedule A, class I (A). Our attention has been drawn to the definition of joint stock company given, in Section 226 of the Indian Companies Act, 1882, as being 'a company having a permanent paid-up or nominal capital of fixed amount, divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of shares in such capital, or the holders of such stock, and no other persons;' and to the fact that companies are divided by the said Act into three classes, *viz.*, (1) companies limited by shares, the amount of whose capital must be divided into shares of a certain fixed amount (Section 8); (2) companies limited by guarantee (Section 9); (3) unlimited companies (Section 10). This argument, though not devoid of weight and having its own significance in relation to the Act in which it is found appears to us to place too narrow a construction upon the words 'joint stock companies' and 'companies' used in the City **[242]** of Madras Municipal Act, more particularly when they are read with the very indefinite words that follow 'carrying on any trade or business having gain for its object, or as benefit societies.' There appears to us to be a very great resemblance between the society and a joint stock company, and that the one might be regarded as synonymous with the other. The policy-hold rs, the premiums, the accumulated premiums forming the joint fund or the general fund, and the quinquennial profits of the one may be compared with the shareholders, the shares, the joint stock, and the dividends of the other. Even assuming that the society does not strictly fall under the denomination of joint stock company, is there any doubt as to its coming within the scope of the words 'other companies carrying on any business as benefit societies?' The terms 'joint stock company' and 'company' are not defined in the City of Madras Municipal Act, but reading Section 103, where, in point of fact the liability to the tax is prescribed, we find that the tax is leviable from every '*person*,' who within the city exercises any one or more of the arts, professions, trades or callings, or holds any one or more of the offices or appointments specified in Schedule A. Turning next to the definition of the word '*person*' in Section 3, Class (C), it is as follows:—'Person shall include any company or association or body of individuals whether incorporated or not.' In the opinion of James, L.J., in *Smith* v. *Anderson*, XV Ch. D., 273, company and association are synonymous terms and mean, as distinguished from partnership, a combination in which the partners can change from time to time without the necessity either of consent as between the partners or of novation as regards the creditors. Turning then to Schedule A, we see that the persons to be taxed are either (1) companies or (2) individuals. How then can the Madras Equitable Assurance Society, which is an association or body of individuals, escape from taxation? In

1867, when necessity for amending Act IX of 1865, the then existing Municipal law in force in the town of Madras, was brought to the notice of Government by the Municipal Commissioners with particular reference to that part of the Act which provides for the levy of tax on trades and callings, they complained that they experienced the gravest difficulty in the application of (the then) Schedule (C) to the several classes liable to the tax on trades and callings, in consequence of the provisions of the schedule being vague and indefinite. The Bill framed, which subse- [243] quently passed into law as Act IX of 1867, provided, *inter alia*, for the revision of Act IX of 1865, 'in such a manner as to leave no room for reasonable doubt as to the classes which come within its scope.' One of the important amendments made in Schedule C was the enlargement of class I (A) by the addition to the simple expression 'joint stock company' of the words 'whether registered under any English or Indian Act or Acts, and other companies, whether incorporated by Royal Charter, Act of Parliament, or Act of the Council of the Governor-General, or of the Governor, or Lieutenant-Governor of any of the Presidencies, and carrying on any trade or business having gain for its object.' Next when Act V of 1878 repealed Act IX of 1867 we observe that the phraseology of class I (A), Schedule A, was only modified so far as to omit all reference to the several modes of registry and incorporation of the companies therein referred to; but the rest of the clause was retained and the words 'or as benefit societies' added, and the definition of the word person was for the first time introduced in the Act. This language has been followed in the Act now in force, and there can be no doubt that one of the essential objects of an enactment of the character under consideration would be to impose a tax on every person residing within its jurisdiction, whose means of livelihood are drawn from following any of the callings named in the schedule. It is clear, therefore, from Section 103 and Schedule A of the present Municipal Act that every company, which has pecuniary gain for its object, or which secures benefit to its members mutually, is liable to be taxed; and in order that no company should, by any chance, escape taxation, it will be observed that the schedule begins with a description of the taxable companies and societies and ends with class IV, which includes 'all companies not hereinbefore provided for,' so that no company or society is exempted unless its object is not gain or benefit. The only conclusion then is that the society is liable to be taxed as a company within Schedule A of the Act.

"The second question raised is as to what should be regarded the capital of the society for the purpose of taxation; and for the purposes of our decision we have limited ourselves to the figures of the last actuarial report, which brings us as near as possible to the period for which the tax has been claimed. Section 5 of the Madras Equitable Assurance Society's Act renders the matter one of easy solution. In pursuance of that section, the directors, [244] in accordance with the recommendation of the actuary, divided Rs. 6,75,774 of the general fund (Rupees 16,64,439) as profits amongst the policy-holders, whose policies were in force on the 31st December 1885, and though we find that, under Article 20 of the old Regulations (see preamble of the Act, the share of each policy-holder, was held to be the 'individual property' of the policy-holder, and was at the discretion of such policy-holder, either to be paid out to him in cash, or applied in reduction of his future premium, and that, according to the present method of appropriation, the amount is not placed absolutely at the disposal of the

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policy-holders to be applied at their will and pleasure, still since it went in abatement of their premiums for the next quinquennium, we are of opinion that by such division the general fund was reduced to Rs. 9,88,665.

"The result is that we are of opinion that the Madras Equitable Assurance Society is liable to be assessed under Schedule A, Class I (*c*) to the payment of a tax of Rs. 100 for the half year ending 30th September 1886, and we do hereby direct that the difference between that sum and the amount paid to the municipality be refunded.

"The conclusion at which we have arrived in regard to the capital of the society falling within the division (C) of class I and not division (B,) the division under which the society was assessed by the municipality, renders it unnecessary to express any opinion in regard to Mr. Michell's contention that the society not being a 'joint stock company,' is exempt from liability to taxation under the latter division, because division (C) takes in 'companies of any of the descriptions mentioned in division (A) of this class, the capital of which is more than five but does not exceed ten lakhs of rupees."

Mr. *Michell*, for appellants.

Mr. *Shaw*, for respondent.

The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

JUDGMENT.

Under Section 103 of the City of Madras Municipal Act, " if the commissioners determine to levy a tax on arts, professions and callings (not being a military profession or calling) and on offices and appointments, every person, who within the city exercises any one or more of the arts, professions, trades or callings...&c., specified in Schedule A" is liable to taxation, and, under [245] Section 3, Clause (*c*) "person" includes any company or association or body of individuals whether incorporated or not.

The Madras Equitable Assurance Society is, in the opinion of two of the Presidency Magistrates, liable to taxation under Schedule A, Clause (*c*); but the Magistrates concerned have stated a case and referred it to the decision of the High Court under Section 193 of the Act.

It is conceded, for the purposes of this reference, that the society is not a joint stock company, but if it is a company carrying on any trade or business having gain for its object, or as a benefit society, and has a capital exceeding five but not exceeding ten lakhs of rupees, it is liable.

It is contended that the society is not a company within the meaning of the Act, that it does not carry on any trade or business having gain for its object, or as a benefit society, and that it has no capital in the sense in which that word is used in the Act. If any or more of these contentions is sound, the objection must prevail.

The origin and constitution of the society are sufficiently set out in the statement of the case.

There is, in our opinion, no foundation for the contention that to render the company liable to taxation under the Madras Municipal Act, it must be a company of the character defined in the Indian Joint Stock Companies Act, that is, that it must have "a permanent paid-up or nominal capital of fixed amount, divided into shares, &c., and having for its members the holders of shares in such capital." A company carrying on business as a benefit society clearly need not be and ordinarily is not such company; but such a company, if it carries on business for gain, is liable

to taxation under the Act. In the case of such societies the aggregate of the sums contributed by those associated for the common purpose, *e.g.*, in the case of industrial and provident societies for the relief and maintenance during sickness or infirmity of members and their families, or in the case of assurance societies, the premia paid by the insurers and the profits from investments of such sums would constitute in an ordinary language the capital of the society; and having regard to the inclusion of benefit societies as liable to taxation under the Act, we entertain no doubt that the word "capital" is used in the more general and not in the limited and technical sense suggested. All companies carrying on business **[246]** having gain for their object are liable to taxation. The assurance society, with which we are concerned, certainly carries on business. It is not a partnership, but it is an association of persons having a common object and interest, *viz.*, the mutual assurance of lives. Does it then carry on its business for gain? *In re Arthur Average Association* (1), the Master of the Rolls observes, with reference to somewhat similar words in an English statute, that gain means acquisition, something obtained or acquired and is not limited to pecuniary gain, still less to commercial profits.

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In the case before us, the insurers contribute their money with a view to making provision for those in whom they are interested, and the statement of the case further shows that the available funds of the association are invested, being lent out at interest; and a certain proportion of the gain or profits derived from such investment is, under the Act by which its affairs are regulated, divisible among the subscribers at stated periods, and it is immaterial that such proportion of the funds is to be applied in reduction of the premia accruing due during the succeeding period. The liability to pay less consequent on there being an available surplus is as distinctly a gain as the division of the profits would be, even if it be not an equal gain.

We are then of opinion that the conclusion come to by the Magistrates is correct.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RAMANNA (*Defendant, No. 1*), *Appellant v.* VENKATA (*Plaintiff*), *Respondent.** [16th and 19th January, 1888.]

Hindu law—Gift of ancestral property by father to stranger—Suit by minor son to recover.

Where a Hindu made a gift of certain land, which he had purchased with the income of ancestral property, and a suit was brought to recover the land on behalf of his minor son, who was born seven months after the date of the gift:

[247] *Held* that the gift was invalid as against the plaintiff and that he was entitled to recover the land from the donee.

[**R.**, 21 M.L.J. 1041 (1049)=10 M.L.T. 418=(1911) 2 M.W.N. 450; **Expl.**, 27 M. 228 (236).]

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* Second Appeal No. 241 of 1887.

(1) L. R. 10 Ch. 546.

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THE plaintiff, Kolluri Venkata Subbarayadu, a minor, by his next friend (his paternal uncle) alleging that his father, defendant No. 3, at the instigation of his mother, defendant No. 4, executed a registered deed on 13th April 1880 in favor of defendant No. 1, purporting to make a gift of the family inam land, sued to recover the land and mesne profits and to cancel the deed of gift.

The District Munsif of Cocanada, A. F. Elliot, dismissed the suit and found that the land had been purchased before plaintiff's birth out of the income of the family property, and held that plaintiff had, therefore, no right to question the gift. It was admitted that the plaintiff was born two months after the sale.

On appeal, the Subordinate Judge, T. Ramasami Ayyangar, reversed this decree on the ground that the gift having been made when the plaintiff was in the womb was invalid and decreed possession to plaintiff.

Defendant No. 1 appealed on the following grounds:—

The Lower Appellate Court ought not to have allowed this suit to be instituted by the minor's next friend, who is not his natural guardian, at the instigation of the minor's father and lawful guardian for setting aside a gift made by himself.

The land mentioned in the plaint having been purchased by plaintiff's father before the plaintiff was begotten, he acquired no right by birth in the same.

The suit is not maintainable, inasmuch as the plaintiff and his father are undivided and living together.

The gift, which is valid against the father, is equally valid against the plaintiff who was not born at the time.

The Sub-Judge ought to have held that the property mentioned in the plaint is not the ancestral property of the plaintiff in the sense that he could impeach its sale or alienation.

As this suit is in reality conducted by the plaintiff's father after having failed in two former attempts to revoke the gift, this suit ought to have been dismissed.

The alienation in question ought, under the circumstances of the case, to have been held valid at any rate to the extent of the father's share in the property.

Bhashyam Ayyangar, for appellant.

Ramasami Mudaliar, for respondent.

[248] The Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

We entertain no doubt that property acquired by means of income derived from ancestral property is also ancestral and that the son acquires a joint interest in it with his father by birth under the Hindu law. Any other view is inconsistent with Mitakshara, chap. I, s. iv, cl. i, which defines self-acquired property. It is suggested by the appellant's pleader that the father may spend the income at his pleasure, and, therefore, if he invests it in land, he is at liberty to alienate it at his pleasure.

We are, however, of opinion that the father is not liable to be called upon to account for the income of family property during co-parcenary not because he has an absolute disposing power either over the family property or its income, but because it is presumed from the continuance of the co-parcenary that the expenditure has been acquiesced in by the co-parcener. If the father saves any part of the income, the saving is

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clearly part of the property of which the son can demand a partition. In the case of a childless Hindu widow, the income derived from her husband's property constitutes part of the widow's estate, but in the case of a joint family, the income of a family estate is, unless it has been expended *bona fide* in the ordinary course of management, part of that estate. The observations of Mr. Justice Mitter in *Gunga Prosad* v. *Ajudhia Pershad Singh* (1) are a mere dictum. We overrule the contention that the property in dispute is the third defendant's self-acquisition for the purposes of this suit.

It is then urged that the appellant is not entitled to recover the whole of the land alienated and to maintain this suit for that purpose though he may sue for partition. Under the Mitakshara law, the son has a power of interdiction and is at liberty to continue in co-parcenary and at the same time to exercise this power in respect of ancestral property improperly alienated. During co-parcenary, the ancestral property vests in the joint family, and if any co-parcener dies before partition, the property vests in the other co-parceners as if he was never born. In the case of a sale, the alienation is upheld to the extent of the alienor's share as a matter of equity, which the purchaser is considered to be entitled to insist upon, but in the case of gift there is no such equity. It [249] has already been decided by a Full Bench of this Court that the gift by a co-parcener of his undivided interest in ancestral property cannot be supported at all even to the extent of the donor's share. We cannot, therefore, hold that the power of interdiction vesting in the son cannot be exercised in the case of an invalid gift otherwise than by suing for partition.

It is then said that the suit already brought by the father to set aside the gift has failed and that if the son's claim is now decreed, the former will be thereby enabled to recover through his son what he could not recover himself and what he would be stopped from recovering by a suit instituted in his own right. There is no doubt this is an apparent anomaly, but the real question is whether the property in question continues to vest in the joint family. The gift is not binding on the family either in part or in whole, and the property in the subject of gift originally vesting in it is not divested by it, and we are, therefore, of opinion that the power of interdiction includes a right to see that the family estate is preserved for the family until a partition is made and that the donee, who accepts the gift subject to this right of a co-parcener, is not entitled to complain of its enforcement to his prejudice. It is conceded that, if the father dies in co-parcenary, the son may then set aside the gift and recover back the property improperly alienated, but, in our judgment, the decision must depend not on the question whether the father or the son may happen to die in co-parcenary, but whether the gift was valid at the time when it was made and whether it operated to transfer the property in the subject of the gift from the family to the donee either in part or whole.

This second appeal fails and we dismiss it with costs.

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(1) 8 C. 131.

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(F.B.).=
1 Weir 638.

11 M. 250 (F.B.) = 1 Weir 638.

[250] APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

QUEEN-EMPRESS *v.* BELLARA.*
[7th Sept. and 23rd Nov., 1887, and 17th Jan., 1888.]

Abkari Act (Madras), Sections 29, 55 (e)—Rule for bidding delegation by licensee of authority to draw toddy, ultra vires.

Under Section 29 of the Madras Abkari Act, the Governor-in-Council made and published a rule on 8th February 1887 whereby it was declared that no license-holder could delegate his authority to draw toddy, unless under exceptional circumstances, to any person :

B, the son of a licensee, drew toddy with his father's permission. He was convicted under Section 55 (*e*) of the Act :

Held that the rule was *ultra vires* and the conviction bad.

CASE referred, for the orders of the High Court, under Section 438 of the Code of Criminal Procedure, by S. H. Wynne, Acting District Magistrate of South Canara.

On the 7th September 1887, the case was referred to a Full Bench by Collins, C. J., and Parker, J.

The facts necessary, for the purpose of this report, are set out in the judgment of the Full Bench (KERNAN, MUTTUSAMI AYYAR, PARKER, and WILKINSON, JJ.).

The Public Prosecutor (Mr. *Powell*), for the Crown.

JUDGMENT.

One Bellara has been convicted under Section 55, clause (*e*) of the Madras Abkari Act, for drawing toddy under cover of a license granted to another person and sentenced to a fine of Rs. 15, or, in default, to fifteen days' rigorous imprisonment.

Bellara was the son of the licensee, and said that he was drawing the toddy, because his father had a boil on his arm and could not ascend the tree.

The case is a similar one to that decided by Muttusami Ayyar and Brandt, JJ., in December, 1886, (Criminal Revision case No. 645 of 1886), in which it was held that the license was sufficient authority for the drawing of toddy by the agent of the licensee, or [251] by a person acting under his authority. If this ruling is to be followed, the conviction should be set aside; but since the ruling above referred to, the Governor-in-Council has, under Section 29 of the Act, framed and published the following rule for the drawing of toddy in the district of South Canara (*vide* Fort St. George Gazette, 8th February 1887, Part I, page 102) :—

"(3) A license-holder may tap and draw toddy from any number of trees within the area mentioned in his license, but no tree may be tapped or toddy drawn by any person other than himself under cover of his license. Provided that, when the licensee becomes unable by prolonged illness to draw toddy, the potail of the village may, at his request and subject to the approval of the tahsildar, allow a relative or servant named by him to tap and draw toddy in his stead."

* Criminal Revision Case No. 324 of 1887.

In this case, therefore the son committed no offence, unless the rule made by the Governor-in-Council operates to create one, and the question is whether the Governor-in-Council has power to make a rule forbidding the drawing of toddy by any person other than the licensee except in the case of prolonged illness, and then only subject to the approval of the tahsildar.

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Section 29 of the Act gives power to the Governor-in-Council to frame rules (cl. *o*) "generally to carry out the provisions of this Act;" but, as pointed out by the Division Bench in Criminal Revision Case No. 645 of 1886, Section 64 of the Act, read in connection with Section 55, clearly shows that the intention of the legislature was to prohibit the drawing of toddy without a license—not to prevent the delegation of the actual work to a servant or agent.

Section 21 declares that, when the exclusive privilege of manufacturing toddy has been granted under Section 16, the Governor-in-Council may declare that the written permission of the grantee to draw toddy shall have, within the area to which the privilege extends, the same force and effect as a license from the Collector for that purpose under Section 12. It was thus clearly the intention of the legislature that no toddy should be drawn except under the authority of a Collector's license or of a renter's permit, the intention being to protect the exclusive right of manufacturing toddy by the holder of a license. Such a condition precedent is not, however, inconsistent with the power of delgation of the actual work.

The Public Prosecutor refers to Section 11, which deals with permits [252] for the transport of liquor, and contends, with reference to the last clause, that where the legislature has intended permits to include servants and agents, it has expressly said so. He admits, however, that the second clause of Section 64 cannot be reconciled with his construction of Sections 12 and 21.

The Act should be construed so as to give effect to all its provisions, and we cannot admit that the second clause of Section 64 shall be limited in its application to the holders of permits for the transport of liquor only. Such a construction is not permissible under the plain words of the section.

It is then urged that the licensee has accepted a license under Section 24, in which the provisions embodied in the rule have been reproduced; but if it was *ultra vires* for the Governor-in-Council to frame the rule, it was equally *ultra vires* to insert the same conditions in the license.

We were referred to the decision of a Division Bench of this Court in Criminal Revision Case No. 141 of 1887, and it must be admitted that this decision is inconsistent with that in Criminal Revision Case No. 645 of 1886, which was decided by a different Bench; but in Criminal Revision Case No. 141 of 1887, the Public Prosecutor was not instructed to appear, and the case was not argued. The former ruling was not, therefore, brought to the notice of the Bench, and after hearing the point argued, we are not prepared to assent to it.

It appears to us that the Act clearly contemplates the delegation of work by the holder of a license or permit to draw toddy, and we apprehend that the power given to the Governor-in-Council to frame rules "to carry out the provisions of the Act" must be exercised within the limit which the Act recognizes. On this ground, we set aside the conviction and direct that the fine be refunded.

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[253] APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

JENNINGS *v.* THE PRESIDENT, MUNICIPAL COMMISSION, MADRAS.*
[20th September, 1887.]

Madras Municipal Act, 1884, *Section* 103—*Exercise of calling—Investment of funds of society—Schedule A*, *class* 1 (*A*), (*B*)—*Benefit society.*

The business of investing the funds of a society for interest is a calling within the meaning of section 103 of the Madras Municipal Act, 1884.

A society established to provide by the subscriptions of its members for pensions for their widows and children is a benefit society within the meaning of Schedule A, class 1 (A) of the said Act.

Where the context discloses a manifest inaccuracy, the sound rule of construction is to eliminate the inaccuracy and to execute the true intention of the legislature.

[R., 18 M.L.J. 349 (352)=3 M.L.T. 400.]

CASE stated under S. 103 of the Madras Municipal Act, 1884, by the Presidency Magistrates, Black Town.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.)

The Acting Advocate-General (Mr. *Spring Branson*), for Jennings.

Mr. *Brown*, for the Municipal Commissioners.

JUDGMENT.

The questions referred for our opinion have reference to the liability of the Madras Widows' and Orphans' Fund to be taxed under the Madras Municipal Act I of 1884. The fund mentioned above appears to have existed for more than half a century. It has not, however, been registered as an association, nor does it hold a certificate of association. The object with which it was instituted was to provide pensions for the widows and legitimate children of subscribers. It is divided into two branches, called the widows' and the children's branch. Each branch is divided into a specified number of classes, and payment of certain donations, premia, and subscriptions is prescribed for admission into each class. The income derived from those sources is applied first to meeting the claims on the fund, and the surplus is invested from time to time so as to constitute a funded capital. This [254] fund stands in the joint names of three trustees, and it is managed by twelve directors elected at a general meeting of the subscribers. In 1885, the funded capital stood at Rs. 12,90,821, the interest derived from it amounted to Rs. 53,487, and the subscriptions and donations, &c., in that year amounted to Rs. 51, 705, whilst pensions aggregating Rs. 99,068 were paid to 359 widows and 93 children.

Two questions were raised for decision before the Magistrates for the City of Madras, and the first was whether the fund was liable to be taxed under the Municipal Act, and the second was whether it was liable to be taxed under class 1 (B), Sch. A, attached to that Act. The Magistrates decided both questions in the affirmative and stated a special case for our decision.

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* Referred Case No. 1 of 1887.

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It is provided by Section 103 of Act I of 1884 that, if the Commissioners determine to levy a tax on arts, professions, trades, and callings (not being a military profession or calling) and on offices or appointments, every person, who within the city exercises any one or more of the arts, professions, trades or callings, or holds anyone or more of the offices or appointments specified in schedule A, shall pay in respect thereof the sum specified in the said schedule as payable by the persons of the class in which such person is placed, subject to the provisions of Section 110, which have, however, no bearing on the special case before us. The portion of schedule A, which is material to our present purpose, is class 1 (A) to (D).

(A) Joint stock companies and other companies carrying on any trade or business having gain for its object or as benefit societies and the capital of which exceeds 20 lakhs of rupees	500
(B) Joint stock companies of any of the descriptions mentioned in division (A) of this class, the capital of which exceeds 10 lakhs but does not exceed 20 lakhs of rupees...	350
(C) Companies of any of the descriptions mentioned in division (A) of this class, the capital of which is more than 5 but does not exceed 10 lakhs of rupees	200
(D) Companies of any of the descriptions mentioned in division (A) of this class, of which the capital is more than 3 but does not exceed 5 lakhs of rupees ...	150

[255] Again, companies of any of the descriptions mentioned in class 1, of which the capital is more than 2 lakhs but does not exceed 3 lakhs of rupees and of which the capital is more than one lakh but does not exceed 2 lakhs of rupees, are placed in the second and third classes with a yearly tax of Rs. 100 and Rs. 50 respectively. All companies not hereinbefore provided for are included in class IV as liable to a yearly tax of Rs. 35.

As to the first question whether the fund is liable to be taxed under Section 103 of Act I of 1884, we are of opinion that it must be decided in the affirmative. According to Section 103, every person who exercises any profession or calling is liable to pay the tax specified in schedule A, and the word "person" is declared by Section 3 (*c*) of the said enactment to include any company, association or body of individuals whether incorporated or not. The investment of the surplus income from time to time for interest so as to augment the funded capital constitutes in our judgment the exercise of a calling, and as the incorporation of the association is expressly declared to be immaterial, the fact that the fund is not registered cannot support a claim to be exempted from taxation, provided that the subscribers exercise a calling through the directors elected at their general meeting. Referring to the terms of schedule A in connection with Section 103, we see no sufficient reason to hold that the association now under consideration is not included therein. It may not be a joint stock company, or a company such as is contemplated either by Acts XIX of 1857 and VII of 1850, or by the Indian Companies Act X of 1866, or by 25 and 26 Vic., Chapter 89, Sections 4 and 184. In these, it is declared that the object must be the acquisition of gain by the company, the association or the partnership or the individual members thereof. The expression "having gain for its object," used in clause I of schedule A, appears to us to refer to

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personal gain, and, therefore, we accede to the suggestion that the subscribers to the fund cannot be said to carry on business, of which the object is pecuniary gain to themselves. We must, however, hold that they do carry on business as a benefit society, although the benefit contemplated is that of their widows and legitimate children, who have a claim upon the association on the death of the subscriber to be paid certain pensions. Further, the words "as benefit societies" are used in contradistinction to the words "having gain for its object," and we do not consider that the benefit which the society is formed to confer must always [256] be personal. It seems to us that the expression is used in the same sense in which the words "friendly society" are used in 38 and 39 Vic., Chapter 60. A society established to provide by voluntary subscriptions of the members thereof, with or without the aid of donations, relief or maintenance, for the subscribers or for their husbands, wives, children, fathers or brothers, &c., in certain events, is therein designated a friendly society, the principle on which it is constituted being that of mutual helpfulness of a provident character and of securing certain pecuniary benefit, if not to the subscribers, to their widows and children. The terms "benefit society" distinguish it from a society of which the object is purely benevolent and charitable or the promotion of social intercourse and convivial enjoyment. The business of investment for interest resulting in gain is a calling within the meaning of Section 103 and the fact that the gain is not personal but that it redounds to the benefit of those in whom the subscribers are interested does not render it the less a calling or a business. It is important to remember that the tax payable under Section 103 is a tax on professions or callings and not on the income resulting to the individual who exercises the profession or calling. We answer the first question, therefore, in the affirmative.

As to the second question, we are of opinion that the fund was properly taxed under class I of schedule A. Reading clauses (A) to (D) and Section 103 together, we entertain no doubt whatever that the companies intended throughout are of the descriptions mentioned in clause (A), and that the expression joint stock was inaccurately inserted in (B). The clauses are framed to provide a sliding scale of taxes with reference to the amount of the capital employed in the business carried on by the companies described in I (A). That such was the intention is plain from the context, and it would be absurd to hold that a company with a funded capital of less than 10 lakhs or over 20 lakhs is liable to be taxed and that the same company is not liable to be taxed when its capital is 12 lakhs. Although, in construing fiscal enactments, we should ordinarily insist upon the subject taxed being clearly within the words of the law and decline to extend its scope when there is an ambiguity, we cannot exclude from our consideration the fact that the context discloses a manifest inaccuracy. In such a case, the sound rule of construction is to eliminate the inaccuracy and to execute the true intention of the legislature. The conclusion we [257] come to is that the fund was properly taxed under schedule A, class 1 (B). The result is that the decision of the Magistrates is right.

Solicitors for Jennings—*Branson & Branson.*

Solicitors for the Municipal Commissioners—*Barclay & Morgan.*

11 M. 257=1 Weir 336.

1887 AUG. 9.

APPEL-LATE CRIMINAL.

11 M. 257= 1 Weir 336.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

QUEEN-EMPRESS v. ELLA BOYAN.* [9th August, 1887.]

Penal Code, Section 330—Causing hurt to constrain a person to satisfy a demand.

E.B., in order to constrain his wife to satisfy his demand that she should return to his house, voluntarily caused hurt to her. He was convicted under Section 330 of the Indian Penal Code ;

Held, on appeal, that the conviction under that section was bad.

APPEAL against the sentence of C. W. W. Martin, Sessions Judge of Salem, in Calendar Case No. 19 of 1887.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (KERNAN and BRANDT, JJ).

The prisoner was not represented.

The Acting Public Prosecutor (Mr. *Powell*) for the Crown.

JUDGMENT.

The Judge convicted the prisoner under Section 330 of the Indian Penal Code of causing hurt in order to constrain the wife to obey a demand of the prisoner to return to his house and sentenced him to five years' rigorous imprisonment. We, however, do not think such a demand is within Section 330, which apparently refers to some demand in respect of property.

However, the prisoner cut, though slightly, his wife, with an instrument for stabbing or cutting within Section 324.

We reverse the conviction and sentence under Section 330, and convict him under Section 324 and sentence him to three years' rigorous imprisonment.

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11 M. 258=12 Ind. Jur. 455.

[258] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

VYDINADA (*Plaintiff*), *Appellant* v. NAGAMMAL (*Defendant No.* 2), *Respondent.*† [31st January and 10th February, 1888.]

Hindu Law—Will—Construction—Gift to husband and wife—Joint tenancy—Survivorship—Alienation by husband to creditor invalid.

A Hindu, by his will, granted jointly to his brother's son and Nagammal, the wife of latter, certain land with power of alienation. The recitals in the will showed that the husband was included in the gift not because of his relationship to the testator but because he was the husband of Nagammal:

Held that the grantees were joint tenants and not tenants in common and that the joint tenancy was not severed by an alienation of the land by the husband to a creditor.

[Overruled, 23 C. 670 (679) (P.C.)=23 I.A. 37=6 M.L.J. 75=7 Sar. P.C.J. 13; R., 33 A. 41 (44)=7 A.L.J. 941=7 Ind. Cas. 697 ; 33 A. 665 (674)=8 A.L.J. 757=10 Ind. Cas. 565 ; 19 M. 110 (117) ; 21 M. 425 (427); 25 M. 385 (387) ; 27 M. 498 (503) ; 34 M. 387 (390)=5 Ind. Cas. 671=20 M.L.J. 268 ; 39 P.R. 1909.]

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* Criminal Appeal No. 154 of 1887. † Second Appeal No. 473 of 1887.

1888
FEB. 10.
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APPELLATE CIVIL.
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11 M. 258 = 12 Ind. Jur. 455.

APPEAL from the decree of D. Irvine, District Judge of Trichinopoly, reversing the decree of A. Kuppusami Ayyangar, District Munsif of Trichinopoly, in Suit No. 368 of 1886.

Ramasami Pillai, by his will, dated 29th February 1884, made a gift of his land to his brother's son, Rangasami, and Nagammal, the wife of Rangasami, jointly. On the 26th April 1885, Rangasami mortgaged this land to the plaintiff to secure the repayment of Rs. 450-4-0 and died shortly afterwards.

This suit was brought to recover the money due under the mortgage-deed (Exhibit A).

Nagammal pleaded that her husband had no power to alienate the land.

The Munsif held that, even if Nagammal had a joint right over the land, her husband had also a right of disposition over it, and decreed the claim.

On appeal, the District Judge held that Rangasami had no separate interest in the land and dismissed the suit.

The further facts necessary, for the purpose of this report, are set out in the judgment of the Court (COLLINS, C.J., and PARKER, J.).

Subramanya Ayyar, for appellant.

Bhashyam Ayyangar, for respondent.

[259] The following authorities were cited :—*Rewun Persad* v. *Mussumat Radha Beeby* (1), *Hirabai* v. *Lakshmibai* (2). *Dias* v. *DeLivera* (3), *Caldwell* v. *Fellowes* (4), *Mathura Naikin* v. *Esu Naikin* (5), and Williams' Real Property, ed. 15. p. 166.

The Court (COLLINS C.J,, and PARKER, J.) delivered the following

JUDGMENT.

The question before us is as to the right construction of the will (Exhibit B). It is addressed by Ramasami to his deceased brother's son, Rangasami, and recites that the testator had protected Nagammal since she was an infant of three months old and had married her to Rangasami; that both of them had remained under his protection; and that they were now protecting him in his old age. The will then goes on "after my death you and the said Nagammal shall enjoy after me all the nanja, punja, &c., free of obstruction from generation to generation with power of alienation and shall remain in good condition. You, Rangasami (in the singular), shall enjoy without any objection as an heir to my assets and liabilities."

The words of gift are distinctly in favour of both and include a power of alienation also in favour of both. The recitals clearly indicate that Rangasami was included in the gift, because he was the husband of Nagammal and not because he was the testator's nephew. The execution of the document to him as well as the last clause may be accounted for by the fact that Rangasami was a grown-up man, while Nagammal was a young girl; but we are clearly of opinion that the testator's intention was that Nagammal as well as Rangasami should take under the will. The question remains whether they took as joint tenants or as tenants in common. It is contended on appeal that they took as tenants in common

(1) 4 M.I.A. 137. (2) 11 B. 69 (573). (3) L.R. 5 App. Ca. 123.
(4) L.R. 9 Eq. 410. (5) 4 B. 575.

and that, even if they took as joint tenants, the tenancy has been severed. In support of these contentions, we were referred to *Rewun Persad* v. *M. Radha Beeby* (1), *Hirabai* v. *Lakshmibai* (2), *Dias* v. *DeLivera* (3), *Caldwell* v. *Fellowes* (4).

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In *Rewun Persad's case*, an estate was left to a tenant for life, and then to the testator's brother B, and his sons C and D, B and C died during the life of the tenant for life and it was held that [260] C and D took vested interests as tenants in common, the actual enjoyment of the expectant interest being postponed till the termination of the life estate; so that C's widow (C and D being divided brothers) was entitled to succeed to C's share, but in this case the Privy Council was of opinion that the instrument itself would have operated as a division so as to prevent D from succeeding to his deceased brother's share as an undivided brother.

In *Hirabai* v. *Lakshmibai*, the testator left his widow, Hirabai, and adopted son, Nathu, as the "heirs of his property." On the death of Nathu without issue, his widow claimed his share and the Courts held that the two heirs had taken as tenants in common, but that Hirabai only took a Hindu widow's interest in the moiety. The principle enunciated was that laid down by the Privy Council in *Mahomed Shumsool* v. *Shewukram*(5) that the intention is to be looked at for guidance, and the meaning to be attached to the words of the will may be affected by the surrounding circumstances. It was there considered that the words of the will did not give, and it was repugnant to general Hindu custom to presume that the testator intended to give his widow more than the qualified interest of a Hindu widow in her moiety.

Against this authority, we are referred to the judgment of Couch, J., in *Mathura Naikin* v. *Esu Naikin*; but in that case the co-heiresses were daughters of a dancing-girl and the will declared they should be "mutual heiresses to one another should anything happen to either."

Applying the principles enunciated by the Privy Council to the present case, the words of the testator clearly imply a gift of the whole estate to both with power of alienation to be enjoyed by both. Having regard to surrounding circumstances, the objects of the gift were husband and wife, it is probable that the testator did not contemplate the eventuality which has arisen, but believed and intended they would both jointly enjoy the property during their lives and that their children would take it afterwards. We think that the tenancy which they took was distinguished by unity of possession, of interest, of title, and by unity of the time of the commencement of such title, and these are the four unities of a joint tenancy. An application of the same principles of decision, which led the Bombay High Court in *Hirabai* v. *Lakshmibâi* to [261] find that in that case a tenancy in common was intended, would lead us in the special circumstances of this case to believe that the intention was to create a joint tenancy.

The question then remains whether the tenancy has been severed by the parties. We think it has not, and that no intention to effect such severance can be presumed from the execution of Exhibit A. The case to which we are referred (*Caldwell* v. *Fellowes*) was a very different one, in which three sisters, who were joint tenants, had their interests in the joint

(1) 4 M.I.A. 137. (2) 11 B. 69 (573). (3) L.R. 5 App. Ca. 123.
(4) L.R. 9 Eq. 410. (5) 2 I.A. 7 (14).

1888 FEB. 10. — APPELLATE CIVIL. — 11 M. 258 = 12 Ind. Jur. 485.

estate settled upon them by their marriage settlements, and it was held that the joint tenancy had been severed by the settlements.

On these grounds, we are of opinion that the whole estate has now vested in Nagammal by survivorship and dismiss this second appeal with costs.

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11 M. 261.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KALIANASUNDRAM AND OTHERS (*Petitioners*), *Appellants v.* EGNAVEDESWARA (*Plaintiff*), *Respondent.**
[28th October and 4th November, 1887.]

Civil Procedure Code, Section 583—*Claim for mesne profits on reversal of decree for possession of land executed.*

A decree for possession of immoveable property having been executed was reversed on appeal. The defendant applied under Section 583 of the Code of Civil Procedure for restitution of the mesne profits taken by the plaintiff. The lower courts dismissed the application on the ground that the proper remedy was by suit:

Held that the defendant was entitled to the relief claimed.

[Appl., 21 C. 989 (996); **R.**, 4 C.P.L.R. 167 (168); **D.**, 24 M. 341 (344).]

APPEAL against the order of. J. A. Davies, Acting District Judge of Tanjore, confirming the order of T. A. Krishnasami Ayyar, District Munsif of Mannargudi, in execution of the decree in Suit No. 439 of 1881.

Mr. *Powell*, for appellants.

Seshagiri Ayyar, for respondent.

The facts appear from the judgment of the Court (COLLINS, C.J. and PARKER, J.).

JUDGMENT.

[262] The plaintiff obtained a decree for the possession of immoveable property and was placed in possession in execution. The decree was subsequently reversed on appeal and the plaintiff's suit dismissed with all costs. In execution of the decree in appeal the Court of first instance has replaced defendants (appellants) in possession of the land, but has refused restitution of mesne profits under Section 583 of the Code of Civil Procedure on the ground that a separate suit must be brought for the same. The order of the District Munsif was confirmed on appeal by the District Judge.

We are of opinion that the terms of Section 583 are wide enough to permit the recovery in execution proceedings of mesne profits, to which the defendants may be entitled by way of restitution. It has already been held by this Court that interest may be awarded under Section 583 upon an amount found on appeal to have been improperly levied—*Ayyavayyar* v. *Shastram Ayyar* (1)—and that mesne profits may also be awarded has been held by the Calcutta High Court in *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah* (2). It by no means follows that, because a separate

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* Appeal against Appellate order No. 39 of 1887.

(1) 9 M. 506. (2) 14 C. 484.

suit to recover those mesne profits may not be barred under Section 244 of the Code—see *Ram Ghulam* v. *Dwarka Rai* (1)—the defendant is precluded from resorting to the remedy given in execution proceedings, by Section 583.

The orders of the Courts below are reversed with costs and the District Munsif is directed to entertain the application.

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11 M. 263.

[263] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt, Chief Justice, and Mr. Justice Parker.

MOIDIN (*Defendant No.* 2), *Appellant v.* AVARAN AND ANOTHER (*Plaintiff and Defendant No.* 1), *Respondents.*
[6th and 20th December, 1887.]

Contract to sell land—Rescission—Resale by registered deed.

A sued to recover certain land which he claimed under a registered deed of sale executed by the owner. Prior to the date of this sale to A, M had been put in possession of the land under an agreement to purchase the land for Rs. 300. The sale deed to M had not been executed because only Rs. 200 of the purchase-money had been paid to the owner:

Held that A could not recover, as it was not open to his vendor to rescind the contract with M.

[R., 16 M. 464; 29 M. 336 (339)=16 M.L.J. 395=1 M.L.T. 153.]

APPEAL from the decree of V. P. de Rozario, Subordinate Judge at Palghat, confirming the decree of B. Kamaran Nayar, District Munsif of Betutnad, in Suit No. 364 of 1885.

The facts necessary, for the purpose of this report, appear from the judgment of the Court (COLLINS, C.J. and PARKER, J.)

Srinivasa Rau, for appellant.

Sankara Menon and *Rajarathna Mudaliar*, for respondents.

JUDGMENT.

The plaintiff sues on a deed of sale executed to him by first defendant on 10th September 1885. The second defendant is in possession of the property and has been in possession since 1881. Both courts find that he was put into possession by first defendant under a contract of sale on his promise to pay Rs. 300 for the land. He has only paid Rs. 200, and, in consequence, the sale-deed in his favour, though it has been drawn up, has never been executed or registered. It is found that the sale to plaintiff was *bona fide* and for valuable consideration, and that the transaction between defendants 1 and 2 was not completed in consequence of second defendant's failure to pay the balance of the money within the time stipulated to Pakelt Mana on behalf of first defendant.

[264] The question is whether the property passed to second defendant. It is found that part of the purchase-money has not been paid, but on account of this it is not open to the vendor having given possession to rescind the contract and recover possession, though he may have a lien

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* Second Appeal No. 262 of 1887.

(1) 7 A. 170.

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upon the property for the unpaid balance of the purchase-money—see *Trimalrav Raghavendra* v. *The Municipal Commissioners of Hubli* (1). The appeal must be allowed and the decrees of the courts below reversed, the plaintiff's claim being dismissed with all costs throughout.

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11 M. 264.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

DAVUD BEG (*Defendant*), *Petitioner* v. KULLAPPA (*Plaintiff*), *Respondent.** [13th December, 1887.]

Small Cause Court Act (Mufassal), 1865—*Rent Recovery Act*, 1865—*Suit to recover moveable property.*

A suit to recover moveable property attached under colour of the Rent Recovery Act (Madras Act VIII of 1865) is cognizable by a Court of Small Causes constituted under Act XI of 1865.

[D., 5 O.C. 190 (191).]

APPLICATION, under Section 622 of the Code of Civil Procedure, to set aside the decree of P. V. Rangacharyar, District Munsif of Sholinghur, in Small Cause Suit No. 34 of 1887.

On the 25th January 1887, defendant, purporting to act under the provisions of the Rent Recovery Act, 1865, and alleging himself to be plaintiff's landlord, seized a buffalo calf for arrears of rent.

Plaintiff sued defendant in a Small Cause Court to recover the calf, or its value Rs. 2, and Rs. 2-4-0 damages. Defendant *inter alia*, objected to the court's jurisdiction. The objection was overruled and plaintiff obtained a decree for the calf and costs Rs. 5.

[265] Defendant now applied to set aside this decree on the ground that—

(1) the court had no jurisdiction;

(2) the attachment was legal.

Mr. *Michell*, for petitioner.

Rangacharyar, for respondent.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

The suit is to recover a buffalo or its value, and the plaintiff's success in the suit would necessarily involve the cancellation of the attachment without any decree for that relief. The buffalo had been attached by the defendant under colour of the Rent Recovery Act.

It is first urged that plaintiff could have had recourse to his remedy under the Rent Recovery Act, but, though plaintiff might have sought that remedy had he chosen, the jurisdiction of the ordinary courts is not ousted.

The decision in *Janakiammal* v. *Vithenadien* (2) is a similar case, in which it was held that such a claim as this being "one for personal property" is cognizable by a Small Cause Court. It is true that ruling is under

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* Civil Revision Petition No. 100 of 1887.

(1) 3 B. 172. (2) 5 M.H.C.R. 191.

Act VIII of 1859, but we do not see that the new Procedure Code affects the principle of the decision.

The Full Bench of the Allahabad High Court in *Godha* v. *Naik Ram*(1) have no doubt dissented from the Madras and Bombay decisions. The facts of that case were, however, not the same as in the present case, for there an objection had been made and disallowed under Sections 278—281 of the Code of Civil Procedure.

We are of opinion that the Small Cause Court had jurisdiction and dismiss this petition with costs.

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11 M. 266.

[266] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KRISHNA (*Plaintiff*), *Appellant* v. RAMAN AND OTHERS (*Defendants*), *Respondents*.* [28th October and 16th November, 1887.]

Civil Courts Act, Section 12—Court Fees Act, Schedule II, Article 17, s. vi—Suit to remove a karnavan—Valuation for jurisdiction.

Although, for the purposes of the Court Fees Act, a suit to remove the karnavan of a Malabar tarwad is incapable of valuation and subject to the fee prescribed by s. vi, Article 17 of Schedule II of that Act yet, for the purposes of determining jurisdiction under Section 12 of the Civil Courts Act, the right of management, which is the subject-matter of the suit, must be valued. If the value is estimated *bona fide* by the plaintiff, the Court should adopt it.

APPEAL against the order of P. P. de'Rozario, Subordinate Judge at Palghat, rejecting a plaint in Suit No. 5 of 1887.

Anantan Nayar, for appellant.

Sankara Menon, for respondents.

The facts are set out in the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

The plaintiff, on 11th January 1886, presented a plaint in the Court of the District Munsif of Angadipuram, in which he stated that he was the karnavan of the tarwad, and his suit was brought to cancel and set aside a razinama entered into by his predecessor in the office of karnavan, by which he, the then karnavan, agreed that defendant No. 1 should manage the tarwad property jointly with himself. The razi was dated 3rd September 1867, and the then karnavan has since died. The plaint bore a stamp value of Rs. 10 under the Court Fees Act and declared that the valution of the plaint for purposes of the suit was Rs. 1,564-3-2.

On the 22nd March 1886, the District Munsif returned the plaint for presentation in another Court, holding that the value of the suit, for purposes of jurisdiction, was the aggregate value of the tarwad properties. He found that the plaintiff had not included [267] the value of a temple belonging to the tarwad, which value (Rs. 3,000) added to the Rs. 2,010 shown in the plaint to be the value of other tarwad properties, brought the value of the suit beyond the jurisdiction of the District Munsif.

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* Appeal against Order No. 90 of 1887.

(1) 7 A. 152.

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The plaintiff then presented his plaint in the Subordinate Judge's Court, but the Subordinate Judge held that the suit was cognizable by a District Munsif and returned the plaint on the 11th August 1876, observing that, as the family property need not be valued in a suit to remove the karnavan or sole manager—*Govindan Nambiar* v. *Krishnan Nambiar* (1) *a fortiori*—it need not be valued in a suit to remove a joint manager and to cancel a razi which provided for joint management.

The plaintiff then appealed to the High Court in appeal against order No. 131 of 1886, when the order of the Subordinate Judge was set aside, the Court observing that "the Subordinate Judge must determine what is the value of the subject-matter of the suit for purposes of jurisdiction. It does not follow that, because the Court-fees payable on the plaint amount only to Rs. 10, the suit is within the jurisdiction of the District Munsif."

The Subordinate Judge has now again refused to entertain the plaint and has returned it for presentation in the District Munsif's Court on the ground that the High Court has held in *N. C. Kunhi Raman* v. *N. C. Puttalathu Kimhunni Nambiar* (2) that, for the purposes of jurisdiction, a suit to remove a karnavan is not a suit for the recovery of tarwad property and to be valued as such, but a suit which asks for a relief which is incapable of valuation. The Subordinate Judge goes on to say that, as the suit is incapable of valuation, it cannot be said to be beyond the pecuniary limits of a District Munsif's jurisdiction. Against this order, the plaintiff has now again appealed, the District Munsif having in the meantime again refused to entertain the plaint.

The Subordinate Judge has, in our opinion, failed to give effect to Section 14 of the Civil Courts Act and is mistaken in considering that the valuation of the relief claimed is necessarily the same as the valuation of the subject-matter of the suit for purposes of jurisdiction. In *Govindan Nambiar* v. *Krishnan Nambiar* (1), the sole question referred for decision was under what provision of the Court Fees Act, a suit for the removal of the karnavan should be **[268]** valued for the purposes of stamp duty. It is true that the learned counsel pointed out that the Courts below seem to have made no distinction between valuation for the purposes of jurisdiction and valuation for the purpose of ascertaining the Court fee leviable; but the High Court restricted the decision to the sole question which was referred under Section 617 of the Code of Civil Procedure.

In that case, it was, however, observed that it would be clearly erroneous to value such a claim as if it were a claim for the recovery of possession of land, for the possession of the property is throughout in the tarwad and is not affected by a change in the person who fills the office of manager. This suggests that the Court regarded the right to manage and not the ownership in the land and the consequent right to possession as the subject-matter of the suit, Again, in *N. C. Kunhi Raman* v. *N. C. Puttalathu Kimhunni Nambiar* (2), it was held that a suit to remove a karnavan is not a suit to recover tarwad property and to be valued as such, but is a suit which asks for a relief that is incapable of valuation, and that the value put on it by the parties was the one to be adopted.

These decisions proceed on the view that possession is always in the tarwad and that the subject-matter of the suit is not the land but an interest in it, namely, the right of management which is not capable of valuation. But it does not follow that a District Munsif has jurisdiction

(1) 4 M. 146. (2) 4 M. 314.

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over every suit for the removal of a karnavan though the tarwad property to be managed is very considerable in value. The right of management must, from the nature of things, rise in value in proportion to the value of the property to be managed. It is not, therefore, unreasonable to take into consideration the value of the property and to see that the value put by the parties on the right of management for the purpose of jurisdiction is *bona fide*, and, if *bona fide*, to adopt it as the value of the subject-matter for purposes of jurisdiction The Subordinate Judge was wrong in holding that, because the subject-matter is incapable of precise valuation, the District Munsif had necessarily jurisdiction over the suit.

We set aside the order of the Subordinate Judge and direct him to entertain the plaint. Costs of these proceedings will be costs in the cause.

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11 M. 269=12 Ind. Jur. 92=12 Ind. Jur. 381.

[269] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

PACHAYAPPAN (*Plaintiff*), *Appellant v.* NARAYANA (*Defendant*), *Respondent.** [21st October and 10th November, 1887.]

Civil Procedure Code, Sections 313, 315, 586—*Suit to recover purchase money—Suit by purchaser at Court-sale of nature cognizable by Small Cause Court—Orders made not final.*

A suit brought, under s. 315 of the Code of Civil Procedure, by a purchaser at an execution sale to recover the purchase money, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, is not a suit of a nature cognizable by a Small Cause Court constituted under Act XI of 1865.

P. bought certain land at a sale in execution of a decree. Before the purchase money was paid, P. applied to the Court by petition to set aside the sale and return the deposit money on the ground that the judgment-debtor had no saleable interest in the land. The Court rejected the petition and confirmed the sale on the 15th March 1881. The sale was subsequently set aside by a decree obtained by V. in a suit against P., and the judgment-creditor. P. then sued the judgment-creditor to recover the purchase money. The District Judge dismissed the suit on the ground that P. was debarred from suing by the order of 15th March 1881.

Held, that the order did not conclude P. from bringing this suit.

[F., 5 C.W N. 240 (241); 12 C.P.L.R. 49 (51); R., 16 M. 361 (362); 19 M. 315 (321); 15 Bom. L.R. 41 (43); 17 Ind. Cas. 437 (438)=23 M.L J. 487 (488)=12 M.L.T. 431=(1912) M W.N. 1130; D., 12 M. 454 (457).]

APPEAL from the decree of C. W. W. Martin, District Judge of Salem, reversing the decree of S. Ponnusami Mudali, District Munsif of Krishnagiri, in suit No. 503 of 1884.

Ramachandra Rau Saheb, for appellant.

Bhashyam Ayyangar, for respondent.

The facts are set out in the judgment of the Court (KERNAN and PARKER, JJ.).

JUDGMENT.

On the 8th of January 1881, the appellant purchased at auction in suit No. 236 of 1879 a moiety belonging to the judgment-debtor in a certain garden for Rs. 300, and having paid into Court a deposit of

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* Second Appeal No. 5 of 1887.

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Rs. 75, applied by petition on the 18th of January 1881 to the Munsif to set aside the sale and return the deposit on the ground that the judgment-debtor had no saleable interest in the garden. On the 15th of March 1881, [270] the Munsif made an order refusing to set aside the sale. The purchaser did not appeal, and completed his purchase by paying the balance of purchase money into Court, and the purchase money was paid by the Court to the execution-creditor, the now respondent. Subsequently, a suit was filed by Vadamayammal and another (No. 588 of 1881) against the execution-creditor and the purchaser to set aside the sale, and a decree was made on the 21st of June 1882 (confirmed on appeal) setting aside the sale on the ground that the judgment-debtor had no interest in the garden which could be pledged or sold. The appellant brought this suit as plaintiff against the execution-creditor to recover Rs. 450, being the amount of the purchase money and interest. The Munsif decreed for the plaintiff, but the District Judge reversed the decree and dismissed the suit on the ground that plaintiff (appellant) was concluded by the order of the 15th of March 1881, refusing to set aside the sale.

This is a second appeal filed by the plaintiff on the ground that the District Judge was wrong in deciding the point of law as he did. A preliminary objection is made by the respondent that the suit is one of the nature cognizable in a Small Cause Court, and there is no second appeal, the subject-matter being less than Rs. 500—Section 586, Civil Procedure Code. To support this objection, it was contended that the plaintiff's (appellant's) claim was on contract within Section 6 of the Small Cause Court Act XI of 1865. There was certainly no express contract between the appellant and respondent in relation to the money, and no facts are stated which would give rise to any presumption that any implied contract existed between them. The premises were put up for sale under the orders of the Court (Sections 286, 287, Civil Procedure Code) by its own officer. The money was paid into Court and was paid out by the Court to the purchaser. Section 315 provides that, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is therefore deprived thereof, the purchaser shall be entitled to receive back his purchase money from any person to whom the purchase money has been paid. It is under the right conferred by this portion of Section 315 that this suit is brought. The right to recover back the money being conferred, a suit may be brought therefor (Section 11). This power was given to the purchaser for the first time by Section 315. Prior to that, no provision was made [271] in the Code, enabling a purchaser to recover purchase money, paid by him into court at an auction sale, on the ground that the judgment-debtor had no saleable interest in the property which purported to be sold. Cases (L.R., 5 I.A., 215; L.R., 10 I.A., 116; L.R., 2 Bom,, 258) were cited in argument to the effect that an action on contract would lie by a purchaser against an execution-creditor, where he guaranteed the title by a statement specially made at his request in the proclamation, or where the Sheriff, at the execution-creditor's request and risk, sold property which he had no right to sell; but the principle on which these cases were decided was that the Sheriff was in fact the agent of the execution-creditor and guaranteed the title. There is no such fact here. It was further contended that the word "contract" in the Small Cause Court Act had been decided by a Full Bench of this Court to be one of which application is not confined to express or implied contracts, but to claims to enforce obligation *quasi ex contractu*, and that this suit is one *quasi ex contractu*. The Full Bench case referred

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to is *Govinda Muneya Tiruyan* v. *Bapu* (1). That was an action in a Small Cause Court for contribution by co-debtors who had paid a debt in which they and the defendant were jointly liable. The Chief Justice held that the action was founded on an implied contract between the debtors and gave his reasons at large. He stated he was aware of cases where the doctrine of implied contract had been widely applied, *viz.*, in suits to recover money paid by mistake and in suits where a plaintiff is at liberty to waive a tort committed and sue in *assumpsit* for money recovered as the result of the tort, and to cases where the circumstances precluded presumption of implied promise or request; but he stated that such obligations could be said to rest on implied contracts only by pure fiction, and that they were merely obligations *quasi ex contractu.* He stated it would be a strained construction to hold that such claims were "on contract" within the meaning of Section 6. He expressed his opinion that this obligation to contribute rested on implied contract according to the term of the English decisions, and was one to which Section 6 applied. Mr. Justice Bittleston concurred in the opinion that the Small Cause Court had jurisdiction, the suit being based on *contract* within the meaning of the Act.

[272] Mr. Justice Holloway referred to the case of *Batard* v. *Hawes* (2), which was an action by co-debtors for contribution. At p. 296 of the judgment in that case, Lord Campbell says: "In a joint contract for the benefit of all, each takes upon himself the liability to pay the whole debt consisting of the shares which each contractor ought to pay between themselves and each in effect takes upon himself a liability for each to the extent of the amount of his share. Each, therefore, may be considered as becoming liable for the share of each one of his co-contractors at the request of such co-contractor, and on being obliged to pay such share, a request to pay it is implied as against the party who ought to have paid it." Mr. Justice Holloway says "being certain that the terms used in the Act were used in the sense of English lawyers, I answer without hesitation that the demand in this case is a demand due on contract."

In a prior part of his judgment, he said "what an English lawyer did and does mean by contract is not a contract at all, but obligation which happens to correspond pretty nearly to the Roman obligation of contract, and *quasi ex contractu.*" He then states his idea of what the obligation is, and ends by referring to Roman law authority and says "with this a whole string of similar obligations will disappear if contract is only to mean obligations *ex contractu.*"

It seems to us that he agreed with the decision of Lord Campbell and with the judgment of the Chief Justice that there was an implied contract between the co-debtors, and that the action was supported thereby and that the action was not founded on an obligation *quasi ex contractu.* Mr. Justice Collett agreed that the case was cognizable by the Small Cause Court, but gave no judgment in detail. Mr. Justice Innes was of opinion that in the use of the word "extent" the Small Cause Court Act had in view all obligations classed as contracts under the English law, *viz.*, express and implied contracts and obligations *quasi ex contractu*; but he considered that the obligation to contribute was one which could not be classed as an implied contract (or an obligation arising out of an agreement inferred from the conduct of the parties), but that it was an obligation *quasi ex contractu* arising simply *ex debito justitiæ*, so that

(1) 5 M.H.C.R. 200. (2) 2 E. & B. 296.

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Mr. Justice Innes would appear [273] to stand alone in his judgment and to differ from the Chief Justice and Mr. Justice Bittleston, and we think from Mr. Justice Holloway and from the decision in *Batard* v. *Hawas*. *Harihara* v. *Subramanya* (1) was cited to prove that contracts *quasi ex contractu* were within the term "contract" in the Act. That was a case in which the question was whether an action by an execution-creditor, who was entitled to rateable distribution of assets under Section 295 and who was not paid, could be maintained in a Small Cause Court. On appeal, it was held by the High Court that such action was one *quasi ex contractu* and within the meaning of the term contract. However the claim in that case was under Section 72 of the Contract Act, being money paid by mistake and under Section 295, Chapter 5 of the Contract Act treats of "certain relations resembling those created by contract." It is, therefore, distinguishable from this case. The Court referred to the Full Bench case as a decision that actions *quasi ex contractu* were within the term "contract" in the Act. However, we can see no reason why the action under Section 315 should be on contract, express or implied, or *quasi ex contractu*.

The suit is founded on the application of Section 315 to the facts, and if the facts are stated in the plaint the legal right appears; no presumption of contract of any sort arises or is necessary to support the action. The Appellate Court decided in this case that the action could not be maintained, inasmuch as the petition and motion of the appellant to set aside the sale under Section 313 was refused. The Lower Court interpreted the decision of High Court (Allahabad) in *Manna Singh* v. *Gajadhar Singh* (2) to mean that if a purchaser applied under Section 312 or Section 313 to set aside the sale and failed, he could not maintain an action under Section 315 even if it was afterwards found that the judgment-debtor had no saleable interest. We do not think such was the decision or the effect of the decision. On the contrary, the Chief Justice says that the words "when it is found" contemplate some previous proceeding in which it was found the judgment-debtor had a saleable interest, and that both remedies were open to the purchaser. The Section 315 appears to contemplate that such motions of a summary nature, if refused, would not prevent the purchaser bringing a suit if it was found that the debtor had not such interest.

[274] It was contended that, as the order under Section 313 was not appealed against, it is final and amounts to a decision of a suit under Section 13; but the Act does not declare that an order under Section 313 or an order on appeal from it is final. Where the Act contemplated that orders on applications should be final, it expressly provides so (see Section 283, Civil Procedure Code). The order under Section 313 is not a final decision in a former suit within the meaning of Section 13. The petition of the appellant to have the sale cancelled was not a former suit between the same parties within Section 13. It was an application in a suit in which the appellant was not a party.

We set aside the decree of the Lower Appellate Court, and, as the Judge decided the case on a preliminary point, remand it to him for trial on the merits. Costs of this appeal to be provided for in the revised decree.

(1) 9 M. 250. (2) 5 A. 577.

11 M. 274.

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APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

SETHU *(Plaintiff), Appellant v.* SUBRAMANYA AND ANOTHER *(Defendants), Respondents.** [4th November, 1887.]

Limitation Act, Section 10—Suit against dharmakarta of temple to recover money misappropriated.

Plaintiff, as dharmakarta of a Hindu temple, alleging that the defendant, a former dharmakarta, who had been removed from office, had, when in office, misappropriated certain temple funds held by him, sued to recover a certain sum alleged to have been misappropriated.

Held that the defendant was a person in whom the temple funds had become vested in trust for a specific purpose within the meaning of Section 10 of the Limitation Act, 1877, and that as the plaint disclosed a right to follow trust funds in his hands, the suit might be treated as a suit for that purpose.

[F., 32 B. 391 (401)=10 Bom. L R. 540 ; 31 C. 314 (317) ; Appl., 21 B. 257 (264-267); R., 14 M. 61 (63); 21 M. 245 (246); 31 C. 519=8 C.W.N. 500.]

APPEAL from the decree of K. R. Krishna Menon, Subordinate Judge at Tinnevelly, in suit No. 5 of 1884.

Subramanya Ayyar, for respondent.

Bhashyam Ayyangar and *Kalianaramayyar*, for appellant.

The facts and arguments appear sufficiently, for the purpose [275] of this report, from the judgment of the Court (KERNAN and PARKER, JJ.)

JUDGMENT.

The plaint was filed by Sivan Sethu Rayar, dharmakarta of the temple of Tiruchendur Subramanya Sami Kovil, on the 1st day of February 1884, against first and second defendants to recover Rs. 5,394-1-3. In the plaint it is stated as follows:—that first defendant had been dharmakarta of the temple from 1878 to April 1879, managing the affairs of the temple; that, while he was so managing, he appropriated money from the temple funds and got a note from one Pandian for Rs. 5,000 and was repaid part of the amount; that the first defendant was removed from the office of dharmakarta, and after that the succeeding dharmakarta brought a suit (No. 6 of 1880) against Pandian on the note; and that the Subordinate Judge, and, afterwards, the District Judge in appeal, decreed against the plaintiff in that suit, the dharmakarta, on the ground that the first defendant did not lend money on the note to Pandian; that the amount alleged to be lent to Pandian according to the accounts of the temple kept by him was misappropriated by the first defendant for his own use; that the second defendant is son of the first defendant; and that after first defendant was dismissed, they divided in order to avoid amounts due to others. The defence filed by the first defendant was as follows:—that the suit is not maintainable; that plaintiff has no cause of action; that when the first defendant was dharmakarta, the devastanam committee passed proceedings to the effect that a certain amount from the temple funds should be lent by first defendant on interest to respectable men of the district; that defendant lent Rs. 5,000 of the funds to Pandian, who was a respectable man, and obtained a promissory note from him and forwarded it to the office of the committee; that Pandian

* Appeal No. 120 of 1886.

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paid part; that the accounts of the first defendant as dharmakarta were furnished to the committee and admitted by them; that he acted under the orders of the committee; that he did everything he was bound to do and failed in nothing in the matter; that the dharmakarta, who succeeded him is his enemy; and that it was owing to the laziness and negligence of that dharmakarta that the money was not recovered from Pandian.

Issues were settled—

(1) whether first defendant during his employment as dharmakarta embezzled funds of the pagoda to the extent of Rs. 2,389;

[276] (2) whether the first defendant concealed his embezzlement by keeping on the pagoda records false accounts; and

(3) whether the suit is barred.

The Subordinate Judge, on the 3rd of March 1886, dismissed the suit as being barred by limitation without going into the merits, although he took the evidence. In his judgment, he refers to this suit as being brought by the present trustee of the pagoda against the first defendant, a former trustee, who is said to have misappropriated, and states the substance of the plaint and defence and issues, and records the evidence. Then the Judge proceeds to record that the defendants contended that the case was within Section 10 of the Limitation Act and expressed his opinion that Section 10 did not apply on the ground that plaintiff was not a beneficiary but a trustee, in whom the legal interest in the trust property was vested. (This view was given up on appeal before us.) The Judge held that this suit is not one to follow trust property. To use his words, he said to claim the benefit of Section 10, Limitation Act, the suit against the trustee must be one instituted by the beneficiary or *cestui que trust* for the purpose of following the trust property in his hands, and it proceeds on the assumption that the trust is still subsisting. Hence the suit is not to follow trust property.

The Judge remarks that the promissory note from Pandian was admittedly genuine and was forwarded to the committee, and that it was after the institution of the suit against Pandian that the plaintiff became aware that no money was lent by the first defendant and that the pagoda accounts had been falsified. He held that the suit was one for compensation for loss arising from loss of money dishonestly misappropriated, or for relief on the ground of fraud, and not to recover any specific property, the subject of the trust; that if all that plaintiff declared in the plaint was true, the defendant's conduct amounted to fraud and the limitation applicable appeared to be either Article 48 or 95 of Schedule II of the Limitation Act; and that under both articles three years elapsed before suit from the discovery of the fraud and that, on the plaintiff's own showing, the fraud became known when the defendant produced his account A in the former suit. He dismissed the suit with costs.

The plaintiff appeals on the ground that Section 10 of the Limitation Act applied and that the limitation of three years did not apply; but that, if three years' limitation applied under Article 96, the suit was within three years from discovery of the fraud, and [277] that Article 120, whereby six years is the limitation, applied. It appears to us that the first defendant was a trustee of the pagoda at the time when it is alleged he misappropriated the money of the pagoda to his own use. It was contended that he was only a manager of the temple appointed by the committee under Act XX of 1863, and that he was only a servant of theirs, as he was appointed by them and could be removed for misconduct. The Act XX of 1863 empowers the committee to appoint a trustee, manager

or superintendent. How the first defendant was appointed, whether orally or by writing, does not appear, nor does it appear whether there is any difference in the duties to be performed by a trustee from those to be performed as a manager, and if the question of limitation might be affected by ascertaining the exact terms in which the first defendant was appointed dharmakarta, we should direct inquiry.

But there is no doubt that the first defendant was dharmakarta of the pagoda, and it has been held in more cases than one that a dharmakarta is a trustee *Virasami* v. *Subba* (1). The defendant then was a dharmakarta appointed by a Collector before the Act XX of 1863 was passed, but he was not a hereditary dharmakarta. He had been removed by the committee, and that suit was brought to recover the possession of the temple and specific moveable property within it and also money of the temple recovered by him and not paid to the committee, and which money, it is stated in the judgment, he paid away after he was dismissed. The Court said, there was no doubt that the dharmakarta was a trustee and that Section 10 applied and time did not bar the suit. A decree had been made by the Subordinate Judge for delivery of the property sought to be recovered including the ready cash recovered by him as stated in the plaint and which the defendant had paid away after he was dismissed, and the High Court affirmed the decree. In the case, second appeal No. 922 of 1885, it was held by the High Court that a dharmakarta is a trustee. The position of a dharmakarta as a trustee is recognized by the Subordinate Judge who calls the defendant "trustee" of the temple.

It was contended for the defendant that, even if he is to be held to be a trustee, yet that the money of the temple did not become vested in him in trust for any specific purpose. It was **[278]** observed that this point was not raised in *Virasami* v. *Subba* (1). As the first defendant was a trustee of the temple property, including the money, was he not trustee for the specific purpose of applying the property to the use of the temple, for the disposal of it to various purposes to which the property of such temple is usually applied? The accounts furnished by him to the committee clearly prove that such was the specific purpose for which he held the property. The trust was one which was not merely an implied trust, arising from a fiduciary relationship. If the first defendant, being a trustee, had not the property vested in him for the specific purpose above mentioned, then there was no purpose for which he held it.

Khierodemoney Dossee v. *Doorgamoney Dossee* (2) was cited by the respondent for the expression of opinion at page 465 that the words "vested for some specific purpose" in Section 10, Limitation Act, meant vested for some specific purpose or object as distinguished from an implied trust, or such trust as the law would infer from the existence of particular facts or fiduciary relations. In that case, certain limitations over to the testator's sister's son in a will were held void; and this being so, it was held that the trustee was not a trustee for any specific purpose in respect of the estate limited over, which was held to have failed. The decision in that case does not affect the case as the specific purpose failed.

Saroda Pershad Chattopadhya v. *Brojo Nath Bhuttacharjee* (3) was also cited for the respondent in which the Court in the judgment state—"To claim the benefit of Section 10, Limitation Act, the suit against the

(1) 6 M. 54. (2) 4 C. 455. (3) 5 C. 910.

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trustee must (amongst other things) be for the purpose of following property in his hands; the plaintiff's suit has no such purpose. It is plain that its object is not to recover any property 'in specie,' but to have an account of the defendant's stewardship, which means an account of receipts and disbursements by the defendant on plaintiff's behalf and to be paid any balance found due to him on taking the account."

That was a suit against a person to whom property was bequeathed in trust that he should hold it during the minority of the plaintiff for his benefit, and to make over as much as remained unexpended to plaintiff on his attaining his age. The defendant accepted the property and the trust and delivered over certain of [279] the property, moveable and immoveable, to the plaintiff, but did not account. The suit was for an account of the trust property. The defendant pleaded that plaintiff's suit was not filed until after three years from his attaining majority. The plaintiff relied on Section 10. The Court, as above stated, held that Section 10 did not apply, but that Article 120 did. It has been contended that the Court in using the word "in specie" meant to decide, and that the true construction of Section 10 is, that unless the trustee has in hands the identical property which the trustee received of the trust estate, and that if he parted with the possession of that identical trust property, no suit to follow trust property can lie; but we do not think such was the intention of the Court, which appears to us to have used the words "in specie" in contradistinction to a suit for an account. A suit to follow trust property not in possession of the trustee will be under various circumstances, *viz.*, if the trustee parted with it to another person not for value (see Section 10), or if the trustee has converted the trust property into other property held in his own name, or in the name of an assignee not for value.

In like manner, trust money used by a trustee in his own trade without authority and trust funds mixed up by the trustee with his own funds can be followed. See *Blake* v. *Bunbury* and *Tidd* v. *Lister* (1). In this case the plaint states that the trustee received the property held for specific purpose, and the first defendant admits the fact, but says that he lent the money as directed by the committee. The plaint does not state (as plaintiff is apparently not aware) whether the defendant still retains that money or has invested it or any other facts which would admittedly entitle the plaintiff to follow the trust fund. However is it not to be presumed, until the contrary is shown by the first defendant, that he still has in possession the trust fund, either in its state as he originally had it, or in some other form of property into which he has converted it? In this view, is not the plaintiff entitled to follow the trust fund? If the plaintiff is not entitled to file a suit to follow the trust property upon such facts as appear in this case, the result may be very serious loss to trust estates in many cases, as the trustee may, by committing a breach of trust and concealing the trust property, or giving no information in respect of it, evade the continuous liability of Section 10 of the Limitation Act.

[280] The facts stated in the plaint and the relief prayed, *viz.*, "a decree that plaintiff do recover from the first and second defendants" the money would be suitable to a claim for compensation or for repayment; but if the right to follow the trust fund is thereby disclosed, though not referred to in express terms on the plaint, there seems no reason why the suit should not be taken as one to follow the trust property. We think

(1) Lewin, p. 577.

therefore that this suit may be treated as one to follow the property entrusted to the first defendant for a specific purpose, and that we should hold that Section 10 of the Limitation Act applies.

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We reverse the decree of the Subordinate Judge and remand the suit for a hearing on the merits. The appellant must have the costs of this appeal, but the costs in the Court below will abide and follow the result.

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11 M. 280.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

CHATHU *(Plaintiff), Appellant v.* KUNHAMED *(Defendant No.* 3), *Respondent.** [29th July, 1887.]

Decree—Execution—Assignment of interest of judgment-debtor in surplus proceeds of sale—Attachment by creditor of judgment-debtor—Suit for declaration of assignee's title—Civil Procedure Code, Section 266 (k)—Contingent interest.

In execution of a decree in a District Munsif's Court, certain property having been sold, a balance, after satisfying the decree, remained in favour of the judgment-debtor X. After the date of sale, but before the whole of the purchase-money had been paid into Court, X applied to the Court by petition, praying that the amount due to him might be paid to A, to whom, he alleged, he had assigned it. Before any order was made on this petition, B, C, D, and E, in execution of separate decrees against X, attached the sum in Court. The District Munsif ordered that B, C, D, and E should be paid before A. A brought a suit against B, C, D, and E in another District Munsif's Court for a declaration that he was entitled to the money and to set aside the said order. The Munsif set aside the order and declared the plaintiff to be entitled to the amount. B, C, D, and E severally appealed against this decree, and the District Court passed a decree in each appeal, dismissing A's suit. A presented one second appeal, making B, C, D, and E parties thereto, against the four decrees of the District Court:

[281] *Held* (1) that A was bound to file a separate appeal against each of the decrees passed by the District Court;

(2) that A (having by permission of the Court amended his second appeal and filed three more second appeals) was entitled to a decree, declaring his title to the amount claimed.

APPEALS from the decrees of H. T. Ross, Acting District Judge of Tellicherry, reversing the decree of P. J. Ittiyerah, District Munsif of Tellicherry, in suit No. 245 of 1884.

The Acting Advocate-General (*Mr. Shephard*) and *Anantan Nayar*, for appellants.

Mr. *Wedderburn* and Mr. *Brown*, for respondents in S. A. 990 of 1885 and 1168 and 1169 of 1886.

Mahadeva Ayyar, for respondent in S. A. 1160 of 1886.

It was argued, for the respondents, that the plaintiff had a separate cause of action against each of the defendants and that the suit was therefore bad for misjoinder; that the plaintiff should have sued in the Chavacherry District Munsif's Court and was not entitled to any decree setting aside the order of that Court: that he was bound to bring an appeal against each decree of the District Court, and his remedy was now barred by limitation.

The facts appear from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

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* Second Appeals Nos. 990 of 1885 and 1158 to 1160 of 1886.

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JUDGMENT.

A decree was obtained against Govindu Poduval and Vasu Poduval in suit No. 186 of 1882 in the Chavacherry District Munsif's Court, in execution of which there was a balance of Rs. 687 to the credit of the judgment-debtors after paying the plaintiff. On 29th August 1883, Govindu Poduval transferred his right to this amount to plaintiff, and by a joint petition (B) they prayed that the amount be paid to plaintiff. The sale had taken place on 27th August, and on the date of the petition (29th August) only 25 per cent. of the sale amount had been deposited. No orders were passed till 11th December, but in the meanwhile the amount had been realized, and before 11th December the amount had been attached by the four defendants in execution of decrees obtained by them in the Subordinate Court. By his order of 11th December 1883, the Chavacherry District Munsif held that the decree-holders had priority over the assignee and refused to pay the amount to plaintiff. The plaintiff then brought this suit on the file of the District Munsif of Tellicherry to cancel the order of the Chavacherry Court and for a declaration against the **[282]** decree-holders in all the four suits that he was entitled to the Rs. 687. No objection was taken as to misjoinder, or as to the jurisdiction of the Court, and the District Munsif decreed in plaintiff's favour with costs. Against this decree, the defendant preferred four separate appeals, and the Acting District Judge, on the ground that a contingent interest only was transferred on 29th August and that the sum was attached before the contingency became vested, reversed the District Munsif's decision and dismissed the plaintiff's suit with costs throughout.

Against these four decrees, the plaintiff has now preferred one second appeal only. It was argued for him by the Acting Advocate-General (1) that the only ground of defence (collusion) having been abandoned, the plaintiff should have had a decree; (2) that if no sum could be assigned on the ground that it was a contingent interest only, so also none could be attached, and that in any case the assignment had priority; (3) that costs had been wrongly given in the four appeals.

Viewing the suit as one for a declaratory decree, we are of opinion that no objection can be properly taken to its being brought in the Tellicherry Court and against all four defendants. Should plaintiff succeed in establishing his title by declaratory decree, he could then carry his decree to the Court by which the order of attachment was issued, and such Court would be bound to recognize the adjudication and act accordingly—see *Kolasherri Illath Narainan* v. *Kolasherri Illath Nilakandan Nambudri* (1)—but four decrees have been passed by the Lower Appellate Court, and against them only one second appeal has been preferred. We are of opinion that this course cannot be adopted and that a second appeal must be preferred from each decree, though the decision in one second appeal will govern the rest. We will, therefore, allow the plaintiff, as the omission appears to have been due to a mistake, to put in three more second appeals and to amend the present one by limiting it to one of the decrees only, and will allow him a month's time for this purpose. If this be done, we shall be in a position to dispose of the whole case, but if it is not done, this second appeal must fail.

The appellant having now (25th July 1887) put in three more second appeals, we now proceed to dispose of the other points raised. **[283]** We can see no reason why the assignment of the interest to the

(1) 4 M. 131.

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plaintiff should not be upheld. The same objection now raised would equally apply to the attachment as to the assignment of the interest.

We must reverse the decree of the Lower Appellate Court and restore that passed by the District Munsif with the exception of the words "it is ordered that the order on petition 1387, of 1883 passed by the District Munsif of Chavacherry on 11th December 1883, be, and the same hereby is, set aside." In other words, we allow the declaration only. We will allow the appellant half costs in this Court and full costs in the lower appellate Court.

This governs second appeals 1158, 1159, and 1160 of 1886.

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11 M. 283.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

ATHAVULLA (*Defendant*) *Appellant v.* GOUSE (*Plaintiff*), *Respondent.** [10th November 1886, 12th September 1887 and 6th February, 1888.]

Pensions Act, 1871, *Section* 4—*Religious Endowments Act,* 1863, *Sections* 14, 15—*Yaumia granted to mosque—Suit against co-trustee for declaration of right.*

Section 4 of the Pensions Act, 1871, provides that no Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former government, whatever may have been the consideration for any such pension or grant and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted:

Held, that a yaumia allowance granted to a religious institution did not fall within the purview of the Pensions Act.

Where a trustee of a Muhammadan mosque sued for a declaration of his title as against a co-trustee:

Held that Sections 14 and 15 of the Religious Endowments Act, 1863, were not applicable to the suit.

[Diss., 22 B. 496 (499); F., 31 M. 12 (14) = 17 M.L.J. 549 = 3 M.L.T. 104.]

APPEAL from the decree of K. R. Krishna Menon, Subordinate Judge of Tinnevelly, in suit No. 19 of 1884.

The plaint in this suit was as follows:—

[284] "Plaintiff's father, Kadar Mohidin Khatib Sahib, Gulam Hydrus, son of Mahomed Gouse, and the defendant's father, Kaja Mohidin Hydrus, were the hakdars to Pirdastagir mosque. The said mosque and the properties appertaining thereto belong to plaintiff's family.

"The properties specified in the schedule hereunto annexed belong to the said mosque. They were granted as inam by the former government to the said mosque in the names of the ancestors of both the parties, so that the income thereof might be applied to the charities of the mosque as specified in Schedule I, and the remainder to the maintenance of the hakdars who do service.

"The forefathers of both the parties were enjoying the said properties and were conducting the charities of the mosque with the income thereof. As the aforesaid Gulam Hydrus, son of Mahomed Gouse, among them,

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* Appeal No. 144 of 1885.

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conducted proceedings against the right of the said mosque, he was dismissed from the place of hakdar by the Inam Collector; and the inam patta was granted in the names of the fathers of plaintiff and defendant.

"Subsequently, a misunderstanding arose between plaintiff's father, Kadar Mohidin Sahib, and defendant's father, Kaja Mohidin Hydrus, and, under the orders of the Collector, the members of the committee were arbitrators and decided, on the 2nd January 1868, according to the wishes and consent of both of them, that plaintiff, the hakdar, should be manager of the said mosque, receive the income of the properties and conduct the charities, and that the defendant and Kadar Shah the plaintiff's step-brother, should do service in the said mosque. The said Kadar Shah went abroad without performing service, &c.

"Thereupon, plaintiff himself was conducting the charities of the mosque out of the income of the said inam properties and out of his own (funds). The defendant also was, in accordance with the said order, doing services for a short time.

"Under such circumstances, the defendant wrongfully alienated some of the properties of the mosque and did not join the plaintiff in drawing yaumia allowance from the taluk (treasury) and further he ceased to do the services of the mosque.

"Moreover, in the suit brought by plaintiff before the Revenue officer about the attempt made separately by the defendant to draw the yaumia of the mosque from the taluk treasury, the defendant deposed in the Tinnevelly taluk kachari on the 8th and [285] 15th of July 1880, that he was the man doing the services of the said mosque, that plaintiff alone was the hakdar to the mosque, and that, if he wrongfully alienated the charity properties in future, he would forfeit his right; and, thereupon, in July 1880, the plaintiff drew from the taluk treasury, on giving a receipt, the yaumia allowance for the amount he had spent out of his own funds in 1879, and plaintiff alone paid the quit-rent due up to fasli 1289.

"Subsequently, the defendant, without properly doing the services of the mosque in accordance with the said deposition, has unlawfully alienated the properties and prevented the tenants from paying the varam. Consequently, plaintiff himself has been conducting the charities of the mosque out of his own funds and the tenants have been paying the quit-rent for plaintiff.

"The defendant obtained rent-deeds from some of the tenants who cultivated the inam lands belonging to the said mosque, alleging fraudulently that he was the hakdar to the mosque; and to recover the melvaram due under them, the defendant brought Small Cause Suits Nos. 8 and 41 of 1883 on the file of the Subordinate Court of Tinnevelly, in which the plaintiff put in a petition stating that he was the hakdar to the said Pirdastagir mosque, that he was entitled to receive the said melvaram, and that he should, therefore, be included as a party, and that the defendant was not entitled to the place. Thereupon, the Court ordered on the 24th November 1883 that this plaintiff should establish his right by means of a regular suit. The mosque in question and the properties appertaining thereto are under the management of plaintiff.

"The cause of action arose on the 24th November 1883 at Tinnevelly.

"The plaintiff, therefore, prays the court

(i) that it may be declared that plaintiff is hakdar to Pirdastagir mosque specified in Schedule I and all the properties

appertaining thereto and entitled annually to draw from the taluk treasury the yaumia allowance fixed for the said mosque as specified in Schedule V, that defendant shall have no connection with them, that plaintiff alone has right to the whole management of the properties, and that the defendant, who has made wrongful alienation, has no right to the mosque, &c.;

[286] (ii) that plaintiff may draw the remaining yaumia allowance for faslis 1290, 1291 and 1293, which is in deposit in the Tinnevelly taluk (treasury), *viz*, Rs. 131-15-1 as specified in sub-No. 1 of Schedule VI, and that plaintiff may recover from defendant the yaumia allowance for faslis 1291, 1292, and 1293, which the defendant has drawn, *viz.*, Rs. 133-10-2 as specified in sub-No. 2 of Schedule VI, and the sum of Rs. 42-5-9 which the defendant has obtained under the decree in Small Cause Suit No. 8 of 1882 on the file of the Subordinate Court of Tinnevelly and which is specified in Schedule VII;

(iii) that plaintiff may recover from defendant the costs of this suit;

(iv) and that such other reliefs may be granted as the Court may deem fit under the circumstances of the case."

The Subordinate Judge decreed part of the claim.

Defendant appealed.

Kalianaramayyar, for appellant.

Rama Rau, for respondent.

The further facts necessary, for the purpose of this report, appear from the judgment of the Court, (COLLINS, C. J., and MUTTUSAMI AYYAR, J.) the material portion of which was as follows:—

As to the preliminary objections, neither Section 14 of Act XX of 1863 nor Section 539 of the Code of Civil Procedure has any application. This is a suit by a trustee against the co-trustee to enforce his vested hereditary right, and it cannot be said that he has simply an interest, such as is defined by Section 15 of the Religious Endowments Act, XX of 1863, nor is it to be considered that Regulation IV of 1831, or the Pensions Act XXIII of 1871, which repealed the above Regulation is applicable to a yaumia allowance granted to a religious institution. As to the contention that the suit was not maintainable, it being a declaratory suit, and that the appellant being in possession, the respondent ought to have claimed consequential relief, the finding is that both are in joint possession as co-trustees, and that the possession of neither was adverse to the other. We do not consider the objection to be well-founded. We dismiss this appeal with costs.

Memorandum of objections is not pressed, and is also dismissed with costs.

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APPEL-
LATE
CIVIL.

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[287] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

KRISHNAYYA (*Plaintiff*), *Appellant v.* PICHAMMA (*Defendant*), *Respondent.** [10th and 31st October, 1887.]

Hindu Law—Inheritance—Bhandu—Daughter's son's son.

N., the daughter of J., inherited his property under Hindu law. N. had a son, who predeceased her, leaving a son K :

Held that K., being a bhandu, was entitled to the property of J. on the death of N. in preference to the daughters of N.

[F., 17 A. 523 (524); Appl., 15 M. 421 (422); R., 13 M. 10 (14); 24 M.L.J. 301 = 13 M.L.T. 213 = 1913 M.W.N. 202 (206).]

APPEAL from the decree of T. Ramasami Ayyangar, Subordinate Judge of Cocanada, reversing the decree of K. Ramalinga Sastri, District Munsif of Narsapur, in Suit No. 659 of 1884.

The facts of this case appear sufficiently, for the purpose of this report, from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

Subba Rau, for appellant.

Srirangacharyar, for respondent.

JUDGMENT.

In this case the house in dispute belonged to one Jogaiya, and, upon his death, it devolved on his daughter, Narasamma. Narasamma had a son, named Krishnaya, but he predeceased her, leaving him surviving a minor son who is the appellant before us. The respondents are Narasamma's daughters, and, on her death, the appellant claimed the house as Jogaiya's next heir. The respondents alleged a gift to them, but it was found by both courts that there was no gift. Narasamma inherited the house from her father, and, upon her death, his heirs are entitled to succeed. The respondents are his daughter's daughters, and, as such, they are not in the line of his heirs. The appellant is only the son of Jogaiya's daughter's son, and it is conceded that he is not entitled to inherit as a sapinda; but it is contended that he is entitled to succeed at least as a bhandu. This contention appears to us to be well-founded. The father's maternal uncle [288] and his son are the father's cognates, because the father's maternal grandfather is the person to whom they and the father offer funeral oblations, and though they belong to different families they are, on that ground, bhinna gotra sapindas. It follows, then, that the father's maternal grandfather, who is nearer to the father than his maternal uncle, is a bhinna gotra sapinda or bhandu as explained in Mitakshara, Chapter II, Section v. 4. We, therefore, set aside the decree of the Subordinate Judge and restore that of the District Munsif with costs.

* Second Appeal No. 1304 of 1886.

11 M. 288.

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APPELLATE CIVIL.

11 M. 288.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

LAKSHMINARAYANA (*Defendant*), *Appellant v.* DASU (*Plaintiff*), *Respondent.** [9th and 20th December, 1887.]

Hindu Law—Grant by widow for religious benefit of husband.

Where two widows of a zemindar granted a small portion of the zemindari to a brahman who had been brought up by them with a view that he should perform the funeral and annual ceremonies of their deceased husband:

Held, that the grant was not *ultra vires*, and could not be resumed by the zemindar's successor.

[R., 34 M. 288 (290) = 6 Ind. Cas. 240 = 20 M.L.J. 793 (802) = 8 M.L.T. 74 = 1910 M.W.N. 222; D., 22 C. 506.]

APPEAL from the decree of C. L. B. Cumming, Acting District Judge of Ganjam, confirming the decree of K. Murtirazu, Acting District Munsif of Berhampore, in suit No. 734 of 1884.

On the 2nd December 1863, two widows of an Uriya zemindar in Ganjam granted certain land valued at Rs. 140, a portion of the zemindari, to the plaintiff on condition of paying a kattubadi or quit-rent of Rs. 1-8-0 to the estate.

The deed recited that plaintiff had performed ceremonies for the late zemindar, that the land should be enjoyed for ever, and concluded with the following sentence: He who appropriates any gift made by himself or another shall suffer in hell as a worm for 60,000 years.

In 1883, the defendant, who had been adopted by the widows, [289] dismissed the plaintiff and resumed the land. Plaintiff sued to recover the land.

The Munsif found that it was customary among the Uriya zemindars to appoint a brahman to perform funeral and annual ceremonies and not to perform them in person. The brahman so appointed was styled a "pro-son brahman."

The late zemindar had appointed one Lakshmana Panda as "pro-son brahman" to the family, and on his death the widows got the plaintiff, a brahman boy aged 7, and brought him up.

The plaintiff had performed the ceremonies and was willing to continue to perform them. The defendant contended that the grant was a service inam, and as such resumable.

It was stated in the District Court that it was necessary that the boy should be brought into the gotra of the zemindar whereby he ceased to be a brahman. The Judge held that under the circumstances the widows were bound to make a permanent provision for him.

Both the Lower Courts held that the grant could not be resumed.

Defendant appealed.

Ramachandra Rau Saheb and *Venkoba Rau*, for appellant.

Rama Rau, for respondent.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

On the death of one Lakshmana Panda, pro-brahman in the family of the late zemindar of Budaresingu, the widows of the zemindar brought

* Second Appeal No. 284 of 1887.

1887 DEC. 20 — APPELLATE CIVIL. — 11 M. 288.

plaintiff into the family for the performance of that office, and, on December 2nd, 1863, executed to him a deed of gift (A), which stated that, as he had performed the pro-brahman karma for their late husband, they have given him the land specified on a kattubadi of Rs. 1-8-0 per annum, which he was to enjoy from generation to generation as long as the sun and moon endure.

It is conceded that the gift was made rather for future than for past services and the extent given is only small.

About seven years after the grant defendant was adopted by the ladies, but plaintiff continued to perform the annual ceremonies as pro-brahman and to enjoy the land (paying the kattubadi) till June 1883, when defendant dismissed him and resumed possession of the land, to recover which plaintiff now sues.

[290] The defendant's contention is that plaintiff is a mere servant whom he (defendant) can dismiss at pleasure, and that the gift of the land to plaintiff by the widows of the late zemindar was beyond the scope of the authority of a Hindu widow.

We cannot assent to this view of the plaintiff's position. The widows were the owners of the estate for the time being, and, in the lawful exercise of their rights of management, made an alienation of a very small piece of land for an indispensable religious necessity, not for their own sakes, but for that of their late husband. Such alienations under similar circumstances are recognized—vide *Rama* v. *Ranga* (1), *Paran Dai* v. *Jai Narain* (2), also *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (3).

The second appeal is dismissed with costs.

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11 M. 290.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

PATTAT AMBADI MARAR AND OTHERS (*Plaintiffs*), *Appellants v.* KRISHNAN AND ANOTHER (*Defendants*), *Respondents.**
[15th and 23rd November, 1887.]

Suit to recover money due on a promissory note by assignee of rights of payee not being endorsee.

K. executed a promissory note on demand for Rs. 6,000 in favour of S. in 1882. In 1884 S., by an agreement in writing, assigned all her property, including the promissory note, to M. but did not endorse over the promissory note to M. M. assigned his rights in the promissory note to a bank in payment of a debt. In a suit by M., and the bank against K. and S. to recover the principal and interest due under the note:

Held, that the plaintiffs could not maintain the suit.

[**Overruled**, 24 M. 654 (665); **N.F.**, 28 M. 544 (545, 546) = 15 M.L.J. 384; 9 O.C. 174 (176); **F.**, 17 M. 461 (462); **R.**, 17 M. 197 (198); **D.**, 7 M.L.J. 231 (232); 8 M.L.J. 262.]

APPEAL from the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in suit 33 of 1885.

The plaintiffs in this suit were (1) Patta Ambadi Marar, (2) Raman Marar, and (3) E. Sherman, Agent of the Bank of Madras at Tellicherry.

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* Appeal No. 158 of 1886.

(1) 8 M. 552. (2) 4 A. 482. (3) 8 M.I.A. 500, (550).

[291] The plaint contained the following allegations :—

(1) First defendant promised to pay second defendant Rs. 6,000 on demand under a promissory note, dated 6th November 1882, now overdue.

(2) First defendant has not hitherto paid that amount.

(3) First defendant is the karnavan of his tarwad. The said amount is payable by him (first defendant) in capacity of karnavan as also in his private capacity. Therefore he, as well as (other) members of his family, and the properties of the tarwad, are liable to discharge this debt.

(4) By a karar, dated 14th August 1884, entered into among plaintiffs 1 and 2 and second defendant and other members of their family, the plaint promissory note and other properties of second defendant were given with consent by him (second defendant) to (his) tarwad in consideration of the tarwad undertaking to discharge the debt due by him (second defendant), then, to the Madras bank, &c.

(5) Under the said karar, it was agreed that all the acts in connection with the tarwad be done by plaintiffs 1 and 2.

(6) On condition to credit the amount of his promissory note on recovery thereof to the (tarwad) debt, the right of the tarwad over it (promissory note) was assigned to third plaintiff.

(7) The cause of action arose on 9th November 1882 at Thiruvangat within the jurisdiction of this Court.

	Rs.
Principal .. .. ,, ...	6,000
Interest at 6 per cent. from 6th Nov. 1882	1,080
Total ..	7,080

It is therefore prayed that a decree may be passed directing first defendant in the capacity of karnavan of the tarwad, as also in his private capacity, to pay the said amount and the future interest at 6 per cent. from this date till payment and also costs with interest to third plaintiff (on behalf of the bank).

[292] The Subordinate Judge dismissed the suit on the ground that under the Negotiable Instruments Act, 1881, the plaintiffs acquired no valid right to the property in the note.

Plaintiffs appealed, *inter alia*, on the following grounds :—

(1) The suit was brought by the plaintiffs as assignees of the debt itself due to second defendant from first defendant, and not merely as holders and transferees of the promissory note, and the Court below was wrong in confining itself to the question whether the plaintiffs could sue as transferees of the note.

(2) The decision of the Court below on the issue whether the plaintiffs, or any of them, have the right to sue upon the pronote in question is erroneous in law.

(3) A promissory note, payable to order, is transferable otherwise than by endorsement.

Mr. *Michell*, for appellants.

Mr. *Brown* and *Anantan Nayar*, for respondents.

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The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

JUDGMENT.

MUTTUSAMI AYYAR, J.—On the 6th November 1882 the first respondent, Krishna Nambiar, made a promissory note in favour of the second respondent, Sungunni Marar, for Rs. 6,000, payable on demand. In 1884 it was arranged between the second respondent and other members of his tarwad that the tarwad was to discharge his debts and that he was to give up to it all his properties, inclusive of the promissory note; and in pursuance of that arrangement the promissory note evidenced by document A, was delivered by the second respondent to the first and second appellants. By document C, dated the 17th September 1884, the first and second appellants assigned their right to the third appellant. Although the promissory note was payable to Sungunni Marar, *or order*, it was not endorsed by him in favour either of the first and second appellants or of the third appellant. The first respondent, having failed to pay to the appellants the amount of the note, they brought the suit from which this appeal arises, to recover it. Both respondents resisted the claim and one of the questions raised for decision was whether the appellants, or any of them, were entitled to sue upon the promissory note A. The Subordinate Judge of North Malabar held that they could not maintain the suit, on the ground that **[293]** there could be no valid transfer of a promissory note payable to order, otherwise than by both endorsement and delivery. It is urged in appeal that endorsement is not indispensable, and that a negotiable instrument may be transferred, like any other *chose in action* by a deed of assignment, and that, assuming that there was no valid transfer, the appellants were still entitled to a decree upon the original consideration.

I am of opinion that the decision of the SubroPinate Judge is right. Document A, purports to be a negotiable instrument payable to the second respondent or order, and, until the latter endorses and delivers it, the property in the promissory note continues to vest in him. The learned counsel for the appellants admits that he cannot refer us to any case in support of his contention, and having regard to Sections 8 and 9 of the Negotiable Instruments Act, which define a holder of a promissory note and a holder in due course, and to Section 46, which declares that a promissory note *payable to order* is *negotiable by the holder by endorsement and delivery*. I entertain no doubt that it cannot be negotiated by the mere execution of a deed of assignment. I do not desire to be understood as holding that the appellants may not sue to compel the second respondent to endorse the promissory note, and after getting it endorsed, put it in suit against the maker, the first respondent, but that is not the relief prayed for in this suit, nor do I find either in the plaint or in the record of the suit any statement of the original consideration on which this action can be supported. It is also to be remembered that the appellants are not the payees. This being so, they cannot maintain an action on the original consideration between the second and first respondents until the property in the promissory note is divested from the second respondent, or until he is restrained from suing upon or negotiating it. The suit, as framed at present, must fail and I would dismiss this appeal with costs.

BRANDT, J.—I concur.

11 M. 294.

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[294] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

BASAVAYYA (*Plaintiff*), *Appellant v.* SUBBARAZU (*Defendant*), *Respondent.** [14th and 29th February, 1888.]

Contract Act, Section 74—Penalty—Payment of higher rate of interest from date of bond on breach.

Where a mortgage-deed provided for repayment of the debt in four instalments with interest at 6 per cent. and in default of payment of any instalments on the due date, for interest at 12 per cent. from the date of the bond :

Held, following *Balkishen Das* v. *Run Bahadur Singh* (I.L.R., 10 Cal., 305) that the stipulation being reasonable, the plaintiff was entitled on default to recover the higher rate of interest from the date of the bond.

[**N.F.**, 14 B. 274 (275); **F.**, 17 M. 62 (66); **Appl.**, 15 A. 232 (242) (**F.B.**); **R.**, 14 B. 200 (205); 18 M. 175 (178); 25 M. 343 (346) = 11 M.L.J. 421; 36 M. 229 (262) = 24 M.L.J. 135 = 13 M.L.T. 20; U.B.R. Civil (1892 1896) 300 (301).]

APPEAL from the decree of Venkata Rangayyar, Subordinate Judge at Ellore, confirming the decree of G. Hanumantha Rau, District Munsif of Tanuku, in suit 333 of 1885.

The facts and arguments appear from the judgment.

Subba Rau, for appellant.

Respondent did not appear.

The Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

The respondent executed in favour of the appellant the mortgage-bond A on the 21st October 1882. The bond provided for repayment of the debt in four instalments with interest at 6 per cent. per annum and stipulated that interest was to be paid at 12 per cent. per annum from the date of the bond in default of payment of instalments on the due dates. Both the Lower Courts held that the stipulation was penal and decreed interest only at 6 per cent. per annum. It is contended for the plaintiff in second appeal that the stipulation is not penal and whether it ought to have been enforced is the only question that arises for decision in this case.

In *Arulu Mastry* v. *Wakuthu Chinnayan* (1) decided in 1864 it was held by this Court that a stipulation to pay a higher rate of **[295]** interest on failing to repay the debt in six months was not penal. In that case the bond provided for payment of principal and interest at 1 per cent. per mensem in six months and in default that the rate of interest should be raised to 6¼ per cent. per mensem from the due date. The Court observed that the plaintiff had a right under his contract to the higher rate of interest and that there was no ground for treating the higher interest as a penalty. In *Mackintosh* v. *Crow* (2) the High Court at Calcutta expressed a similar opinion. In that case, however, a distinction was made between a bond in which the contract is merely that if the money is not paid at the due date it shall *thenceforth* carry interest at an enhanced rate and a bond of which the provision is that in default of payment on

* Second Appeal No. 272 of 1887.

(1) 2 M.H.C.R. 205.

(2) 9 C. 689 (693).

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the due date a higher rate of interest shall be payable *from the date of the contract*. The Court observed that in the last-mentioned case the provision was penal and referred to Section 74 of the Contract Act and to *Rasaji Davlaji* v. *Sayana Sagdu* (1), *Mazhar Alikhan* v. *Sardarmal* (2), and *Muthura Persad Singh* v. *Luggun Kooer* (3). In *Muthura Persad Singh* v. *Luggun Kooer* it was observed that when the agreement was to pay an increased rate of interest from a future day it might well be regarded as a substantive part of the contract, not as a penalty for its breach ; but where, as in that case an increased rate of interest was made payable from the date of the bond in case of default, it could not be regarded in any other light than as a sum named in the contract to be paid in case of breach within the meaning of Section 74 of the Contract Act. In *Jaganadham* v. *Ragunadha* (4) an agreement to pay higher interest from the date of default was held not to be penal and *Mackintosh* v. *Crow* was approved.

The result of the foregoing decisions, so far as they bear on the question before us, was that an agreement to pay an enhanced rate of interest on default from the date of default was not penal, because such agreement was a substantive part of the contract, but that an agreement to pay higher interest on default from the date of the bond was penal, because it was an agreement to pay a sum mentioned in the contract in case of breach. The question, however, ultimately came under the consideration of the Privy Council **[296]** in *Balkishen Das* v. *Run Bahadur Singh* (5). In that case as in the one before us, the agreement was to pay on default higher interest at one rupee per cent. per mensem from the date of the solehnama. Adverting to the contention that such an agreement was penal, the Judicial Committee said "it was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances." The true test is not whether the agreement is a contract to pay a given sum on its breach, but whether it is reasonable in the circumstances of the case or only substitution of a higher for a smaller rate of interest in a given state of circumstances. Following the decision of the Privy Council, we modify the decrees of the Courts below by awarding to the plaintiff interest at 12 per cent. instead of 6 per cent. per annum from the date of the bond A to the date of realization, and his whole cost throughout, and confirm the decrees in other respects.

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11 M. 296.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilson.

VELAN (*Defendant No. 4*), *Appellant v.* KUMARASAMI AND ANOTHER (*Defendant No. 2 and Plaintiff*), *Respondents.**
[4th November and 16th December, 1887.]

Civil Procedure Code, 1859, *Section* 259 - *Certificate of sale—Registration Act*, 1866, *Section* 49 —*Proof of title without production of certificate* - Omnia presumuntur rite esse acta.

Assuming that Section 49 of the Registration Act, 1866, required that a certificate of the sale of land in execution of a decree passed under the Civil Procedure

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* Second Appeals Nos. 165 and 307 of 1887.

(1) 6 B H.C.R. A.C. 7. (2) 2 A. 769. (3) 9 C. 615.
(4) 9 M. 276. (5) 10 C. 305.

Code, 1859, should be registered, a plaintiff who has purchased land at such a sale is not bound to rely on the certificate to prove his title. 1887 DEC. 16.

If it is proved *aliunde* that the sale took place and that possession was given, the Court should presume, after long lapse of time and possession by a mortgagee of the purchaser, that the sale was duly made by the Court. APPEL-LATE CIVIL.

[F., 7 C.L.J. 384 (385); R., 9 P.R. 1903=36 P.L.R. 1903.]

APPEAL from the decree of C. Venkoba Rau, Subordinate Judge of Madura (West), reversing the decree of P. A. Lakshmana Chetti, District Munsif of Tirumangalam, in suit 525 of 1885. 11 M. 296.

[297] The facts necessary for the purpose of this report appear sufficiently from the judgment of the Court (KERNAN and WILKINSON, JJ.)

Bhashyam Ayyangar, for appellant.

Subramanya Ayyar, for respondent No. 1.

JUDGMENT.

This is a suit to recover possession of certain lands in the possession of the defendants on payment of the mortgage amount.

The plaint lands originally belonged to the zemindar of Padamatur.

The plaintiff's case is that Kanaka Nachiar, the widow and representative of Gourivallaba Tevar, the last zemindar of Padamatur, who died in 1861, mortgaged the lands in 1866 to Pingala Krishna Rau (exhibit D); that in 1869 the lands having been attached in execution of a decree obtained by one Odayappa Chetti against the zemindar, Sethu Rau, the son of the mortgagee, purchased them; that after the death of Krishna Rau and Sethu Rau, their heir and representative Krishnammal *alias* Sithabhai Ammal relinquished all her rights in favour of Rathabhai Ammal (exhibit B), who, in 1885, sold the lands to plaintiff (exhibit A), subject to a mortgage lien of Rs. 812-12-0 due under the mortgage-bond executed by Sethu Rau to defendant No. 3 (exhibit M).

Defendant No. 2 (appellant in S. A. 307) pleaded, *inter alia*, that Sethu Rau acquired no right by the Court sale in 1869—no certificate of sale having been granted, or if granted, the certificate not having been registered, that in 1874 Saluga Tevar, the brother of the late zemindar, having sued defendant No. 3 for the land, a compromise (exhibit K) was entered into, by which defendant No. 3 relinquished all his rights to, and possession of, the land to Saluga Tevar. whose son, Periasami Tevar, assigned his rights to defendant No. 2 in 1882 (exhibit I), since when defendant No. 2 had been in possession as owner.

Defendant No. 4 (appellant in S.A. 165) admitted the validity of plaintiff's purchase from Rathabhai Ammal, but pleaded purchase from Periasami Tevar in 1878.

The District Munsif dismissed the suit on the ground that the plaintiff had acquired no valid title, inasmuch as it was not shown that the sale certificate said to have been obtained by Sethu Rau in 1869, though liable to compulsory registration, had been [298] registered that it was not proved that plaintiff's vendor ever had possession.

The Subordinate Judge reversed the decree of the Munsif, holding that the production of the sale certificate was not necessary; that the registration of the sale certificate was not compulsory, and that Sethu Rau obtained a valid title under the Court sale.

The first question raised in second appeal is that, as no interest passed by the alleged sale in execution of the decree in Original Suit 5 of 1866, the plaintiff has no valid title. Original Suit 5 of 1866 was a suit instituted

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by Odayappa Chetti against the late zemindar, Kumarasami Peria Udayar Tevar, and his younger brother, Gouri Vallaba Tevar, and, as appears from (exhibit E), what was sold in execution of the decree obtained by Odayappa Chetti and purchased by Sethu Rau was "the right, title, and interest of the said zemindar alone." It is contended that the defendants in the said suit, who were cousins of the late zemindar, had no right to be treated as his representatives, and that as Kanaka Nachiar, the widow and sole representative of Gouri Vallaba Tevar, was no party to the suit, the sale in execution of that decree conferred no title on the purchaser, Sethu Rau. It does not appear that this objection was raised in either of the Courts below; defendant No. 2 (appellant in S.A. 307) relying on the invalidity of plaintiff's title owing to the non-registration of the certificate and his purchase from Periasami Tevar in 1882. The Courts below have held that that purchase was good and valid, and, if it be found that plaintiff acquired no valid title by the purchase in Court sale, it will be unnecessary to decide the question mentioned above. No doubt the Full Bench decision, *Srinivasa Sastri* v. *Seshayyangar* (1) was that the sale certificate under the Code of 1859 was the instrument whereby a transfer of the title and interest of the execution debtor was made, and that, therefore, under the Registration Act XX of 1866, Section 49, that certificate should be registered, and that, as it was not registered, evidence could not be given of it. If, therefore, it was necessary in this case to decide the same question, we are bound to follow that decision, or to refer the point for further consideration of a Full Bench.

In that case the decision in *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall* (2) was not brought to the notice of the Full Bench, **[299]** nor did the Court consider it. Again the Privy Council held that the certificate did no more than create statutory evidence of the transfer in place of transfer by bill of sale. If that case was now considered by a Full Bench the Court would probably hold that neither the production of the certificate nor its registration was necessary when proof of the Court sale and delivery of possession was made (see the observation of Innes and Muttusami Ayyar, JJ., in *Velliyammal* v. *Katha* (3).) See also *Narasayya* v. *Jungam* (4), decided by the Chief Justice and Muttusami Ayyar, J., in which it is stated: "The language of Act VIII of 1859, which might have given colour to the contention that a certificate was a conveyance, was construed otherwise by the Privy Council."

However the question which we have to consider is whether the plaintiff is obliged to rely on the certificate. It has been found as a fact by the Munsif and by the Subordinate Judge that Sethu Rau purchased the property in the Court sale on 22nd October 1868, and that the sale was complete, that, on the same day, he mortgaged the lands to defendant No. 3, who was, after the date of his mortgage, in possession.

Plaintiff's title as transferee of Sethu Rau's title (subject to the legal question) is established by both Courts from the documents proved.

Defendant No. 3 got possession from Sethu Rau.

The question, therefore, is whether the purchase by Sethu Rau was not well proved without reference to the certificate. On principle it seems to us it was. There was a sale complete and possession was given. The rule of presumption, *omnia rite acta*, applies especially after such lapse of time, and long possession under the sale by the mortgagee from the

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(1) 3 M. 37. (2) 14 M.I.A. 496 (523).
(3) 5 M. 61. (4) 7 M. 418 (420).

purchaser, and recollecting that the principal documents to prove the confirmation order may have been either lost or destroyed under the order for destruction of records.

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On authority also, we think it was not necessary for the plaintiff to prove either the certificate or registration of it. In *Velliyammal* v. *Katha* (1), above referred to, the Court, in giving judgment, remarks as follows on the decision in 14 Moore, p. 453: "If this be the effect of the grant of the certificate, it is clear such certificate is not necessary to pass the title. But then the question **[300]** comes whether a purchaser at a Court sale can recover in a suit without producing the certificate. If it is admitted, as is the case here, that the Court auction did take place, and that the property was sold to the person whom plaintiffs now represent—that would seem to be a sufficient admission that the title passed to that person."

In that case the sale by the Court was proved by the admission of the defendant. Defendant No. 2 here denies the sale, but the fact is proved against him. An admission by a party dispenses with other proof. But it is a form of proof (see Evidence Act, ss. 17 and 31). When no admission is made of a relevant fact it may be proved *aliunde*. In *Jagan Nath v. Baldeo* (2), a Full Bench held that it was not incumbent on the purchaser to produce a certificate of the sale to him, and it was competent to him to prove his purchase *aliunde*. The Court observed that the confirmation of the sale to the purchaser under Act VIII of 1859 was *prima facie* evidence of his title, and was sufficient to pass such title to him, of which a certificate, if afterwards obtained, would be merely evidence that the property so passed. In *Doorga Narain Sen* v. *Baney Madhub Mozoomdar* (3), and *Tara Prasad Mytee* v. *Nund Kishore Giri* (4), the fact of sale was admitted, and the Court held that the production of the sale certificate was not necessary, and that the order of confirmation passed the title. If we are right that the presumption we have above referred to is now to be made that all things were done by the Court, to give the purchaser a title, such as confirmation order, then this case stands on the same footing as those cases decided in Allahabad and Calcutta. We are therefore of opinion that on this main question we may confirm the Subordinate Judge's decision.

We dismiss both appeals.

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11 M. 301.

[301] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

VENKATASAMI (*Judgment-creditor*), *Appellant v.* NARAYANARATNAM (*Judgment-creditor*), *Respondent.**

[26th August & 1st September, 1887.]

Civil Procedure Code, Sections 228, 239, 344, 360—*Application to be declared insolvent made to Court to which decree was transferred for execution.*

Where a decree had been transferred for execution from the Court of the District Munsif of E, to that of the District Munsif of B, and an application was made by the judgment-debtor under Section 344 of the Code of Civil Procedure, to be declared an insolvent and entertained by the latter Court:

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* Appeal against Order No. 56 of 1887.

(1) 5 M. 61. (2) 5 A. 305. (3) 7 C. 199 (207). (4) 9 C. 842.

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APPELLATE CIVIL.

11 M. 301.

Held, that the District Munsif of B had no jurisdiction to entertain the application.

APPEAL against an order of E. Subbaraiyadu, District Munsif of Bezwada, passed under Section 344 of the Code of Civil Procedure, declaring one Golla Narayanaratnam, defendant in suit 99 of 1882, on the file of the District Munsif of Ellore, an insolvent.

The appeal was preferred by Simakurti Venkatasami, an opposing creditor, on the ground that the Court held no jurisdiction to entertain the application.

Parthasaradhi Ayyangar, for appellant.

Venkata Subba Rau, for respondent.

The facts necessary for the purpose of this report are set out in the judgment of the Court (COLLINS, C. J. and PARKER, J.).

JUDGMENT.

A decree was passed against the respondent in the Court of the District Munsif of Ellore, and was transferred for execution to the Court of the District Munsif of Bezwada. On the respondent being arrested, he applied to the District Munsif of Bezwada to be declared an insolvent, and has been so declared.

The ground taken in appeal is that the District Munsif of Bezwada acted without jurisdiction in entertaining the insolvency application.

The second paragraph of Section 360 of the Code of Civil Procedure provides that any Court invested by the Local Government with **[302]** the powers conferred on District Courts by Sections 344-359 may entertain any application under Section 344 by any person arrested in execution of a decree of such Court. In the present case the decree in execution of which the respondent was arrested was passed by the Court of the District Munsif of Ellore, and not by the Court of the District Munsif of Bezwada.

But it is contended that an application to be declared an insolvent, when made on an arrest, is part of the proceedings in execution, and that under Section 228 of the Code of Civil Procedure the Court executing a decree has the same powers as if the decree had been passed by itself. We cannot accede to this contention. The procedure for declaring a judgment-debtor an insolvent falls under a different chapter of the Code, and may be resorted to without the judgment-debtor having been first arrested.

The powers of a Court executing the decree of another Court are limited, and, we think, the proper procedure for the District Munsif of Bezwada would have been to stay proceedings under Section 239 for a reasonable time in order to enable the judgment-debtor to apply to the District Court to be declared an insolvent, such discharge would not under Section 241 have prevented the person of the judgment-debtor being retaken in execution, if his application to be declared an insolvent was eventually dismissed. The terms of Section 360 preclude a District Munsif from entertaining insolvency application by a person arrested in execution of a decree of any other Court than his own.

We must allow the appeal and set aside the order declaring respondent an insolvent, but as the point is a new one and the objection was not taken in the Court below, we will make no order as to costs.

11 M. 303.

1887 DEC. 19. — APPELLATE CIVIL. — 11 M. 303.

[303] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

BHASHYAM AND OTHERS (*Defendants*), *Petitioners v.* JAYARAM (*Plaintiff*), *Respondent.** [19th December, 1887.]

Civil Procedure Code, Section 622—Error of law—Material irregularity—Personal decree against minors for debt of deceased Hindu father.

In a suit to recover a debt incurred by the deceased father of a Hindu family, the District Judge gave a personal decree against the sons of the debtor, of whom two were minors:

Held, that under Section 622 of the Code of Civil Procedure, the decree against the minors should be reversed, but that the Court had no power to revise the decree against the other defendants.

[**F.**, 17 C.P.L.R. 57 (59) ; **R.**, 17 M. 410 (418) (**F.B.**).]

APPLICATION under Section 622 of the Code of Civil Procedure to set aside the decree of S. T. McCarthy, District Judge of Chingleput, modifying the decree of P. Dorasami Ayyar, District Munsif of Chingleput, in suit 73 of 1886.

Plaintiff by his next friend sued to recover from defendants Rs. 408, principal and interest, due under a promissory note executed on 15th February 1882 by the (deceased) father of defendants 1, 2, 3 and 4 and by Narasimhulu Naidu, the (deceased) undivided brother of defendants 5 and 6. The Munsif decreed that plaintiff should recover the amount claimed and costs from the self-acquired property of Narasimhulu Naidu, deceased, "if he has any."

On appeal the District Judge decreed that defendants 1 to 4 and their share of the undivided family property should be held liable for the amount sued for.

This application was made by defendants 1 to 4, defendants 3 and 4 being minors.

Mr. *Ramasami Raju*, for petitioners.

Parthasardi Ayyangar and *Srirangacharyar*, for respondents.

The Court (KERNAN and WILKINSON, JJ.) delivered the following

JUDGMENT.

The defendants 1 to 4 were bound by their father's debt to be recovered out of any assets of their father or out of **[304]** ancestral property of the father and sons. Under the circumstances it may have been illegal for the Judge to make a personal decree against any of the defendants 1 to 4. But the word "illegal" in Section 622 has been held by the Privy Council not to mean an error of judgment—*Amir Hassan Khan* v. *Sheo Baksh Singh* (1). The Judge had jurisdiction to determine the question of liability of the defendants to pay the debt, and in the exercise of his judgment he may have decided erroneously, but we cannot interfere as to this. Then did he act with material irregularity? Irregularity refers to procedure. The Judge did not distinguish between the adult and non-adult defendants 1 to 4. In the circumstances procedure

* Civil Revision Petition No. 125 of 1887.

(1) 11 C. 6.

1887 DEC. 19. — APPELLATE CIVIL. — 11 M. 303.

did not warrant a personal decree against an infant. As regards the infants 3 and 4 the Judge acted with material irregularity in giving a personal decree against them.

Therefore so far as it did give such personal relief against the infants, the decree is set aside.

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11 M. 304.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

ARIYAPUTRI (*Defendant No.* 1), *Appellant v.* ALAMELU AND ANOTHER (*Plaintiff and Defendant No.* 2), *Respondents.**
[18th October, 1887 and 6th January, 1888.]

Hindu law—Widow's estate—Mortgage by two co-widows—Sale of equity of redemption in execution of decree against one widow—Suit to redeem by other widow—Decree for redemption of moiety on payment of moiety of mortgage amount.

A mortgage of ancestral estate having been made by A and B, two Hindu co-widows, the equity of redemption of the said estate was sold in execution of a decree for money against B only and purchased by the mortgagee.

Held, that A was entitled to redeem only a moiety of the estate during the lifetime of B.

[**F.**, 23 M. 504 (509) = 10 M.L.J. 253; **Appl.**, 31 B. 560 (565) = 9 Bom. L.R. 1049; **R.**, 33 C. 1079 (1087); 22 M. 522 (524) = 9 M.L.J. 101; 34 M. 72 (73) = 7 Ind. Cas. 858 = 8 M.L.T. 233; 7 C.P.L.R. 153 (154); **D.**, 22 M. 209 (211) = 8 M.L.J. 309.]

APPEAL from the decree of J. Hope, District Judge of South Arcot, confirming the decree of C. Suri Ayyar, District Munsif of Cuddalore, in suit 53 of 1886.

[305] The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C. J. and (MUTTUSAMI AYYAR, J.).

Subramanya Ayyar, for appellant.
Ramachandra Rau Saheb, for respondents.

JUDGMENT.

The land in suit lately belonged to one Narrainsami Padayachi, since deceased, and the respondents are his childless widows. In December 1871 they executed a mortgage in appellant's favor for Rs. 500, and it is conceded that that mortgage is valid as against them. In original suit No. 589 of 1873, one Senji Chetti, obtained a money decree against respondent No. 2 and her mother-in-law only; and in execution of the same, he attached and brought to sale the equity of redemption. Whilst that decree was under execution, respondent No. 1 objected to the attachment and sale on the ground that her husband and one Malaya Perumal were co-parceners, and that upon the death of the former, the latter became entitled to the land in dispute by right of survivorship. Her objection was, however, overruled and the equity of redemption was put up to sale; at which the appellant became purchaser. Malaya Perumal instituted a suit afterwards to set aside the sale and failed. Thereupon respondent No. 1, who was not a party to the decree in original suit No. 589 of 1873, brought the present suit to redeem the mortgage of December, 1871. The appellant

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* Second Appeal 16 of 1887.

1888 JAN. 6. — APPELLATE CIVIL. — 11 M. 304.

resisted the claim and relied on the auction sale of the equity of redemption. He contended further that respondent No. 1 was not entitled to maintain the suit, as she disclaimed all interests in the land during the execution of the decree in original suit No. 589 of 1873.

It has been found in this case that the debt decreed in that suit was not one which could bind either respondent No. 1 or Narrainsami's estate. The Court sale of the equity of redemption is therefore inoperative as against her and her interest in her husband's property. Nor is she estopped from maintaining this suit by reason of her having disclaimed all interest in the execution proceedings in original suit No. 589 of 1873. Though she then acted in collusion with Malaya Perumal, she did not thereby forfeit the right which she really had to her husband's property. The appellant was clearly not misled by her statement, for he purchased the equity of redemption in spite of it. The plea of estoppel must be overruled. Another contention in appeal is that the respondent No. 1 as one of Narrainsami's two widows can [306] only redeem a moiety of the land in question and that the appellant is entitled to remain in possession of the other moiety during the lifetime of the other widow, respondent No. 2; this contention appears to us to be well founded. If Narrainsami left but one widow, and she sold his property for a purpose which was not binding on the reversion, the sale, although invalid as against the reversioner, would be good as, against her to the extent of her life interest. The reason is that she would then be a party to the sale, and, though she could not prejudice the reversion, the sale would certainly bind such interest as she had. We see no sufficient reason to hold that the same principle is not applicable in the case of an alienation by one of two widows. It is true that when there are more widows than one, they take together as a class. It is also true that partition is permitted between them not as in the case, of male-coparceners for the purpose of converting a joint estate into two or more separate estates to be held in severally, but for the limited purpose of securing to each widow a distributive enjoyment of the benefit of joint property. In this view partition between them certainly creates no separate property in the portions placed in their separate possession and no disposing power so as to defeat the right of survivorship vesting in the co-widow, but as between them, each widow is entitled to take the income of the portion placed in her possession during her life, and it is to this extent the purchase must be upheld; otherwise, the widow that sells may induce her co-widow to recover the entire property sold and give her back her share so as to defraud the purchaser. Neither in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (1) nor in *Gajapathi Nilamani* v. *Gajapathi Radhamani* (2) it decided that the widow's right to separate possession of her share might not be sold in execution of a decree against her subject to the co-widow's right of survivorship. As observed in both neither widow has disposing power so as to create separate property, but this is not inconsistent with her right of separate beneficial enjoyment during her life being bound by her own voluntary act or by a court sale in execution of a decree against her. We shall therefore modify the decrees of the lower courts and decree redemption of a moiety of the land sued for on payment of a moiety of the mortgage debt and declare the plaintiff entitled to redeem [307] the other moiety on the death of the second respondent and confirm them in other respects. Each party will bear his costs in this Court.

(3) 3 M.H.C.R. 424. (2) 1 M. 290.

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Nov. 21.

APPELLATE CIVIL.

11 M. 307.

11 M. 307.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

KESAVA AND OTHERS (*Plaintiffs*), *Appellants v.* UNIKKANDA AND ANOTHER (*Defendants*), *Respondents.** [21st November, 1887.]

Malabar Law—Maintenance claimed by anandravans living in tarwad house against karnavan, who had left tarwad house and neglected to maintain family.

Where a suit was brought by an anandravan of a Malabar tarwad living in the family house for maintenance against the karnavan, who had left the family house, resided elsewhere, and neglected to maintain the plaintiffs:

Held that the plaintiffs were entitled to maintain the suit—*Kunhammatha* v. *Kunhi Kutti Ali* (I.L.R., 7 Mad. 235) distinguished.

[R., 36 M. 203 (212) = 14 Ind.Cas. 383 = 22 M.L.J. 309 = 11 M.L.T. 112 = (1912) M.W.N. 109.]

APPEAL from the decree of F. H. Wilkinson, District Judge of South Malabar, confirming the decree of S. Subramanya Ayyar, District Munsif of Temelprom, in Suit 89 of 1885.

The facts are set out in the judgment of the District Court, which was as follows:—

"This was a suit by certain members of the Naidalath Puthen house, a tarwad governed by Marumakatayam law, against their karnavan and certain others for a separate allotment of maintenance.

"The Munsif held that the suit would not lie, the High Court having in *Kunhammatha* v. *Kunhi Kutti Ali* (1) ruled that a member of a Malabar tarwad living in the tarwad house cannot bring a suit against the karnavan for a monthly allowance on the ground that the karnavan does not make sufficient provision for his or her maintenance.

"The plaintiffs appeal on the ground that the issue as to whether the suit was maintainable was not founded on the pleadings and that the case is different from that quoted above.

"In the above case the Chief Justice remarked: 'I can find [308] no authority, and none has been cited at the bar, to show that members of the tarwad residing in the tarwad house are entitled either separately or collectively to obtain a decree for the payment monthly of allowance in money on the ground that the karnavan does not make sufficient provisions for their maintenance.'

"The mere fact that the plaintiffs in this suit claim maintenance partly in paddy and partly in money is not in my opinion sufficient to take the case out of the above ruling, and so long as that is the law laid down by the High Court, the Munsif was clearly justified in raising an issue as to whether the suit would lie. The plaintiffs are admitted living in the tarwad house and are in possession of considerable tarwad property, but they appear to be dissatisfied because the karnavan lives away from the family house, and because they are of opinion that he has not allowed them a full and proper share of certain prizes which he has recently drawn in lotteries. If so, a suit for removal of the karnavan on

* Second Appeal 923 of 1886.

(1) 7 M. 233 (235).

the ground of neglect of duty might lie, but a suit for maintenance assuredly does not.

"The appeal is dismissed with costs."

Sankaran Nayar, for appellants.

Respondents did not appear.

The Court (BRANDT and PARKER, JJ.) delivered the following

JUDGMENT.

The case, upon the authority of which the Courts below have thrown out the appellants' claim, is not on all fours with the present. In *Kunhammatha* v. *Kunhi Kutti Ali* (1), the right of anandravans of a Malabar tarwad to receive maintenance is not questioned; but there the parties were living in the tarwad house with the karnavan and were being maintained, but they wanted a special allowance, objecting to the scale of maintenance with which they were provided. Here the case for the appellants is that up to October 1883 they had been maintained by the karnavan in the tarwad house, but that the first respondent then went away from that house to live elsewhere, leaving them unprovided for.

We are not aware of any decided case and are of opinion that there is no principle with reference to which it should be held that the appellants in such circumstances are not entitled to maintenance.

[309] We set aside the decrees of the Courts below and remand the case for disposal on the merits by the Court of first instance.

The respondents did not appear, and we direct the costs throughout be provided for in the revised decree.

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11 M. 309 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

KAMARAJU (*Plaintiff*), *Appellant* v. THE SECRETARY OF STATE FOR INDIA (*Defendant*), *Respondent.**

[15th September, 1886, 22nd November, 1887 and 17th January, 1888.]

Madras Forest Act, 1882, *Section* 10—*Decision as to title to land, appeal to High Court from decision of District Court on appeal—Boundary Act*, 1860, *Section* 15—*Regulation V of* 1804—*Representation of minor by manager of estate—Decision of Boundary Officer* res judicata, *if not contested by suit under Section* 25.

An appeal lies to the High Court from a decision of a District Court passed under Section 10 of the Madras Forest Act, 1882, on appeal from the decision of a Forest Settlement Officer.

A Survey Officer in 1875 held an enquiry under the Boundary Act, 1860, and demarcated certain land out of a zamindari. At that time the zamindar was a minor under the Court of Wards and he was represented at the enquiry by the manager of his estate appointed under Section 8 of Regulation V of 1804. In a suit brought by the zamindar to recover the land it was contended that the decision of the Survey Officer was not binding on the zamindar because he was not properly represented by his guardian at the enquiry:

Held, that the decision of the Survey Officer was binding on the zamindar, and that the matter in dispute was *res judicata*, no appeal by way of suit as provided by the Boundary Act, 1860, Section 25 having been brought.

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* Second Appeal 786 of 1885.

(1) 7 M. 233 (235).

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FULL BENCH.

11 M. 309. (F.B.).

[Appl., 12 M. 105 (108)=13 Ind. Jur. 50; R., 5 Ind. Cas. 884=20 M.L.J. 283 (287)=7 M.L.T. 132; 7 M.L.J. 13 (15); D., 29 B. 480 (509)=7 Bom.L.R. 497; 28 M. 257 (289)=15 M.L.J. 147.]

APPEAL from the decree of T. Weir, District Judge of Madura, confirming a decision of F. E. Robinson, Forest Settlement Officer, under the Madras Forest Act, 1882.

On the 15th September 1886 the Division Bench (COLLINS, C.J., and KERNAN, J) referred the case to the Full Bench.

The order of reference was as follows:—

The plaintiff, the zamindar of Bodinayakanur, claimed before the Forest Settlement Officer of Madura to recover from Govern-[310] ment a tract of forest land called Tambirankaval. In the course of the survey, in 1875, the Deputy Superintendent of Survey, acting under Act. XXVIII of 1860, held an enquiry and demarcated the said lands out of the zamindari. The zamindar was then a minor under the Court of Wards, and no appeal by a regular suit was preferred as provided by the said Act to set aside the decision.

The ground of the zamindar's claim is that the decision in question is not final, and that he is not barred by the law of Limitation, as the Government, holding possession through the Court of Wards, were constructively his trustees (Section 10 Limitation Act). The Forest Officer and the District Judge (on appeal) held that possession by the Court of Wards did not constitute the Government as trustees—*Palkonda Zamindar* v. *The Secretary of State for India* (1) and that section 10, Limitation Act, did not therefore apply; that the decision of 1875 was final and binding as no steps were taken to set it aside within the time allowed by section 25 of that Act, and that, as that Act provided a specific remedy and fixed a time for it, no other remedy was open and the general rule of 12 years' limitation for recovery of immoveable property was inapplicable.

The appellant (zamindar) before this Court contends that his claim is not *res judicata* and is not barred by time, that he was no party to, nor was properly represented in, the proceedings before the Survey Superintendent, and that the remedy provided by section 25 of Act XXVIII of 1860 is not the only one open to him.

The questions referred for the consideration of the Full Bench are:—

(1) Is there an appeal?
(2) Is the zamindar bound by the acts of the Settlement Officer under Act XXVIII of 1860?
(3) Is the claim barred by limitation?
(4) Is plaintiff entitled to succeed under the present appeal?

Subramanya Ayyar, for appellant.

The Government Pleader (Mr. *Powell*), for respondent.

The Full Bench (KERNAN, MUTTUSAMI AYYAR, PARKER, and WILKINSON, JJ.) delivered the following

JUDGMENT.

[311] The plaintiff, the zamindar of Bodinayakanur, claimed before the Forest Settlement Officer of Madura a tract of forest called Tambirankaval, which tract of land the Government proposed to constitute a reserved forest, and had included in a notification published under section 4 of the Madras Forest Act V of 1882. The Forest Settlement Officer

(1) 5 M. 91.

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rejected the claim under Section 10, and, on appeal to the District Court under the same Section (10), the District Judge has confirmed the decision appealed against. Against the decision of the District Court a second appeal has been preferred, and the first point referred to the Full Court by the Division Bench is whether an appeal will lie.

Chapter II of the Madras Forest Act deals with the manner in which land at the disposal of Government may be constituted a reserved forest. A clear distinction is drawn in the Act between lands which are at the disposal of Government and those which are not,—Chapter III dealing with the protection of land at the disposal of Government which it is not proposed to include in a reserved forest, and Chapter IV with the control over forest and lands not at disposal of Government, or in which Government has a limited interest. In order that land may be constituted a reserved forest, it is necessary that it should first be at the disposal of Government, and Chapter II prescribes the mode in which claims may be settled or rights acquired by Government before the final notification under Section 16 declaring the limits of the reserved forest is issued.

The first step to include any land in a reserved forest consists in the issue of a notification under Section 4 in which the lands to be so included are specified, and an officer (called the Forest Settlement Officer) is appointed "to enquire into and *determine the existence, nature, and extent of any rights claimed* or alleged to exist, and to deal with the same as provided in this Chapter." Section 8 provides that the Forest Settlement Officer shall, in the conduct of all such enquiries, record the evidence in the manner prescribed by the Code of Civil Procedure in *appealable* cases, and Section 5 bars the ordinary right of suit in the Civil Courts until the final notification under Section 16 has been published, which publication cannot take place (1) until the Forest Settlement Officer has disposed of all claims which have been made, and (2) until the period for appealing has lapsed and all appeals have been disposed of by the appellate authority, and (3) until lands for which claims [312] have been allowed have been acquired under the Land Acquisition Act, 1870.

It is evident from this that the Forest Settlement Officer is constituted a Court with special jurisdiction, from which Court a regular appeal lies to the District Court, which is a Court of regular jurisdiction, from the decrees of which (passed in appeal) a second appeal ordinarily lies to the High Court under the provisions of Section 584 of the Code of Civil Procedure.

The decision of the District Court passed on appeal from the decisions of the Forest Settlement Officer is clearly a decree within the meaning of the Civil Procedure Code, and the second appeal is not taken away by express enactment. It remains to consider whether the second appeal has been taken away by necessary implication on the part of the Legislature. The presumption is against the taking away of a substantive right of a very valuable nature by mere implication, and it may be fairly contended that had the Legislature so intended, it would have expressly said so.

In this view of the case it is pertinent to consider whether the right of ultimate appeal to the High Court is barred with respect to claims which may come up for investigation under this Act other than those which are dealt with under Section 10.

Section 11 deals with the investigation by the Forest Settlement Officer into claims to rights defined in clauses (*a*)—(*d*) of Section 10; and Section 14 provides for an appeal from his decision either by the claimant

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or by the Forest Officer (as representing Government) to a "Forest Court" or to a Revenue Officer specially appointed under that section to hear appeals from such orders. The constitution and procedure of this "Forest Court" is defined by Sections 37—40, and the last clause of Section 14 prescribes that the Revenue Officer hearing such appeals in the absence of a Forest Court shall be guided by the provisions of Sections 39 and 40 in the same way as a Forest Court would be so guided. These two sections enable a Forest Court to state a case for the opinion of the High Court on the arising—at the hearing—of any question of law, or usage having the force of law, or of the construction of a document affecting the merits of the case, and this reference may be made by the Court of its own motion, or on the application of any of the parties. It is further provided that the order of the High Court shall be binding on the Forest Court.

It is thus seen that claims to rights described in clauses (*a*)—**[313]** (*d*) of Section 10 are not made appealable to the regular Courts,—but to a specially constituted tribunal, from which a second appeal would not lie to the High Court under the ordinary law,—but that, in making these decisions so appealable the Legislature has been careful to provide a mode for the ultimate determination by the High Court of the very question on which a second appeal would lie had the decision been that of an Appellate Court of regular jurisdiction. It is hardly probable that the Legislature would have provided for the ultimate determination by the High Court of a class of accessory rights over land while intending at the same time to bar the jurisdiction of the High Court in the determination of the title to the land itself.

Further the Act provides for the acquisition by Government of the land itself in cases in which claims have been allowed, and no agreement has been come to with the claimant for the surrender of his rights. For this purpose (Section 10) the Forest Settlement Officer is invested with the powers of a Collector under Act X of 1870 and the procedure of Act X of 1870 is made applicable for the acquisition of such lands. This involves a possible regular appeal to the High Court, if the decision appealed against is that of the District Judge (Section 35, Act X of 1870) and perhaps a second appeal if the decision be that of an inferior Court—*Atri Bai* v. *Arnopoorna Bai* (1). Though under Section 16 of the Land Acquisition Act the land may vest immediately in the Government so that the notification under Section 16 of the Forest Act can issue, the jurisdiction of the High Court for the determination of title is not ousted; and similarly it may be pointed out that though, under Section 16 (*b*) of the Forest Act the notification may issue when the appeals have been disposed of by the appellate authority (the District Court and Forest Court are here referred to), it is only rights *in respect of which no claims have been preferred under Section* 6 that are extinguished under Section 17, thus leaving it open to any person whose claim has been disallowed on appeal by the District Court to prosecute any other remedy which may be open to him under the general law. The effect of Section 5 is to substitute for a limited time a special tribunal of first instance (with an appeal therefrom) in the place of the ordinary Courts of first instance and regular appeal, but on the issue of the **[314]** notification under Section 16 all rights which are not *res judicata* or extinguished under Section 17 will revive, and may be prosecuted as before by any remedy still available under the ordinary law. The intention

(1) 9 C. 838.

of the Act appears to be to compel all persons having claims to bring them forward for settlement under pain of losing them by extinction under Section 17. When once brought forward it is open to Government to acquire them, or to exclude the area over which they are claimed from the limits of the proposed "reserved forest."

On the first question referred to us, we would therefore reply to the Division Bench that a second appeal does lie to the High Court from a decision of the District Court under Section 10 of the Forest Act.

The next question referred to us for consideration is whether the decision of February 1875, under the Boundary Act XXVIII of 1860, is binding on the zemindar. The ground on which it is urged for the appellant that it is not binding, is that the zemindar was no party to, nor was he properly represented in, the proceedings before the Survey Superintendent. It may be observed that this is an entirely new plea raised for the first time in second appeal, the sole contention in the Courts below having been that the Government had been constructive trustees for the zemindar and hence that no length of time could bar the zemindar's claim under Section 10 of the Limitation Act. The decision of the Privy Council in the *Palkonda case* (1) is decisive on this point, and it is not again urged on second appeal.

At the time of the enquiry under the Boundary Act the zemindar was a minor under the Court of Wards under the provisions of Regulation V of 1804, and he was represented at the enquiry by the manager of his estate appointed under Section 8 of that Regulation. It is contended that the Collector could not properly represent both the Government and the zemindar in legal proceedings in which the interests of Government and the zemindar were opposed and that, under Section of the Regulation, the minor should have been represented by his guardian appointed under Section 19. A clear distinction is drawn in the Regulation between the duties of manager and those of the guardian; the manager being entrusted with the care of the estate, and the guardian with [315] the person of the minor. The guardian has nothing to do with the income of the estate, except that portion of it which is set aside for the maintenance and education of the ward. It would appear therefore that the manager entrusted with the preservation and with the custody of the records of the estates would be a more appropriate person to represent the estate at an enquiry under the Boundary Act than the guardian who was only entrusted with the personal care and education of the ward.

The objection is purely a formal and technical one, for it is not contended that the omission of the guardian to attend at the enquiry caused substantial injury to the ward.

Section 23 provides that disqualified persons, being in the custody of guardians, shall not be liable to be sued on any actions otherwise than as under the protection and in the joint name of their guardians. Strictly speaking, therefore, a claim put forward on behalf of the minor under Section 3, Act XXVIII of 1860, was not a suit on an action against the minor within the meaning of Section 23, Regulation V of 1804.

In support of the contention we were referred by the learned pleader for the appellant to the following cases. *Oolagappa Chetty* v. *Arbuthnot* (2), *Doorga Persad* v. *Kesho Persad Singh* (3), *Ganga Prosad Chowdhry* v. *Umbica Churn Coondoo* (4).

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(1) 8 M. 525. (2) 1 I.A. 268. (3) 9 I.A. 27. (4) 14 C. 754.

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No. 1 was a suit brought by the plaintiff to recover a sum of money alleged to be due to him from the minor's estate, under a razinama executed to him by the minor's predecessor in the zemindari. It was therefore a suit to which Section 23 of the Regulation clearly applied, and, accordingly, we find that the minor was represented by (1) the Collector and Agent of the Court of Wards on behalf of the minor; (2) the manager of the estate; (3) the guardian of the minor; and (4) the mother and natural guardian of the minor. The minor was then included as under the protection and in the joint name of his guardian, but the estate was represented also by the Agent of the Court of Wards and the manager appointed by him.

No. 2 was a case arising under Act XV of 1858 relating to minors in Bengal. It does not apply to this Presidency, and the case related to the power of a manager of the estate of an infant not under the protection of the Court of Wards, but subject to the [316] jurisdiction of the Civil Court. It was held with respect to such manager that he was not the guardian of the infant for the purpose of binding him by a bond or defending suits against him in respect of money advanced with reference to the estate unless he had obtained a certificate of administration under Section 3, Act XV of 1858. This case has therefore no bearing upon the present.

No. 3 is a case in which a suit was brought against a minor widow in which the plaintiff did not procure the appointment of any guardian *ad litem*, nor did any one obtain the permission of the Court to defend the suit on behalf of the minor. It was held that the minor was no party to the suit. Here, of course, the minor was not represented at all.

It appears to us, therefore, that the law does not render it obligatory, that the minor should be represented by his guardian at the enquiry under the Boundary Act, and the Regulation vests the management of the estate in the Collector as Agent of the Court of Wards and the manager appointed by him under Section 8. These were represented at the enquiry and though the zemindar, when he came of age and took charge of the estate gave notice of a civil suit to upset the decision of the Survey Superintendent, no proceedings have been taken, and no further claim was made until the shola was notified as a Forest reserve. We are of opinion therefore that the matter in dispute is now *res judicata*, and that the zemindar is bound by the proceedings under the Boundary Act in 1875.

It is conceded that the question of limitation does not arise.

The result will be that the second appeal must fail and should be dismissed with costs.

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11 M. 317.

[317] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

ANANTHARAMAN (*Plaintiff*), *Appellant v.* RAMASAMI (*Defendant*), *Respondent.** [24th January, 1888.]

Civil Procedure Code, Section 424—Collector as guardian of ward not entitled to notice in suit to recover money from estate of ward.

In a suit to recover money due on a promissory note executed by a deceased zemindar, out of the estate of the deceased and of his son, the defendant, a

* Appeal No. 1 of 1888.

1888 JAN. 24. APPELLATE CIVIL. 11 M. 317.

minor under the Court of Wards, the Collector, being appointed guardian *ad litem* of the defendant, pleaded that under Section 424 of the Code of Civil Procedure he was entitled to notice before suit, and the suit was dismissed on the ground of want of notice:

Held, on appeal, that Section 424 was not applicable to the case.

[F., 13 B. 343 (347); R., 12 M. 250 (252).]

APPEAL from the decree of C. Venkobacharyar, Subordinate Judge of Madura (West), in suit No. 39 of 1887.

The facts necessary for the purpose of this report appear from the judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.).

Subramanya Ayyar, for appellants.

The Government Pleader (Mr. *Powell*), for respondent.

JUDGMENT.

This is an appeal from a decree of the Subordinate Judge of Madura (West). The appellant was plaintiff in suit No. 39 of 1887 before that Court and alleged that the zemindar of Saptur, deceased, the father of the infant defendant, the new zemindar, executed a pro-note for Rs. 10,000, payable to the father, now deceased, of the appellant, and prayed for payment of the amount of the note out of the estate of the late zemindar and from the estate of the present zamindar, his son.

The infant defendant was at the time of the suit a ward of the Court of Wards, which was in possession of the zemindari. The Collector of Madura, was, in his official capacity of Collector, also guardian of the infant defendant, and he filed a written statement, alleging amongst other defences, that no notice of action had been served on him as prescribed in Chapter XXVII, Section 424 of the Civil Procedure Code, issues were framed, including an issue whether such notice was served and whether such notice was necessary.

[318] At the hearing the Subordinate Judge ruled that such notice was necessary and, as he found it was not served, he declined to go into the other issues and dismissed the suit with costs.

The appeal is on the ground that Section 424 was not applicable to the suit.

The Section 424 provides that no action shall be brought against a public officer in respect of an act purporting to be done by him in his official capacity until the expiration of two months next after notice in writing containing the particulars thereby prescribed.

Now the suit was not one instituted against the Collector in his official capacity, or at all. The Collector, in his official capacity, was the guardian of the defendant, the infant, and as such, he was named as the guardian of the infant defendant.

But no cause of action against him was stated in the plaint and no relief was prayed for against him; nor could any personal decree for payment of the amount of the note sued for be made against him. Neither is the suit brought on the ground that the public officer did any act purporting to be done in his official capacity. The fact that he did not pay the amount is not an act of omission, on which the suit is brought. It is an action brought on a contract in order to enforce payment from the assets of the deceased zemindar and from the ancestral property of the present zemindar by reason of his obligation to pay thereout the debt of his deceased father. The Collector merely defends as guardian on behalf of the infant.

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The case of *Narsingrav Ramchandra* v. *Luxumanrav* (1) referred to by the Subordinate Judge was not under Chapter XXVII of the Civil Procedure Code, Section 424. It was there only decided that a Collector, acting as guardian for an infant defendant, was acting in his public capacity, and therefore was not subject to the jurisdiction of the Subordinate Judge under the Bombay Civil Court's Act. In *The Collector of Bijnor, Manager of the Estate of Chaudhri Ranjit Singh* v. *Munuvar* (2) also referred to by Subordinate Judge, the Collector, as guardian, illegally seized some property. This is one of the cases to which Section 424 applies and accordingly it was held that notice should have been given.

In *Shahebzadee Shahunshah Begum* v. *Fergusson* (3) referred to [319] by the Subordinate Judge, but to which he gave no weight without assigning any reason, Mr. Justice Cunningham decided that the intention of Chapter XXVII was to give to Government representation by the Secretary of State and to give public officers in the discharge of their public duties the same protection as English statutes confer on many public officers, *viz.*, that when it is alleged that they have committed an illegality in the discharge of their duties they shall have time and opportunity of making amends before the matter is brought into court. Probably this may have been the intention of the Legislature in framing Chapter XXVII, Section 424. But independent of this intention the language of the Section 424 is clear and requires no notice unless the suit is brought against the public officer in respect of an act done by him purporting to be in discharge of his duty, and it is equally clear this suit is not one of that class.

It is to be regretted that the Subordinate Judge, by making a hasty and ill-considered decision, put the parties to the expense and delay of this appeal. We set aside the decree of the Subordinate Judge, and remand the case for trial on hearing the evidence and merits which the discretion of the Subordinate Judge excluded. We also order that the Collector, as guardian of the minor respondent, do pay to the appellants their costs of this appeal out of the estate of the said minor respondent and that the costs of hearing already had do abide and follow the result.

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11 M. 319.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

RAJA *(Defendant), Appellant v.* STRINIVASA *(Plaintiff), Respondent.** [17th and 21st February, 1888.]

Civil Procedure Code, Sections 311, 588 (8).

An application under Section 311 of the Code of Civil Procedure to set aside a sale in execution of a decree having been dismissed for default, the petitioner applied to [320] the Court to restore the application to the file. The Court having rejected this application, petitioner appealed against this order:

Held, that no appeal lay.

Ningappa v. *Gangawa*, (I.L.R. 10 Bom. 433) followed.

[F., 29 A. 596 (598) = A.W.N. (1907) 186; 27 C. 414 (415); 31 C. 207 (209) 10 O.C. 353; R., 27 M. 504 (508); 3 C.L.J. 276; 13 C.L.J. 153 (155) = 14 C.W.N. 573 = 5 Ind. Cas. 493; D., U.B.R. (1897-1901), 254 (255).]

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* Appeal against Order 169 of 1877.

(1) 1 B. 318. (2) 3 A. 20. (3) 7 C. 499.

1888 FEB. 21. — APPELLATE CIVIL. — 11 M. 319.

APPEAL against the order of T. Kanagasabai Mudaliar, Subordinate Judge of Tanjore, rejecting a petition to set aside the dismissal of an application in Suit No. 9 of 1886.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

Pattabhi Ramayyar, for appellant.

Ramasami Ayyangar, for respondent.

JUDGMENT.

The appellant on 21st May 1887 petitioned the Subordinate Court of Tanjore under Section 311 of the Code of Civil Procedure to set asfde a sale on the ground of irregularity. On the petition being called on 1st August, the petitioner was not present, and the petition was dismissed for default.

The same day (1st August) appellant presented a petition, explaining that he had been called out of Court at the moment the petition was called and praying that the petition be restored to the file for enquiry. The petition purported to be put in under Section 99 of the Code of Civil Procedure (evidently a clerical error for Section 103). The Subordinate Judge rejected the petition on 2nd August, and it is against that order that this appeal is preferred. A preliminary objection is taken that an appeal does not lie.

The appellant's pleader contends that by Section 647 the procedure of the Civil Procedure Code is made applicable to all proceedings other than suits and appeals; hence that Sections 102 and 103 are applicable and an appeal lies under Section 588, clause (8) from an order rejecting an application to set aside the dismissal of this petition.

For the respondent it is argued that an appeal is a substantial right and not a mere matter of procedure; that Section 588, clause (8) gives an appeal only against an order rejecting an application to set aside the dismissal of a suit, and we were referred to *Hurreenath Koondoo* v. *Modhoo Soodun Saha* (1) and *Sultan Ackeni Sahib* v. *Shaik Bava Malimiyar* (2). The principle on which the first case was decided would appear to be in point, though the question then arose under the now-repealed Act XXIII of 1861, Section 38. In the second case the question was whether the High Court was competent to entertain an appeal from an order **[321]** made by a District Court under Section 5, Act XX of 1863. The High Court held that, although the Religious Endowment Act made no provision for an appeal, the general law contained in the Civil Procedure Code was by Section 647 extended to all proceedings other than suits and appeals, and that the order passed by the Judge in the proceedings before the Court was analogous, to a decree in a suit, and hence that an appeal would lie from such an order in the same manner as an appeal would (under Section 540 of the Code Civil Procedure) lie from a decree in a suit. In *Minakshi* v. *Subramanya* (3) the Privy Council observed that they "could not assume that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by statute, or by some authority equivalent to a statute." There Lordships then proceeded to discuss the order of the District Judge and held that it was impossible to bring the order within the definition of a decree as contained in the Procedure Code, and on these grounds reversed the decision of the High Court.

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(1) 19 W. R. 122. (2) 4 M. 295. (3) 11. M. 26 (31).

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We have found, however, in the decision of the Bombay High Court a case in which the point was exactly the same as the present, *Ningappa* v. *Gangawa* (1). In that case also a petition under Section 311 had been dismissed for default and an application for restoration refused under Section 103; and it was held by the Bombay Court, following the principle laid down by the Calcutta Court in *Hureenath Koondoo* v. *Modhoo Soodun Saha*, that Section 647 did not confer any rights of appeal not expressly given elsewhere by the Code, and that its object was to apply to proceedings other than suits and appeals, the mode of trial and procedure incidental and ancillary thereto.

We are constrained to hold that the weight of authority is against the right of appeal.

It was then urged that an appeal would lie under Section 588, Clause (16) from the order refusing to set aside the sale, but the order of 2nd August, from which the present appeal is preferred, is not such an order. On these grounds we must hold that the appeal fails and dismiss it with costs.

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11 M. 322.

[322] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

TIRUPATI AND OTHERS (*Defendants*), *Petitioners* *v.* MUTTU (*Plaintiff*), (*Respondent.*)* [5th and 18th January, 1888.]

Civil Procedure Code Sections 373, 622—*Leave given by District Court on appeal to withdraw suit—Material irregularity.*

A District Munsif having dismissed a suit, plaintiff appealed to the District Court, and, at the same time, applied to the Court to allow him to withdraw his suit with permission to bring a fresh suit on the same cause of action.

The District Court granted the application without assigning any reasons for its order:

Held, under Section 622 of the Code of Civil Procedure that the District Court had acted with material irregularity.

APPLICATION under Section 622 of the Code of Civil Procedure to set aside an order made by W. F. Grahame, Acting District Judge of Trichinopoly, in appeal suit No. 257 of 1885.

The facts necessary for the purpose of this report appear from the judgment of the Court (KERNAN and WILKINSON, JJ.).

Parthasardi Ayyangar, for petitioners.

Srinivasa Rau, for respondent.

JUDGMENT.

This is an application under Section 622 of the Code of Civil Procedure presented by the respondents in appeal Suit No. 257 of 1885 in the Court of the District Judge of Trichinopoly praying the Court to revise the order passed by the District Judge in the said appeal.

That was an appeal against the decree of the additional District Munsif of Trichinopoly in Original Suit No. 196 of 1885, a suit in which the District Munsif dismissed the plaintiff's suit with costs. The plaintiff

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* Civil Revision Petition 49 of 1887.

(1) 10 B. 433.

1888 JAN. 18. — APPELLATE CIVIL. — 11 M. 322.

appealed, and, at the same time, applied to the District Court by petition to be allowed to withdraw the Original Suit (No. 196 of 1885) with permission to bring a fresh suit on the same cause of action. The District Judge apparently, without serving notice upon the defendants, passed the following order on the petition—"Permission granted on the same terms as [323] in the other Appeal No. 256 of 1885." What order was passed in Appeal Suit No. 256 of 1885 is not apparent; but in the printed paper the order passed in Appeal Suit No. 257 of 1885 is as follows:—" Withdrawn with permission to institute a fresh suit on the same cause of action. Each party to bear his own costs." From the wording of this order, which was passed five days before the order above quoted, it would appear that defendants were present.

We are of opinion that the District Judge acted with material irregularity in permitting the plaintiff to withdraw his suit after a decree had been passed against him in the Court of first instance, without assigning any reasons for acceding to the plaintiff's application. The decree passed by the Munsif has not been set aside and is still valid and operative against the plaintiff.

We set aside the order of the District Judge and direct him to hear and dispose of the appeal (257 of 1885). Costs in this Court will follow the result.

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11 M. 323=2 Weir 117.

APPELLATE CRIMINAL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justicê Parker.

MUHAMMAD MUSALIAR (*Petitioner*) v. KUNJI CHEK MUSALIAR AND OTHERS (*Defendants*).* [28th October, 1887.]

Criminal Procedure Code, Section 147—Dispute concerning right to officiate in a mosque.

Where a dispute likely to cause a breach of the peace is shewn to exist concerning the right to perform a religious ceremony in a mosque the Magistrate may exercise the powers conferred by Section 147 of the Code of Criminal Procedure.

[**Diss.**, 14 C.W.N. 611= 6 Ind. Cas. 182 ; **F.**, 29 M. 237 (238) =4 Cr.L.J. 58; **R.**, 24 B. 527 (531) ; 3 Bom.L.R. 416 (418); 46 P.L.R. 1903.]

APPLICATION under Section 439 of the Code of Criminal Procedure to revise the proceedings of F. E. K. Wedderburn in charge of the Joint Magistrate's Office, North Malabar.

The facts are set out in the judgment of the Magistrate which was as follows :

"In 1880 the kazi of the Quilandi Mapillas died and for the following two years there were two candidates for the post.

[324] "In 1882 Government appointed one of the candidates, Muhammad Musaliar, as Government kazi, and the Jama mosque was put into his possession.

"The other candidate, Kunji Chek Musaliar, put in several petitions asking that he might be appointed instead; but his petitions were rejected by the District Magistrate. From this date, down to the present time, Kunji Chek Musaliar and a party seceded from the Government kazi party.

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* Criminal Revision Case 400 of 1887.

1887 OCT. 28. — APPELLATE CRIMINAL. — 11 M. 323 = 2 Weir 117.

"On 3rd June 1887, a riot took place in the Moidin Palli mosque; the fight arose out of the attempt on part of Kunji Chek Musaliar to celebrate Jama or Kutba in the Moidin Palli mosque. The parties were convicted on both sides and the decision of the lower Court has been upheld on appeal. The evidence showed that a bench and lamps in the Moidin Palli mosque were broken in the fight.

"As it appeared to this Court that a dispute concerning the fight of Kunji Chek Musaliar to perform the Jama ceremony in the Moidin Palli mosque existed, and as both parties asked for an order, an enquiry under Section 147 has been instituted and both parties have been heard. The mosque was inspected by the Court in the presence of counsel on either side. The Jama mosque is a large tiled building in possession of the Government kazi. The Moidin Palli mosque is a small thatched building about 100 yards away from the Jama mosque. The following fact is admitted by both sides; that the Moidin Palli mosque is in actual possession of one Mussa Kutti Musaliar. It is claimed by the Government kazi that his appointment under the Kazi Act gives him constructive possession over this mosque.

"Mussa Kutti Musaliar, however, has given permission to Kunji Chek Musaliar to officiate in this mosque and Kunji Chek Musaliar at the time of the Court visiting the mosque was in actual possession of it. The questions raised are:—

"(1) Whether any one, besides the Government kazi, can perform the Jama ceremony. It appears to me that under the Kazi Act the Government kazi is not given any sole power to perform any of the functions of a kazi. I see no reason to find that no one but the Government kazi can perform the Jama.

"(2) Whether two Jamas can take place in the same neighbourhood. It is no doubt contrary to Muhammadan [325] custom to allow two Jamas to exist in the same place; but Government have recognized the fact that where there is a dispute the Jamas may be performed, and, in several places, two kazis have been recognized by Government. I decide this in the affirmative as there is no question of a dispute existing at Quilandi.

"(3) Whether Moidin Palli mosque is in exclusive possession of Kunji Chek Musaliar.

"There is no doubt that the Moidin Palli mosque is in the charge of Mussakutti Musaliar, and that he has given sanction to Kunji Chek to hold this Jama ceremony there. Mussakutti's possession is sufficient in my opinion to warrant his granting the permission to Kunji Chek.

"(4) Whether the Government kazi has general control over all the mosques in his jurisdiction.

"The Kazi Act does not, in my opinion, grant the Government kazi administrative powers over the mosques in his division.

"Lastly, the question is raised, whether Kunji Chek Musaliar has exercised the right within three months.

"The previous Friday to the riot (26th May) he applied to the police for protection, and police were sent to the mosque and he swears that he performed Jama in this mosque on that day. He likewise swears that ever since he gave up the keys of the Jama mosque he has been celebrating the Jama in this mosque. He says the reason of the present objection was the approaching enlargement of the Moidin Palli mosque. I

1887 Oct. 28. — Appellate Criminal. — 11 M. 323 = 2 Weir 117.

find (1) that the Government kazi, with reference to his functions as Government kazi, has no right to prevent Kunji Chek Musaliar from performing Jama and (2) that he has no right to interfere with the management of the ceremonies in Moidin Palli mosque, which is in possession of Mussakutti Musaliar, and that, therefore, Kunji Chek Musaliar has, with the consent of Mussakutti Musaliar, a right to perform the Jama in this Moidin Palli mosque and I find that he has exercised this right within three months from institution of the enquiry. Under Section 147, I issue an order permitting Kunji Chek Musaliar to perform Jama ceremony in the Moidin Palli mosque till the party objecting obtain a decree of the Civil Court entitling them to prevent the celebration."

[326] Muhammad Musaliar objected to this order on the following grounds:—

(1) Section 147 of the Code of Criminal Procedure is not applicable, because there was no dispute concerning the right to do or prevent the doing of anything in or upon any tangible immoveable property.

(2) The right was not exercised during the season next before the institution of this enquiry, and therefore the Magistrate erred in passing the order.

(3) The Magistrate failed to receive all the evidence adduced before him.

Sankaran Nayar, for petitioner.

Desikacharyar, for Kunji Chek Musaliar.

The Court (COLLINS, C. J., and PARKER, J.) delivered the following

JUDGMENT.

We are not able to hold that Section 147, Criminal Procedure Code, is inapplicable to this case.

A dispute likely to cause a breach of the peace is shown to exist concerning the right to perform a religious service in the Moidin Palli mosque, *i. e.*, upon tangible immoveable property and the Magistrate finds that (in his opinion) the right exists and that it has been exercised within three months next before the institution of the enquiry.

The Moidin Palli mosque is found to be in the possession of Mussa Kutti Musaliar, and it is further found that Kunji Chek Musaliar has, with his consent, performed the religious services therein.

The claim of the petitioner, who is the kazi appointed by Government, is that he alone is authorized to perform this religious service within a given area; but we find nothing in Act XII of 1880 declaratory of such a right, and it should, if it exists, be established by a regular suit brought for that purpose in due course of law.

The Magistrate's order appears to be legal, and there is nothing before us to show that any further evidence was tendered before him.

We decline to interfere and dismiss this petition.

Ordered accordingly.

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APPELLATE CIVIL.

11 M. 327.

11 M. 327.

[327] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

KUNHI (*Plaintiff*), *Appellant v.* MOIDIN (*Defendant*), *Respondent.**
[2nd and 13th March, 1888.]

Muhammadan law—Marriage—Suit by husband for restitution of conjugal rights—Duty of wife to cohabit with husband—Plea of non-payment of dower bad.

Suit by a Muhammadan to recover possession of his wife, the defendant. Defendant pleaded that she was not bound to return to plaintiff until plaintiff paid Rs. 42, prompt for dower, which plaintiff promised to pay by the marriage contract and had not paid.

The lower Courts following *Eidan* v. *Mazhar Husain* (I.L.R., 1 All., 483) dismissed the suit:

Held, on appeal that defendant could not refuse cohabitation on the plea that her dower had not been paid—*Abdul Kadir* v. *Salima* (I.L.R., 8 All., 149, followed.

[**N.F.**, 10 O.C. 11 (13); **F.**, 30 B. 122 (125) = 7 Bom.L.R. 684; 1 L.B.R. 145; 5 P.R. 1891; **Appl.**, 164 P.R. 1889; **R.**, 35 B. 336 (389) = 13 Bom.L.R. 511 = 11 Ind. Cas. 558 (559).]

APPEAL from the decree of F. H. Wilkinson, District Judge of South Malabar, confirming the decree of V. Kelu Eradi, District Munsif of Shernad, in Suit 366 of 1886.

The facts appear from the judgment of the Court (KERNAN and PARKER, JJ.).

Rajaratna Mudaliar, for appellant.

Respondent was not represented.

JUDGMENT.

The original suit No. 366 of 1886 in the Shernad Munsif's court was brought by the plaintiff to obtain possession of his wife, the defendant. The Munsif in the court of first instance and the District Court on appeal dismissed the suit. The facts found are—the plaintiff and defendant entered into a contract of marriage and the plaintiff agreed to pay 12 miscals equal to Rs. 42, prompt for dower to the defendant, but did not pay it. After the marriage the parties lived together and the defendant withdrew from his house, but in her defence she says she is willing to return if dower was paid. Both the Lower Courts followed the decision in *Eidan* v. *Mazhar Husain* (1) to the effect that when prompt-dower was not paid the wife might refuse cohabitation [328] to her husband. The opinion of Haneefa, though opposed to the views of his two disciples as recorded in the Hedaya, pages 150 to 152, was in that case followed. However, a Full Bench of that court have since reversed that decision and followed the views of the two disciples, *Abdul Kadir* v. *Salima* (2). There is no case on the subject reported in the Madras Supreme or High Courts. The reasons given by the Allahabad Full Bench for their decision seem to us sound and we agree therein. The Muhammadan matrimonial contract involves separate and independent contract by the husband and wife. The wife is by contract bound to submit herself to her husband and he is bound to pay the prompt or other dower according to the contract, or if no sum agreed on, according

* Second Appeal No. 434 of 1887.

(1) 1 A. 483. (2) 8 A. 149.

to the provision of the law. Each has a separate remedy against the other for non-performance of the contract. We reverse the decree of both the Lower Courts and direct the defendant to return to cohabitation with the plaintiff within three months from this date.

Another suit No. 410 of 1886 in the Munsif's Court for payment of dower was brought by the wife against the husband. Both suits were heard together and were heard in appeal together and dismissed. We cannot interfere as to suit No. 410, as there has been no appeal. The parties will bear their own costs respectively of this suit No. 434 throughout including this appeal, as the appellant set up an untrue case in respect of the payment of the dower and the respondent without legal excuse left her husband's house.

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11 M. 329 = 1 Weir 903.

[329] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

QUEEN-EMPRESS *v.* MUTTIRULANDI.* [20th October, 1887.]

Stamp Act, 1879, *Section* 61—*Acknowledgment of receipt of cheque by letter, not stamped, an offence.*

M acknowledged receipt of a cheque for Rs. 100 by letter. The letter was not stamped:

Held, that M. was properly convicted under Section 61 of the Indian Stamp Act, 1879.

APPLICATION under Section 439 of the Code of Criminal Procedure.

The accused was convicted by C. H. Mounsey, Acting Joint Magistrate of Madura, under Section 61 of the Indian Stamp Act, 1879, and fined Rs. 25 for acknowledging by letter without affixing a receipt stamp thereto, the receipt of a cheque for Rs. 100.

The grounds on which this petition was based were as follows:

(1) Because the Lower Court is wrong in treating the letter written by the accused as receipt.

(2) Because the accused did give a stamped receipt to the complainant after the demand was made.

(3) Because the accused was not bound to give a stamped receipt before any demand was made.

Balaji Rau and *Rajaram Rau*, for the accused.

The Public Prosecutor (Mr. *Powell*) for the Crown.

The Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

We are of opinion that the conviction is right. Section 3, Clause (17) of the Stamp Act, I of 1879 defines a receipt to be a note or memorandum in writing, whereby . . . any cheque or promissory note is acknowledged to have been received.

By Article 52 of Schedule I a receipt for any money or other property, the amount or value of which exceeds Rs. 20, requires a one-anna stamp (except it be especially exempted) and a cheque is **[330]** clearly property. Section 58 requires that a receipt for a cheque exceeding Rs. 20 in

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* Criminal Revision Case 365 of 1887.

1887 Oct. 20. — Appellate Criminal.

amount shall be acknowledged by a receipt duly stamped, if demanded. In the case before us, a cheque for Rs. 100 was sent to the accused and by him acknowledged in the following terms : "Your cheque for Rs. 100 to hand." We entertain no doubt but that it is an instrument chargeable with the stamp duty of one anna within the meaning of Section 61 of the Stamp Act, Act I of 1879, and the petition is dismissed.

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11 M. 329 = 1 Weir 903.

11 M. 330.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

KELAN (*Plaintiff*), *Appellant v.* MANIKAM (*Defendant No.* 2), *Respondent.** [16th March, 1888.]

Revenue Recovery Act, Sections 41, 42—*Sale for arrears of revenue—Land subject to kanam—Purchaser's title not subject to kanam holder's rights.*

Where land subject to a kanam was sold for arrears of revenue due by the pattadar and owner and the kanam holder claimed to retain possession as against the purchaser on the ground that his rights were not affected by the sale.

Held, that reading Sections 41 and 42 of Madras Act II of 1864 together, the purchaser's title was not subject to the kanam.

The contracts referred to in Section 41 of the Act are those which do not create a charge on the proprietary right in the land sold.

APPEAL from the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, reversing the decree of K. Imbichunni Nayar, District Munsif of Tellicherry, in suit 463 of 1885.

Plaintiff having purchased certain land sold for arrears of revenue under Act II of 1864 (Madras), sued to recover the same. Defendant No. 1 was the original owner and pattadar. Defendants 3 and 4 were tenants under defendant No. 2 who claimed, under a kanam for Rs. 350 (granted by defendant No. 1 prior to the sale to plaintiff), to retain possession until his kanam was redeemed.

The Munsif found that no encumbrances had been reserved at the revenue sale and citing *Zamorin of Calicut* v. *Sitarama* (1) decreed for plaintiff.

[331] Defendant No. 2 appealed.

The Subordinate Judge held that, though the land was bought free of encumbrances, the contract between defendant No. 1 and his tenant, defendant No. 2, would still be binding on the purchaser by virtue of Section 41 of Act II of 1864.

He also held that *Zamorin of Calicut* v. *Sitarama* (1) was not applicable to this case and that *Lakshmaya* v. *Appadu* (2) was more in point.

Plaintiff appealed.

Sankaran Nayar, for appellant.

Sankara Menon, for respondent.

The Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.) delivered the following

JUDGMENT.

The land in dispute belonged to the 1st defendant and he demised it on kanam to the respondent under (exhibit I.) It was since sold for

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* Second Appeal No. 503 of 1887.

(1) 7 M. 405. (2) 7 M. 111.

arrears of revenue due thereon and the appellant bought it at the revenue sale held under Act II of 1864. The Subordinate Judge considered that the appellant took the land subject to the kanam and it is urged in appeal that the decision is wrong in law. The Subordinate Judge observes that Section 42 is controlled by Section 41 and must be construed so as to validate all contracts between the defaulter and his tenants. We are unable to adopt the construction suggested by him. It is provided by Section 42 that all the lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. Reading Sections 41 and 42 together, the only conclusion that can be arrived at is that the contracts contemplated by Section 41 are such as do not create a charge on the proprietary right in the land in suit or an under-tenure and thereby impair its value. Though ordinarily some rent is payable under a kanam document and it constitutes a tenancy on that ground for 12 years or more, yet the tenancy is created on the basis of a subsisting mortgage; and if the mortgage becomes inoperative under Section 42, the tenancy which rests on it must also fail. We may add that, in the case before us, the kanam document contains a stipulation that the whole income derived from the land shall be taken in liquidation of the interest due on the amount of the loan, and there is therefore no founda- **[332]** tion for the contention that it created any tenancy at all. The cases cited by the Subordinate Judge are not in point.

We reverse the decree of the Subordinate Judge and restore that of the District Munsif. The respondent will pay the appellant's costs throughout.

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11 M. 332 = 1 Weir 672.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

IN THE MATTER OF KITTU AND OTHERS.*
[15th December, 1887.]

Act XIII of 1859, Section 2—Limitation Act no bar to a claim to recover an advance.

Act XIII of 1859 being a penal enactment, the Limitation Act is no bar to a claim under Section 2 to recover an advance made to a labourer.

[Diss., Rat. Unrep. Cr. Cas. 874 ; **R.**, 16 B. 368 (370) ; 28 M. 37 (39) = 1 Weir 671 (*a*).**]**

CASE referred under Section 439 of the Code of Criminal Procedure by S. H. Wynne, Acting District Magistrate of South Canara.

The facts were stated as follows :—

" A complaint was brought under Act XIII of 1859 to recover a sum advanced in respect of work, which work was not done. The Magistrate has rejected the complaint under Section 203 of the Code of Criminal Procedure, because a suit to recover the sum would be barred by limitation. As it is expressly stated in the preamble to Act XIII of 1859 that the reason for the enactment is that the remedy by suit is wholly insufficient, I do not think the order was legal. There is no law limiting the time within which complaints under Act XIII of 1859 may be brought. The Act is penal, its object being to make 'persons guilty of fraudulent

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* Criminal Revision Case 448 of 1887.

1887 DEC. 15. — APPELLATE CRIMINAL. — 11 M. 332 = 1 Weir 672.

breach of contract subject to punishment,' and therefore proceedings taken under it are not suits and are not governed by Article 120 of Schedule II of the Limitation Act.

"I request that the case be submitted for the orders of the High Court."

The parties did not appear.

The Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

[333] Act XIII of 1859 is a penal enactment, and the Act of Limitation is no bar to the enforcement of a penal provision. Though it was passed because the remedy by suit was insufficient, it is no ground for saying that the Act ceases to be applicable when the civil remedy is barred. The expression without lawful or reasonable excuse has reference to the circumstances in which the breach occurred. A plea of limitation which is available only in civil suits cannot be taken to bar punishment for what is an offence. The case before us is perhaps one not foreseen and provided for by the Legislature, but we must construe a penal enactment as it stands. We set aside the order made by the 2nd-class Magistrate and direct him to restore the complaint to his file and to deal with it in accordance with law.

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11 M. 333.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

PASSANHA (*Plaintiff*) *v.* THE MADRAS DEPOSIT AND BENEFIT SOCIETY (*Defendants*).* [3rd February, 1888.]

Limitation Act, Schedule II, Articles 36, 49.

Plaintiff was the owner of a house mortgaged to defendants. On the 22nd August 1885 defendants sold the house by auction under a power of sale contained in the mortgage and gave possession to the purchaser. On the 2nd September 1887 plaintiff sued the defendants to recover the value of certain timber which was stored in the house and not mortgaged and which plaintiff alleged the defendants had taken possession of and converted to their own use. It was proved that the timber was in the house when defendants took possession from the plaintiff and defendants did not account for it.

Held, (1) that plaintiff was entitled to recover from the defendants the value of the timber and (2) that the suit was not barred by Article 36 of Schedule II of Indian Limitation Act, 1877.

CASE referred under Section 69 of the Presidency Small Cause Courts Act, 1882, by J. W. Handley, Chief Judge of the Court of Small Causes at Madras.

[334] The case was stated as follows:—

"In this suit plaintiff sought to recover from the defendant Society the value of certain timber which it was alleged defendants seized, took possession of, and converted to their own use and wrongfully deprived the plaintiff of the use and possession thereof.

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* Special Case 83 of 1887.

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"The admitted facts were that plaintiff was the owner of a house in the Mount Road, Madras, which was mortgaged to defendants. On the 22nd August 1885 defendants sold the house by auction under a power of sale in the mortgage having obtained the key on that day from plaintiff's brother, plaintiff being then absent from Madras. Plaintiff's case was that certain timber, consisting of beams, joints, doors, windows and other similar articles, partly new and partly old, and intended for re-building a neighbouring house also belonging to plaintiff, was stored in the house sold by defendants. It was admitted that if there was any such timber in the house it was not subject to the mortgage; but defendants denied all knowledge of the existence of any such timber in the house. It was abundantly proved however that the timber was stored in the house, as alleged by plaintiff, and I found accordingly and that the value of the timber was as claimed in the plaint Rs. 1,500. The sale was conducted outside the house, which was in a partially dismantled condition, and nobody on behalf of defendants seems to have entered the house at the time of the sale or made any examination of its contents. Defendants did not profess to sell the timber, but they sold the house and handed over possession to the purchaser without taking the trouble to ascertain what was in the house. Upon plaintiff's return to Madras some informal communications appear to have taken place between him and one of the Directors of the Society; but it was not till 25th August 1887, shortly before the filing of this suit, that a formal demand in respect of the timber was made by plaintiff through his solicitors, Messrs. Grant and Laing.

"Two questions of law were raised in the course of the hearing, upon which, at the request of defendant's Attorney, I have to ask the opinion of the High Court.

"The first question was that of limitation. It was contended on behalf of defendants that the case was governed by Article 36 of Schedule II of the Limitation Act. If this were the article applicable to the case, the suit would be barred, if the cause of action arose **[335]** on the day of sale, 22nd August 1885, as the period of limitation under that article is 2 years and the suit was filed on 2nd September 1887. But if the correct view is that the cause of action arose on the house being handed over to the purchaser, further evidence would be necessary as to that date. The only evidence on that point, was that of the auctioneer, who said he gave over the key to the purchaser on the balance of the purchase money being paid, which he said was about 8 days after the sale. I held that the case was governed by Article 49 of the schedule, the period of limitation under which is 3 years, and that the suit was therefore not barred.

"It was further contended on behalf of defendants that there was no evidence of wrongful conversion to entitle plaintiff to recover in this suit. Finding the facts to be, as stated above, I held that plaintiff was entitled to recover. I considered that defendants having taken possession of the house became responsible for it and its contents, and if they chose to sell it without taking proper measures for the security of any property in the house not covered by their mortgage they were liable to make good any loss to plaintiff occasioned by their so doing.

"I therefore gave judgment for plaintiff for Rs. 1,500 and costs contingent upon a reference to the High Court upon these two points of law.

"The questions therefore which I have the honor to refer for the opinion of the High Court are these :—

(1) Is the suit barred by the Law of Limitation?

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11 M. 333.

(2) Is plaintiff entitled to recover upon the facts as stated above?"

Mr. *Shaw*, for plaintiff.

Mr. *Michell*, for defendants.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

Upon the facts stated, we are of opinion that the plaintiff is entitled to recover. The defendants took possession of the timber, and have not accounted to plaintiff for it. On the question of limitation we think that Article 49 of the Limitation Act does apply. It is open to plaintiff under that article to bring his suit for the specific moveable property or for compensation for wrongfully taking the same.

[336] In our opinion the learned Chief Judge has rightly decided both the questions referred. Defendants are to pay the costs of this reference.

Solicitors for plaintiff: *Grant & Laing.*

Solicitors for defendants: *Barclay & Morgan.*

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11 M. 336.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

GOPILANDHU (*Plaintiff*) *v.* DOMBURU (*Defendant No.* 2.)*
[12th January, 1888.]

Limitation Act, Schedule II, Article 179 (4)—*Application for copy of decree not a step in aid of execution.*

The application by a decree-holder for a copy of a decree with intent to apply for execution is not a step in aid of execution within the meaning of Clause 4 of Article 179 of Schedule II of the Indian Limitation Act, 1877.

[F., 23 B. 311 (313, 314) ; **Rel.**, 11 C.L.J. 243 = 5 Ind. Cas. 660 (663).**]**

REFERENCE under Section 617 of the Code of Civil Procedure by M. Visvanatha Ayyar, District Munsif of Aska.

The case was stated as follows :—

"Gopilandhu Patnayak obtained a decree for Rs. 40-1-5 against Domburu Maharana, defendant No. 2, on 28th April 1884, in small cause suit No. 137 of 1884, on the file of this Court. The decree-holder applied for execution of the said decree for the first time on 20th May 1887. It is alleged in the petition that it is not barred by limitation, firstly, inasmuch as the petitioner had applied for a copy of the decree on 17th September 1884 ; secondly, inasmuch as the judgment-debtor had made two payments out of Court to him, *viz.*, Rs. 9 in June 1884 and Rs. 10 in December 1884, and had got receipts for these payments.

"The decree-holder did not certify these payments to the Court, nor did the judgment-debtor file the receipts and ask the Court to call upon him to certify these payments. The adjustment outof Court was specified for the first time in the present application for execution. The dates of these payments cannot give the decree-holder a fresh starting point of limitation.

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* Referred Case No. 14 of 1887.

1888 JAN. 12. — APPELLATE CIVIL. — 11 M. 336.

[337] "The decree-holder, through his pleader, applied to this Court on 17th September 1884 for a copy of the decree. The said application recites that the copy is required to enable him to execute the decree.

"The decree-holder's pleader contends that the said application is an application 'in accordance with law to the proper Court to take some step in aid of execution of the decree,' under Clause 4 of Article 179 of the Limitation Act. He relies upon a certain passage in the judgment of the Calcutta High Court in *Ganga Pershad Bhoomick* v. *Debi Sundari Dabea* (1) and upon the case in *Kunhi* v. *Seshagiri* (2) as favouring his contention.

"In the latter of the two cases cited above, an application by a judgment-creditor to the Court which passed the decree for a certificate that a copy of a revenue register of the land is necessary to enable him to obtain such copy from the Collector's office and thereupon to execute the decree by attaching the land was declared to be a step in aid of execution within the meaning of Clause 4, Article 179 of the Act. This decision no doubt indicates a tendency to construe the clause in a more liberal spirit.

"Under Section 238, Civil Procedure Code, it is indispensable that an application for attachment of land registered in the Collector's office should be accompanied by an authenticated extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue. An application for a certificate that a copy of the revenue register is necessary is a legitimate and necessary step in aid of execution.

"But the Civil Procedure Code does not make it obligatory on the judgment-creditor to file a certified copy of the decree with his application for its execution. I doubt, therefore, whether the application for a copy of the decree can be regarded as a step in aid of execution within the meaning of Clause 4 of Article 179. As a matter of fact, applications for execution are accompanied by copies of decrees sought to be executed. When they are not accompanied by such copies, the Courts generally call upon the applicants for execution to produce copies of the decrees so as to facilitate an examination by the officers of the Court to see whether the contents of the applications, as required under Section 235, Civil Procedure [338] Code, are correctly entered before they are filed, as the records of the suits are generally sent away to the District Court for safe custody.

"These particulars can no doubt be verified by reference to the entries in the suit registers; but it must be admitted that a copy of the decree is essential to a judgment-creditor to enable him to specify in his application for execution the particulars required by (*g*) and (*h*) of Section 235.

"On the ther hand, if an application for a copy of the decree be regarded as a step in aid of execution, the starting date prescribed in every one of the Clauses 1, 2 and 3 of Article 179 would virtually be a dead letter.

"The passage on which the judgment-creditor's pleader relies in the other case quoted by him is as follows:—'This was an application to get back the copy of the decree, for purposes of execution, *made by a lady who had not then been substituted for the decree-holder on the record.* We think that this application also cannot be considered as a step in aid of the execution of the decree.' The pleader lays stress on the words italicized in the above passage, and says that their Lordships would have regarded it as a step in aid of execution had it not been for the defect, *viz.*, that she

(1) 11 C. 227. (2) 5 M. 141.

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had not been substituted for the decree-holder on the record by the date of the application to get back the copy of the decree. It is doubtful whether their Lordships intended such a thing.

"As the question is one of importance as my order in execution of the small cause decree now sought to be executed is final, and, as I entertain reasonable doubt as to the soundness or otherwise of my views on the point, I have thought it fit to make this reference. I have, however, dismissed the application for execution as being barred by limitation, subject to the decision of the High Court on the following question :— 'Whether, under the circumstances stated in this reference, the application of the decree-holder on 17th September 1884 to this Court for a copy of the decree with intent to apply for execution is a step in aid of execution of the decree within the meaning of Clause 4 of Article 179 of the Limitation Act."

The parties did not appear.

The Court (KERNAN and WILKINSON, JJ.) delivered the following

JUDGMENT.

Further information was called for after this **[339]** petition was presented. It now appears that, when the decree-holder applied for a copy of the Munsif's decree, the original was in that Court. Therefore, it was not necessary then for the decree-holder to obtain the copy before he could obtain the execution. The Munsif says that it is the practice of the office to require a copy to be furnished before execution is issued, and that execution could not be obtained unless the copy was furnished to the office; but the Civil Procedure Code makes no provision for such practice, and the application for execution, without production of the copy, would be "according to law" as provided by Article 179, Clause 4. The practice of the office cannot affect the question of limitation. The principle of the decision in *Kunhi* v. *Seshagiri* (1) applies, and that is that the true meaning of "step in execution" under Article 179, Clause 4, is a step which is necessary to be taken before execution can be had.

The dates are—

Decree, 28th April 1884.

Application for execution, 20th May 1887. Therefore the application was more than three years after the decree.

We answer, the reference by saying the application for copy of decree and obtaining it were not steps, nor was either of them a step in execution of the decree within Article 179 of the Limitation Act.

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11 M. 339 = 2 Weir 380.

CROWN SIDE.

Before Mr. Justice Kernan.

QUEEN-EMPRESS *v.* VENKATAPATHI AND FOUR OTHERS.*
[18th April, 1888.]

Criminal Procedure Code, Section 289—*Prosecutor's right to reply.*

Where documentary evidence was put in by the accused during the case for the Crown and before examination of the accused :

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* Calendar Nos. 3 and 4 of 1888 of the 2nd Madras Sessions.

(1) 5 M. 141.

Held, under Section 289 of the Code of Criminal Procedure, that the Crown had the right of reply—*Queen-Empress* v. *Grees Chunder Banerjee* (I.L R , 10 Cal., 1024) dissented from.

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CROWN SIDE.

11 M. 339 = 2 Weir 380.

[Diss., 17 C. 930; R., 4 L.B.R. 5 (7).]

[340] IN this case the accused were tried on various charges with conspiring to defraud the Government by selling salt stored in a monopoly factory and misappropriating the sale-proceeds. During the examination of the witnesses for the Crown several entries in books relating to the factory were proved and marked as exhibits and put in evidence. In cross-examination some of the accused required that certain other entries in the same books should be marked to be used as evidence on their behalf, and those entries were marked and read to the Jury by the witnesses for the Crown. At the close of the case for the Crown the accused stated through their counsel that they did not intend to call any witnesses and claimed that the prosecutor should sum up the case.

The Public Prosecutor (Mr. *Shaw*) contended that he had the right of reply and referred to a ruling of Muttusami Ayyar, J., in *Queen-Empress* v. *Bhow Rau* at 3rd Madras Sessions on 16th August 1886, and to similar rulings by Collins, C.J., in *Queen-Empress* v. *Arunachala* and *Queen-Empress* v. *Jevan Lall* at the 3rd Madras Sessions, 1887.

Mr. *Wedderburn*, Mr. *Ramasawmi Raju*, *Anundacharalu*, *Sadagopacharyar*, *Namaya Chetti*, for the accused.

It was urged contra that the prosecutor had heard all the evidence to be used for the accused, and, under Section 289 of the Code of Criminal Procedure, he had no right to reply—*Queen-Empress* v. *Grees Chunder Banerjee* (1) and *Empress of India* v. *Kaliprosonno Doss* (2).

JUDGMENT.

KERNAN, J., following the rulings of Collins, C.J., and Muttusami Ayyar, J., held that, as the accused had adduced evidence, the prosecutor was entitled to reply.

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11 M. 341.

[341] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS, (*Plaintiffs*) *v.* PARTHASARADI AND ANOTHER (*Defendants*).*
[3rd February, 1888.]

City of Madras Municipal Act, 1878, *Section* 318—*President sole judge of necessity of cleansing tank likely to prove injurious to health.*

By Section 317 of the City of Madras Municipal Act, 1878, the President of the Municipal Commissioners was invested with a discretion as to the necessity of cleansing and filling up tanks and wells and draining off stagnant water likely to prove injurious to the health of the neighbourhood; and by Section 318 was empowered on neglect of the owner to comply with a requisition to do the necessary work, to get the work done and to recover the costs in the manner provided for the collection of taxes. No appeal was allowed by the act against the President's decision :

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* Special Case 84 of 1887.

(1) 10 C. 1024. (2) 14 C. 247.

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APPELLATE
CIVIL.

11 M. 341.

Held, in a suit by the Municipal Commissioners to recover from the defendants the cost of draining and cleansing a tank, that it was not open to the defendants to prove that the tank was not likely to prove injurious to the health of the neighbourhood.

[R., 25 M. 118 (122, 133).]

CASE referred under Section 617 of the Code of Civil Procedure, by J. W. Handley, Chief Judge of the Court of Small Causes, Madras, in suit No. 19381 of 1884.

The case was stated as follows :—

"This was a suit by the Municipal Commissioners to recover under Section 318 of the City of Madras Municipal Act, 1878, from defendants as trustees of a pagoda, the cost of draining and cleansing a tank alleged to be the property of the pagoda. Defendants at first appeared by the same vakil and pleaded, *inter alia*, that the tank was not the property of the pagoda. The case was adjourned from time to time at the request of the parties with a view to a compromise, it being proposed on behalf of plaintiffs that the suit should be withdrawn upon defendants executing on behalf of the pagoda a release of all claims to the tank in favour of the Municipality. Ultimately, however, the **[342]** negotiation fell through and the case came on for final disposal on the 11th November 1887, defendant No. 1 being represented by another vakil, and defendant No. 2 not appearing either in person or by pleader. If the question, whether the tank, the subject of the suit, was in fact at the time when the Municipality took action in the matter injurious to health or offensive to the neighbourhood within the meaning of Section 317 of the Municipal Act of 1878 had been open in this suit, I should have found on the evidence that plaintiffs had not shewn that such was the state of the tank. But I was of opinion that the Act left this matter entirely to the discretion of the President, and that if he considered the state of a tank to be such as is described in Section 317 he was entitled to issue the notice and, in default of compliance with such notice, proceed under Section 318. I therefore held that plaintiffs were entitled to recover, and having found that defendants as dharmakartas of the pagoda were the persons liable to pay and that Rs. 1,000 was the proper amount recoverable, I gave judgment for that amount and costs to be recovered from the property of the pagoda. The vakil of defendant No. 1 requested me to state a case for the opinion of the High Court as to the construction of Section 317 of the Act. Accordingly I made my judgment contingent upon the opinion of the High Court.

"The following is the question which I have to refer for the opinion of the High Court :—

"Is it open to the Court in this case to decide whether the tank, the subject of the suit, was at the time when the Municipality took action in the matter injurious to health or offensive to the neighbourhood within the meaning of Section 317 of the City of Madras Municipal Act, 1878 ?"

Mr. *Michell*, for plaintiffs.

Sundram Sastryar, for defendant No. 1. Defendant No. 2 did not appear.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

We agree with the learned Chief Judge that the Legislature in Section 317 of Madras Act V of 1878 has invested the President with the

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discretion to require the owner of the tank to drain off or remove the stagnant water from the tank, and in the event of the owner neglecting to comply with such requisition the President may execute the work and recover the expenses in the [343] manner prescribed in Section 318. No appeal is given and the President is constituted the sole judge of the necessity.

The defendants must pay the costs of this reference.

Solicitors for plaintiffs : *Barclay & Morgan.*

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11 M. 343=1 Weir 732.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Parker.

QUEEN-EMPRESS *v.* BOLAPPA.* [29th February, 1888.]

District Municipalities Act, 1884 (*Madras*), *Section* 173—*Obstruction of public street.*

Section 173 of the District Municipalities Act, 1884 (Madras), provides that no person shall deposit anything so as to cause obstruction to the public in any street without the written permission of the Municipal Council :

Held, that the depositing by any person of an article in the street without the permission of the Municipal Council amounted to an obstruction.

CASE referred by H. Goodrich, District Magistrate of Bellary, under Section 438 of the Code of Criminal Procedure.

The facts were stated as follows :

"The accused in this case, a merchant of Bellary town, was charged by the Municipality under Bye-law 61, Section 255 of the District Municipalities Act IV of 1884 with having stored jaggery bags on the bazaar road within the Municipality. It was proved by the witnesses for the prosecution that the accused stored about 50 bags of jaggery on the public road in front of his shop, occupying a portion of the road surface measuring 5 yards long and 4 yards broad and causing obstruction to passengers. The accused admitted having stored 20 bags occupying about 2 yards in width of the road surface, but pleaded that he had a right to do so, as no obstruction was hereby caused to the public. In spite of this admission the accused was acquitted under Section 245 of the Code of Criminal Procedure, the Bench of Magistrates having held by a majority that the act of the accused did not constitute an offence.

"In their Order, No. 559, dated 23rd March 1887, Government have sanctioned the levy of a fee of Rs. 12 a year from each grain [344] merchant by the Bellary Municipality, who might desire to acquire the privilege of utilizing a space of 2 yards of the road in front of his shop for unloading, measuring, and storing his consignments of grain for two hours on the weekly market day and on the day preceding it, provided room was left for traffic. No permission of any sort was obtained by the accused in the present case, nor any fee paid by him.

"The Municipal Council moved Government to direct the Public Prosecutor under Section 417 of the Code of Criminal Procedure to present an appeal to the High Court from the order of acquittal passed in this and three other similar cases.

"Government have in their Order, No 2681, Judicial, dated 24th November 1887, observed that the point involved was one of law and

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* Criminal Revision Case 579 of 1887.

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instructed me to refer the plainest case to the High Court under Section 438 of the Code of Criminal Procedure and to ask that the law on the point may be authoritatively declared and a new trial directed.

"The act of the accused in the present case falls under Section 173 of the District Municipalities Act and Bye-laws 57, 61, and 62 of the Municipality sanctioned in G.O., No. 1010, dated 7th June 1878. In Section 173 and Bye-law 61 the words, "So as to cause obstruction to the public," occur, and these words do not seem to have been defined anywhere. It is doubtful whether these words throw on the prosecution the burden of proving that the public could not pass at all by reason of the obstruction or whether, the public having the right to pass freely over all portions of the street, an obstacle in any part of the roadway is an obstruction within the meaning of the section.

"I am of opinion that the act of the accused amounts also to a public nuisance as defined in Section 268 and punishable under Section 290 of the Indian Penal Code. The case of *Umesh Chandrakar, in re* (1), is analagous to the present one.

"I have therefore the honour to request that the Honourable Judges may be pleased to issue orders declaring the law on the point authoritatively and to direct the retrial of the case."

The Public Prosecutor (Mr. *Powell*), for District Magistrate.

The Court (KERNAN and PARKER, JJ.) delivered the following

JUDGMENT.

[345] The depositing by any one of any article on the high road except with the license of the Municipality under Section 173 is an obstruction. The public are entitled to the whole width of the road unimpeded by any article deposited thereon. The Bench having found that articles were deposited on the road without license, should have found that such deposit caused obstruction. The deposit might not be very great, but in law it was an obstruction.

We set aside the acquittal and direct the accused to be retried before the Bench.

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11 M. 345.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

RUPABAI AND OTHERS (*Plaintiffs Nos.* 1, 2, *and* 3), *Appellants v.* AUDIMULAM AND OTHERS (*Defendants*), *Respondents.**
[4th November, 1887, and 17th January, 1888.]

Presumption that person paying off a mortgage intends to keep the security alive—Power of Court to order refund of money wrongly paid out of Court in another suit—Limitation Act, Schedule II, Article 29

In 1861 B granted a lease of his zamindari to A for 30 years, A undertaking to pay off all debts then due by B. B died in 1882 and his successor sued A and obtained a decree that on payment of Rs. 1,20,000 A should give up possession of the zamindari. This sum having been paid into Court, A lost possession of the zamindari. On January 5th, 1875, A had mortgaged the whole zamindari, which consisted of 22 villages, to M to secure a loan of Rs. 1,00,000 borrowed by A to pay off the debts of B which A undertook to pay in 1861. On June 27th, 1879,

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* Appeal No. 84 of 1886.

(1) 14 C. 656.

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A being indebted to M in the sum of Rs. 1,78,000, paid M Rs. 1,00,000, and undertook to pay the balance out of the income of the estate, M releasing the 22 villages from the mortgage of January 5th, 1875. On June 28th, 1879, A executed a mortgage of the 22 villages to L to secure repayment of Rs. 1,30,000. Of this sum, Rs. 1,00,000 was borrowed to pay M and Rs. 30,000 was a prior debt due by A to L. Of the Rs. 1,00,000 paid to M, Rs. 27,000 was specially applied to discharge so much of the charge created by the mortgage of January 5th, 1875. On January 30th, 1875, A borrowed from S Rs. 43,000 and mortgaged to her 10 of the 22 villages of the zamindari. In 1885 S sued L to have her debt declared a first charge on the money paid into Court by the zamindar. The Subordinate Judge held that L had a prior claim on the fund and dismissed the suit:

Held, on appeal, following the principle of decision in *Gokaldas* v. *Puranmal* (L.R., 11 I.A., 126) that L was entitled to a first charge on the fund to the extent **[346]** of Rs. 27,000 which had been applied to pay off the mortgage of January 5th, 1875. In the suit brought by B's successor against A to recover the zamindari L was a party, but S was not. In that suit L obtained an order for payment of Rs. 1,00,000 of the sum paid into Court by the zamindar. It was contended by L (1) that S could have no decree for repayment of this sum and (2) that if the money was wrongly paid under the order of the Court to L it was wrongfully seized within the meaning of Article 29 of Schedule II of the Indian Limitation Act:

Held, that the Court had power to order a refund and that Article 29 of Schedule II of the Limitation Act was not applicable.

[F., 16 M. 94 (96); 20 M. 274 (275) = 7 M.L.J. 87; 12 C.P.L.R. 70 (72); R., 35 M. 183 (185) = 22 M.L.J. 12 (14) = 10 M.L.T. 380 = (1912) M.W.N. 158 (161); 16 Ind. Cas. 914 (916) = 23 M.L.J. 519 = 12 M.L.T. 458 = (1912) M.W.N. 1179.]

APPEAL from the decree of A. J. Mangalam Pillai, Subordinate Judge of Madura (West), in suit No. 7 of 1885.

The facts are set out in the judgment of the Court (KERNAN and PARKER, JJ.).

Bashyam Ayyangar and *Kalianaramayyar*, for appellants.

Subramanya Ayyar, for respondents.

JUDGMENT.

This case was argued at much length, and many documents, records of suits and many legal authorities were referred to. We do not think it necessary to follow the arguments (except on the points that appear material) in detail.

Bangaru Appu Nayak, zamindar of Kannivadi, was in the year 1861 greatly in debt and had consented to decrees in many suits brought by creditors and thereby gave those creditors hypothecation for their debts on different villages.

Those debts were created—some by the ancestors of the zamindar, but mostly by himself—and they amounted to about Rs. 3,19,500.

The zamindar granted to Adimulam Pillai, defendant No. 1, a lease, dated the 20th of July 1861, of the zamin for 30 years, for the purpose, as stated therein, of clearing the debts slowly as therein specified. That lease recited the debts due to the various creditors by names, and the intention of the zamindar to liquidate the debts as thereby provided. It provides that Adimulam Pillai should take possession of 22 of the villages, and manage the same (3 villages being retained by the zamindar) and that Adimulam Pillai should pay the peshkash to Government and certain maintenance to the zamindar and to others and interest on the debts, and the principal of the debts also as therein provided. Provisions are made for securing Adimulam Pillai the debts paid by him. Adimulam Pillai entered into possession of the 22 villages and so continued in possession, until he was put out of possession in 1882 as after stated.

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By means of money, partly his own, but [347] principally by money borrowed by himself from other persons, he paid off and got the zamindari released from the original debts set out in the lease of 1861.

Many of the sums of money borrowed by Adimulam Pillai he repaid from the income of the 22 villages. But two large debts contracted by him remained unpaid, when his possession of the villages ceased in 1882. These debts are—one to Sukya Bhai (represented by the plaintiffs in this suit) under Exhibit A, and a debt due to defendant No. 4 under Exhibit C. By Exhibit A, 30th January 1875, Adimulam Pillai mortgaged to Sukya Bhai 10 of the villages to pay a sum of Rs. 43,000, which sum, with interest, is the claim of the plaintiff in this suit. By exhibit C, Adimulam Pillai mortgaged the whole 22 villages for payment of Rs. 1,30,000, to defendant No. 4. Bungaru Appu Nayak, the lessor, in the lease of 20th July 1861, died on the 6th February 1881, without issue. The zamindari was impartible, and his brother, Appasami Nayak. having succeeded as zamindar filed suit No. 4 of 1881 in the Court of the District Judge of Madura to establish his title to the zamindari free from the lease of 20th July 1861 and for possession of the zamindari with mesne profits from 9th February 1881. The defendants to that suit were Adimulam Pillai, the lessee, and Kusturi Reddi, Kuppu Reddi and Gurusami Reddi, who were sub-lessees of portions of the zamin from Adimulam, defendant, and who alleged they advanced money to him, No. 1, to pay debts due by the late zamindar, the lessor. Defendant No. 4 in this suit applied to be, and was made party (defendant No. 5) to that suit to protect his interest in the debt due to him by Adimulam (defendant No. 1) secured by Exhibit C, on foot of which and collateral securities he claimed Rs. 1,74,445. In that suit, it was decided by the District Judge that the document of the 20th July 1861 was not binding on the plaintiff, the zamindar, as a lease, but that it was binding on him as a mortgage to the extent of Rs. 1,87,885 paid by defendant No. 1, to release the estate from debts which as against the plaintiff were proper charges on the estate, and by decree, dated the 18th of April 1882, the Court ordered that the defendants (in that suit) should give up possession of the zamindari of Kannivadi to the plaintiff on his paying into Court for defendants No. 1 and No. 5 the sum of Rs. 1,87,735 with interest at 9 per cent. from the 9th of February 1881 till payment less profit of the estate.

[348] The zamindar deposited on the 3rd of June 1882 Rs. 2,00,000 in Court in that suit. On the 7th of June 1882, the District Court made an order for payment to defendant No. 5 in that suit (fourth defendant here) of Rs. 1,00,000 (stated to be admitted to be due to him) out of the sum so deposited and recited that the claims of creditors Nos. 2, 3, 4, and the representatives of Tekaram Sukya Bhai could not exceed Rs. 1,00,000, and it was ordered that Rs. 1,00,000, should be retained for a limited time for other creditors to put forward claims. Notices (Exhibit S) were, issued to defendants Nos. 2, 3, 4, and to Sukya Bhai to file a petition on or before the 21st July 1882, stating if anything was due to them, respectively, out of this money in Court.

The plaintiff in that suit (4 of 1881) appealed to the High Court and by decree, dated the 2nd of May 1885, the sum of Rs. 1,87,335, was reduced to Rs. 1,20,000. The difference between the latter sum and 2,00,000, rupees was paid out of Court to the zamindar leaving 20,000, in Court which sum was by order, dated the 18th of January 1887, paid to defendant

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No. 4, in this suit on an undertaking by him to repay the sum, if so ordered by the Court.

On the 1st May 1885 this suit was filed by the four plaintiffs, the first two of whom are daughter and grand-daughter of Sukya Bhai and the third is husband of the 2nd and the 4th is transferee, by way of security, of the claim of the other plaintiffs.

The defendants are No. 1, Adimulam Pillai, No. 2 and No. 3 are his sons, No. 4 the Rev. Laberthere (defendant No. 5 in the former suit).

In the first instance Kusturi Reddi and Gurusami Reddi were made parties to this suit, but their names were afterwards struck out and they are not now parties. In the plaint, the deed of hypothecation of the 30th of January 1875 from defendant No. 1 to Sukya Bhai for Rs. 43,000 payable by instalments beginning 30th January 1878 the last of which was due on the 30th January 1884 is stated and the plaint claims that after crediting a payment (admitted) the sum of Rupees 69,284-3-0 is due thereon. The plaint also states the decree directing the money to be paid into Court and the payment out of Rs. 1,00,000 to defendant No. 4 and that Rs. 1,00,000 still was in Court (when the plaint was filed the appeal had not been disposed of). The relief prayed is payment [349] by the defendants, Nos. 1, 2, 3 of the Rs. 69,284 and that same should be declared to be a first charge on the amount deposited by the zamindar. Defendant No. 1 in his written statement admits the rights of plaintiffs Nos. 1 and 2. Defendants Nos. 2 and 3, sons of defendant No. 1, deny that they are liable. Defendant No. 4 does not appear to have filed any written statement, but alleged, as appears by the Judge's judgment, that he is not liable to the plaint claims, having got the money from the Court and denies plaintiffs' debt and says plaintiffs are not the legal heirs of Sukya Bhai.

The Subordinate Judge decided that plaintiffs, Nos. 1, 2 and 3 were the representatives of Sukya Bhai and made a decree for payment of the plaintiffs' claim by defendants Nos. 1, 2, 3, but dismissed the suit as against defendant No. 4, on the ground that the claim of defendant No. 4 on the Rs. 1,20,000 is prior to the claim of the plaintiffs. The question of priority between the plaintiffs and defendant No. 4 is to be determined.

One ground of priority relied on by the defendant No. 4 and to which the Judge referred is this. He is assignee of a judgment against the zamindar—the lessor in suit 5 of 1868 for Rs. 1,27,000 and also assignee of a judgment against the same zamindar in suit No. 19 of 1870 for Rs. 20,000 or there-abouts. It is contended for defendant No. 4 that these judgments were obtained for moneys borrowed by defendant No. 1 or paid by him to discharge debts due by the zamindar before 1861 and for which razinama decree had been obtained. This is no doubt true. It is also probably true that in the debts for which the decree in 5 of 1868 was given, some of these debts were incurred for moneys borrowed to pay off portions of the debts, which were included as charges in the Rs. 1,20,000. But defendant No. 1 borrowed and borrowed again to pay the prior borrowing and it would be impossible to trace any equity in defendant No. 4 or in the assignors of the decrees of 1870 and 1868 to have the benefit of money lent to defendent No. 1 to pay off such ancestral or family debts. Moreover, the zamindari has been released on record from *all* debts in suits before 1861 and those suits included all debts, ancestral and other debts, which would be chargeable against the zamindari.

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The zamindar by the lease of 1861 bound himself, when proof was given to him of payment of the debt mentioned in that document, to give a bond for the amount of such debt, and the [350] bonds on which the decrees 19 of 1870 and 5 of 1868 were obtained were so given.

These bonds and decrees were securities binding on the zamindar and might be used against him, but they did not bind the estate in the hands of the present zamindar.

The money paid into Court was not paid for the purpose of discharging either of those decrees. But it was paid in, in discharge of ancestral and family debts binding the estate, and which had been paid by defendant No. 1 under the conditions in the lease of 1861. The decree for payment of Rs. 1,20,000 was made not because of any liability on the estate *then* existing by virtue of decrees, but because the estate was relieved by defendant No. 1 from ancestral and family debts to the extent of Rs. 1,20,000 and because it would be inequitable to take from defendant No. 1 the benefit of the lease without paying him the amount which the present zamindar would have been obliged to pay, if defendant No. 1 had not paid those debts. Defendant No. 4 was not entitled to take any proceedings against the estate, or against the present zamindar in respect of either of the decrees.

We do not think defendant No. 4 is entitled to be considered to have a charge on the Rs. 1,20,000 by reason only of being assignee of the decrees. The plaintiffs in the appeal before us contended that the Rs. 1,20,000 was compensation for the loss of the lease, and in lieu of the lease, and that plaintiffs, as the mortgagees of the lease, have a first charge on the money.

It is clear the money was not awarded by the Court in lieu of the lease, as the lease was declared invalid as a lease, but good as a mortgage to the extent of Rs. 1,20,000.

The money paid into Court was not a substitute for the interest in the lease. The Court treated the lease as a mortgage on the zamindari for the amount which the plaintiff in the suit of 1881 ought to pay. That mortgage was created by the decree and was not contemplated by any of the parties when the instruments, under which the plaintiffs and defendant No. 4 claim, were executed. The mortgage, though not a substitute for the lease in the zamindari, was an interest, which had arisen in consequence of the payment by defendant No. 1, in respect of his interest in the lease, which interest was mortgaged to the plaintiffs and defendant No. 4.

The interest in the lease has failed, but defendant No. 1 had a [351] right under the decree of January 1882 to remain in possession until the amount awarded was paid. We think, therefore, the mortgagees of the lease were entitled to have the amount due to them on the mortgage of the lease thrown on the Rs. 1,20,000. As between defendant No. 1 and defendant No. 4 this view has been adopted in suit 4 of 1881 and as between the plaintiffs and defendant No. 1 the latter has in his written statement admitted plaintiffs' right to be paid out of the mortgage amount. Moreover, from the order of the 7th June 1882, it appears that the District Judge contemplated that other parties than defendant No. 4 claiming against defendant No. 1 would be entitled to participate in the fund.

A question is made by the plaintiffs in the 4th ground of appeal whether the Rs. 1,20,000 should be divided rateably between them and defendant No. 4, but it was not urged or argued by either party.

It is therefore now to be seen what are the priorities of the plaintiffs and defendant No. 4 to the sum of Rs. 1,20,000. No doubt the decree of

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the 18th April 1882 directed that the Rs. 1,87,000 was to be paid to the defendants Nos. 1 and 5 in that suit, but the plaintiffs in this suit were not parties to, and are not bound by, that decree. Defendant No. 4, however, contends that, if the plaintiffs adopt the decree in respect of the declaration that the Rs. 1,20,000 should be paid into Court, they must adopt all the directions in the decree, including the direction for payment to defendant No. 4. This contention is not well founded.

Defendant No. 4 sets up that decree as defining his rights. The plaintiffs not being bound thereby may, and do submit, to be bound by the declaration that the lease is not valid as a lease, but good as a mortgage. They cannot set up any matter inconsistent with that declaration. But the direction as to payment of the amount of the mortgage money is entirely separate from the prior declaration. A direction for the payment of the mortgage money to plaintiff would not be inconsistent with the prior declaration.

Here the plaintiffs only dispute the direction for payment to defendant No. 5 in that suit of the Rs. 1,20,000 and this is consistent with the adoption of the rest of the decree. The appellants rely on the deed of the 30th of January 1875, whereby security was given on 10 villages and claim the priority of that date. If defendant No. 4 does not establish priority over that [352] deed, plaintiffs will have priority over so much of the Rs. 1,20,000, as will represent the proportionate value of the 10 villages to the 12 other villages. Defendant No. 4 relies on the deed of the 28th of June 1879, whereby all the 22 villages were hypothecated. As regards the 12 villages not hypothecated to the plaintiffs, they cannot claim any portion of their proportionate value. Defendant No. 4, however, seeks to establish his priority over the plaintiffs in respect of the 10 villages thus :—

By deed of the 5th of January 1875, Exhibit XII, defendant No. 1 hypothecated to Minakshi Nayak the 12 villages [and also property belonging to defendant No. 1 in his own right] to secure a sum of Rs. 1,00,000, therein recited as being due by defendant No. 1 for moneys advanced to pay debts mentioned in the deed of 1861.

This deed created the hypothecation first in date by defendant No. 1 on all the villages.

By an agreement in writing, dated the 27th of June 1879, (allowed to be given in evidence by the plaintiffs on the appeal) between Minakshi Nayak and defendant No. 1, the Exhibit, No. XII of the 5th January 1875, is recited and also the fact that defendant No. 1 became further indebted to Minakshi making his whole indebtedness after credit and deduction Rs. 1,78,317—and that Minakshi received from defendant No. 4, by name, Rs. 1,00,000—and that, after crediting of that sum 21,683 and 6,030 rupees to the bond of the 5th January 1875, there remained a balance of Rs. 78,317 due by that defendant to Minakshi. The agreement provided that Minakshi released the 22 villages from the hypothecation liability created by the deed of 5th January 1875, and that the Rs. 78,317 should be paid by defendant No. 1, out of the income of the zamin, by instalments as thereby provided.

The Exhibit C was executed bearing date the next day, *viz.*, the 28th of June 1879. It recited that Rs. 30,000 was theretofore and then due by defendant No. 1 to defendant No. 4, and that the latter at request of the former paid to Minakshi Rs. 1,00,000. It then provided that, for the purpose of paying that sum of Rs. 1,30,000 and interest, from the income

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of the zamin, the peshkash and maintenance and interest should be paid and that defendant No. 1 should pay Rs. 78,317 and interest to Minakshi by Rs. 16,000 per annum and should pay the Rs. 1,30,000 by [353] instalments, commencing 30th July 1885 and ending 30th July 1889,—that after the debt to Minakshi should be paid off the estates which defendant No. 1 mortgaged to Minakshi should be made equivalent to the amount of the debt of Rs. 1,30,000 and interest until it was cleared. The properties set out in C comprise the 22 villages and property of defendant No. 9 not belonging to the zamindari.

Thus it appears that 21,683 + 6,030 = 27,713 of the Rs. 1,00,000 lent by defendant No. 4 was specially applied to discharge so much of the hypothecation charges created by the Exhibit XII, dated the 5th of January 1875. The principle of the decision in *Gokaldas* v. *Puranmal* (1) is that when in India there are successive mortgages on an estate, a purchaser or mortgagee of the equity of redemption who pays off a first incumbrance, is entitled as against intermediate incumbrances to stand in the place of the incumbrances paid off, even though he did not express any intention to keep alive the first incumbrance. In the judgment, it is said: "The doctrine of *Toulmin* v. *Steere* is not applicable to Indian transactions, except as a law of justice, equity and good conscience. The obvious question to ask in the interest of justice, equity and good conscience is what was the intention of the party paying off the charge. He had a right to extinguish it or to keep it alive. What was his intention? If there is no express evidence of it what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest. In each case, it may be for the advantage of the owner of the partial interest to keep on foot a charge upon the corpus which he has paid off?" If therefore, the Rs. 1,00,000 lent by defendant No. 4 had been applied to pay off the whole hypothecation charges under the Exhibit XII, 5th January 1875, no doubt defendant No. 4 would have had the priority of that charge to the full amount. But only Rs. 27,713 was so applied, and the question is does that fact prevent the application of the rule above stated. We do not think it does, inasmuch as the hypothecation under that agreement of 5th January 1875 is by the terms of the agreement of the 27th of June 1879 released and Minakshi after that had no hypothecation on the villages. The position there-[354] fore of defendant No. 4 is in principle the same as regards Rs. 27,713 as if he had paid off the whole amount of the hypothecation of 5th January 1875. The whole charge was released as it was in the case the subject of the decision in the Privy Council. But as defendant No. 4 has only paid a part of the amount of the first charge, he can only rank to that extent and interest in the priority of that first charge. The result is that defendant No. 4 must be declared to be entitled to have a first charge to the extent of Rs. 27,713 and interest on the sum of Rs. 1,20,000.

It is alleged by the plaintiffs that the 10 villages are more valuable villages than the 12 villages. If this is so, the value of each village should be ascertained. If the amount of the value of the 10 villages exceeded the value of the debt due to the plaintiff, then the balance would be applicable to the debt of defendant No. 4, who has a second charge thereon.

(1) 11 I. A. 126=10 C. 1035.

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Defendant No. 4 contends that having been awarded payment of the sum of Rs. 1,00,000 under the order of the 7th of June 1882, the plaintiffs are not entitled to obtain any decree that defendant No. 4 should refund that sum, or any part of it. We do not doubt that a court of equity has power to make such order, if it is necessary to effectuate justice between the parties. The plaintiffs were not parties to the suit of 1881 and the decree and order for payment were made by the Court in the absence and in ignorance of the claim of the plaintiffs. The order was made in mistake of the facts. Moreover, the order was plainly not intended by the Court to be a final disposition of the fund. It contemplated that further claims might come in, but apparently the Court thought it was not likely that the payment to defendant No. 4 could be disputed. The payment was merely provisional. Moreover, a court of equity exercises the jurisdiction to order a refund of payment made under its order when justice requires it. In cases when legatees have been paid by order of Court in the distribution of assets and when an unpaid creditor or legatee sues to recover his debt or legacy, the Court makes decree against the paid legatee to refund. See *March* v. *Russell* (1), *Gillespie* v. *Alexânder* (2).

Defendant No. 4 contended that the money paid to him under the order of the 7th of June 1882, if it was wrongfully paid, was wrongfully seized within the meaning of Article 29 of the Limit-**[355]**ation Act, and therefore the plaintiff is barred from recovering the amount wrongly paid. We do not think the order for payment was a legal process within the meaning of that section.

The process meant by that article refers to process under which seizure takes place. Here there was no seizure. The fund was Court and was subject to the order of the Court. Article 29 does not apply.

Though the plaintiffs stated their cause of action arose in 1878, they were mistaken. Their cause of action arose when the decree of the February 1882 was passed and Article 120, Limitation Act, applies. Therefore the suit is in time. The first two plaintiffs are the representatives of Sukya Bhai to whom the bond of the 30th of May 1875 was executed and apparently are the parties entitled to maintain this suit along with plaintiff No. 4. The sub-lessees, the Reddies, who were parties to suit 4 of 1881, had not any hypothecation on the lease of 1861 and have no claim in the fund and it was not necessary to make them parties to the suit. They did not appeal from the decree of 1881. The sum due to the plaintiffs and defendant No. 4 exceeds the Rs. 1,20,000 and interest. We modify the decree of the Subordinate Judge as follows :—We declare that the funds applicable to the payment of the plaintiffs and defendant No. 4 in this cause are as follows :—Rs. 1,20,000 with interest thereon, Rs. 1,00,000 from 7th June 1882, also interest on Rs. 20,000 from the 18th day of January 1887 and with such further interest as mentioned in the decree of the High Court, and that all such sums and interest, after making deduction allowed by the Court amounted on the 18th January 1887 to Rs. 1,38,639 as appears by an order of the Court of that date. Declare defendant No. 4 entitled to a first charge on the Rs. 1,20,000 and interest thereon for Rs. 27,713 from the 28th June 1879 to 7th of June 1882 at 9 per cent. per annum and that he is entitled to retain the same out of Rs. 1,00,000 paid to him under the order of the 7th of June 1882 and that the 22 villages shall be valued separately and that the plaintiffs and defendant No. 4

(1) 3 My. & Cr. 41.

(2) Russell—130.

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are entitled to the residue of the fund after payment to defendant No. 4 as aforesaid in the proportion of the value which the 10 villages and 12 villages bear to each other. It is ordered that defendant No. 4 do bring in and deposit in Court to the credit of this cause the sum of Rs. 38,639 drawn out of Court under the order of the 18th January 1887 with [356] interest thereon at 4 per cent. per annum until payment into Court. It is ordered that in case the said sum of Rs. 38,639 and interest is not sufficient to pay to the plaintiffs the sum they shall be entitled to receive according to the above directions, that defendant No. 4 shall pay into Court to the credit of the cause a sum sufficient along with the said sum and interest to make up the sum payable to the plaintiffs.

The claim of the plaintiffs and of defendant No. 4 to costs are nearly equally balanced. The plaintiffs have succeeded in the appeal, but not to the full extent for which they sued. Unless the plaintiffs had chosen to go in and claim under the order of the 7th of June 1882 a suit was unavoidable to finally dispose of the fund in No. 4 of 1881. As between the plaintiffs and the defendant No. 4, each party—plaintiffs and defendant No. 4—should abide their own costs. Confirm the decree of the Sub-Judge in other respects with the above directions. The case is remitted to the Court of first instance to be carried out.

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11 M. 356.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

MADDEN (*Decree-holder*), *v.* CHAPPANI (*Decree-holder*).*
[2nd December, 1887.]

Civil Procedure Code, Sections 294, 295.

M and C each obtained a decree against the same judgment-debtor and applied for execution. C, in execution of his decree, attached certain immoveable property, and, with the permission of the Court, purchased the same under Section 294 of the Code of Civil Procedure and set off his purchase-money against the decree. M claimed that the proceeds of the sale to C should be rateably distributed under Section 295 of the Code and that C should either elect to have the property resold or pay into Court the rateable proportion due to M. C objected to a resale or to pay :

Held, that C might be compelled to refund the rateable amount due to M by summary process in execution.

[**R.**, 16 B. 91 (102) ; 11 C.L.J. 69 (72) ; **D.**, 32 M. 334 = 4 Ind. Cas. 509 (510) = 19 M.L.J. 307 = 5 M.L.T. 125.]

CASE referred, under Section 617 of the Code of Civil Procedure, by W. E. Clarke, Subordinate Judge of the Nilgiris.

[357] The case was stated as follows :—

"Mrs. Madden, plaintiff in Original Suit No. 62 of 1885, is a decree-holder against three persons. Paria Chappani Pillai, plaintiff in Original Suit No. 38 of 1885, is a decree-holder against one of Mrs. Madden's judgment-debtors. In execution of her decree, Mrs. Madden has taken out various execution proceedings, one of which is still pending. In execution of his decree, Chappani Pillai attached certain immoveable property of his judgment-debtor, and, with permission of the Court, purchased a portion of it at a court-sale, setting off his purchase money against his decree

* Referred Case No. 10 of 1887.

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amount—Section 294. On this purchase and set-off becoming known to Mrs. Madden, she, through her solicitor, Mr. Smith, protested against this course being allowed, and urged that the proceeds of the sale of the property attached by Chappani Pillai should be rateably divided amongst the decree-holders under Section 295. On hearing Mr. Smith for Mrs. Madden in support of this contention and Mr. Orr for Chappani Pillai against it, the Court was of opinion, on the authority of *Shrinivas* v. *Radhabai* (1), that, although it had given Chappani Pillai leave to bid and set off, this could not deprive Mrs. Madden of her right as a decree-holder to a rateable distribution of the purchase money under Section 295; but it had a doubt as to whether it could order such purchase money to be paid into Court, as, however, the case already cited seemed to show that, under circumstances very similar to the ones which exist in this case, the Bombay High Court allowed a judgment-creditor to elect a re-sale, and Section 294, Clause 3, provides for a resale, the Court ordered that Chappani Pillai should exercise such election, or show cause why he should not pay the purchase money into Court. Notice to this effect was served on the said Chappani Pillai. On the day appointed for the said Chappani Pillai to show cause, he appeared by Mr. Winterton, who argued that his client was not bound by the Court's order to elect or show cause, and maintained that the last proviso of Section 295 operated to secure him from being compelled to pay his purchase money into Court, and that Mrs. Madden could only get her share of such money by filing a suit for it.

"OPINION.—I am of opinion that the case of *Shrinivas* v. *Radhabai* is clear authority for the position that Section 294 only applies **[358]** as between a purchasing decree-holder and his judgment-debtor and cannot avail to deprive a competing decree-holder under Section 295 of his rights under the latter section; as to Mr. Winterton's argument founded on the wording of the last proviso to Section 295, I am of opinion that it is not at all in point, for this proviso seems to me only to apply in respect of assets which have been realized and paid into Court and then paid out of Court to a person not entitled to receive them.

"In this case, however, no assets at all have been received by the Court or paid out to any one, and, therefore, I think this proviso inapplicable to the present case. I am, however, doubtful whether, since this Court allowed Chappani Pillai permission to bid and set off under Section 294, it can order him to pay his purchase money into Court, there being no provision of the Code to this effect. I would, therefore, respectfully solicit the decision of the Honourable the Judges of the High Court as to whether, under the circumstances narrated, this Court has power to order his purchase money to be paid into Court by Chappani Pillai, or whether its power is restricted to ordering a resale under Clause 3 of Section 294."

Mr. *Shaw*, for Mrs. Madden.

Chappani did not appear.

The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

JUDGMENT.

The permission granted under Section 294, Civil Procedure Code, to a judgment-creditor to set off the amount of the purchase money payable

(1) 6 B. 570.

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for the property sold against the debt due to him under his decree must be taken to be granted subject to the provisions of Section 295—*Viraragava* v. *Varada* (1).

The set-off so allowed in effect represents the payment, into and out of Court, of the purchase money due by the purchaser, and we agree with the view expressed in *Taponidi Hordanund Bharati* v. *Mathura Lall Bhagat* (2) that the substantial nature of the transaction is not altered and that the set-off is allowed as a substitute for payment into and out of Court as a matter of convenience.

It is clear then that Chappani Pillai would not be bound to pay into Court the purchase money if he considered it to his interest to elect for a resale, and that if he wishes the sale to [359] stand he must pay in so much of the purchase money as may be rateably due to other creditors under Section 295 on account of their money decrees.

If he will neither elect a resale nor pay the money into Court as above limited, such refund may be enforced either by suit or by an order in execution proceedings by way of restitution. Clause 3, Section 294 of the Code of Civil Procedure is applicable only to cases in which the purchaser buys without the permission of the Court, and there is no other provision in the Code which authorizes the Court executing the decree of its own motion to order a resale by reason of non-compliance with a direction to refund.

We, therefore, answer the question referred to us as follows:—The Court executing the decree has no power to order the purchaser to pay the whole of the purchase money into Court, but it is competent to the Court to give him the option of electing a resale, and if he does not avail himself of that option, it is open to the Court to order him to pay into Court so much of the price as is due to the other decree-creditors entitled to share rateably in the distribution of the assets, and to enforce that order by summary process in execution. The Court is also at liberty, where it sees fit, to refer the execution-creditor or creditors to a regular suit when the circumstances of the case appear to render such a course desirable.

There will be no order as to costs in the matter of this reference.

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11 M. 359=1 Weir 712.

APPELLATE CRIMINAL.

Before Sir Arthur, J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

KHADAR KHAN, IN RE.* [15th December, 1887.]

Cattle Trespass Act I of 1871, *Section* 22—*Compensation.*

No appeal lies against an order made under Section 22 of Act I of 1871.

CASE referred under Section 438 of the Code of Criminal Procedure, by A. F. Cox, Acting Sessions Judge of Cuddapah.

The facts of the case as stated by the Judge were as follows:—

One Khadar Khan was ordered by a Second-class Magistrate to pay Rs. 35 as compensation under Section 22 of the Cattle Trespass [360] Act.

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* Criminal Revision Case 467 of 1887.

(1) 5 M. 123. (2) 12 C. 499.

1887 DEC. 15. — APPELLATE CRIMINAL. — 11 M. 359 = 1 Weir. 712.

Khadar Khan appealed, and the Joint Magistrate admitted the appeal and reversed the order treating it as a conviction. The Sessions Judge was of opinion that no appeal lay (Weir, p. 676, ed. 3).

Khadar Khan in person.

The Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

We are of opinion that no appeal lay against the order of the Second-class Magistrate made under Section 22 of Act I of 1871. We set aside the order made by the Joint Magistrate in appeal, and restore the order of the Second-class Magistrate.

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11 M. 360.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

OUCHTERLONY v. OUCHTERLONY AND OTHERS, ADMINISTRATOR-GENERAL OF MADRAS AND WAPSHARE AND OTHERS.* [20th April, 1888.]

Trust—Improvement of estate—Rights of tenant for life and remainder man as to sums expended.

A testator conveyed his property which consisted of extensive coffee estates to trustees upon trust as to part thereof for certain persons for life and then upon trust for their children absolutely. A suit having been filed for the administration of the trusts of the will a receiver was appointed. On the application of the receiver, and with the consent of all parties, the Court sanctioned the extension of the estate. This was done by raising a loan on pledge of the profits of the estate, out of which, when realised, the loan was paid off. By the will, the trustees were empowered to raise money for the purpose of managing the estate at their absolute discretion, either by using the profits, or by pledging or selling the corpus. The tenants for life claimed that the loan might be declared a charge on the estate:

Held, that the extension was within the powers of the trustees, but that as between the life-tenants and the remainder men, the former were entitled to have the sums expended on the improvements charged on the corpus, they keeping down the interest.

THIS suit was filed in 1878 for the administration of the trusts under the will of James Ouchterlony. The plaintiff and defendant No. 1 were the surviving sons of the testator, and the other defendants were his two daughters and his daughter-in-law and **[361]** their children, most of whom were minors. The suit was revived on the death of the plaintiff by Michael Gould, Administrator-General of Madras, his executor, and the estate of defendant No. 1 was on his death represented by H. C. F. Wapshare, the husband of one of the testator's daughters, and one of the executors of the will of defendant No. 1. On the 8th of September 1879 an order was made that an account should be taken by a Judge sitting in Chambers of the estate of the testator, &c. On the 10th April 1888 the case came on for hearing for confirmation of the certificate of the Judge in Chambers.

The Acting Advocate-General (Mr. *Spring Branson*), for plaintiff.

Mr. *Wedderburn*, for defendant No. 1 and the trustees of the will.

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* Civil Suit No. 298 of 1878.

1888 APRIL 20. — ORIGINAL CIVIL. — 11 M. 360.

Mr. *Grant* and Mr. *Brown*, for the tenants for life.

Mr. *Shaw* and Mr. *Kernan*, for the reversioners.

Mr. *Grant* moved that certain sums of money which had been expended out of the income of the estate by the receiver on extensions and improvements of the estate should be declared to be a charge on the reversion in favour of the tenants for life who would otherwise have received 30,000 rupees each.

These sums had been raised under orders of the Court on the application of the receiver with the consent of all parties to the suit by pledging the annual coffee crop with a bank, the loan being repaid out of the sale-proceeds of the crop.

Mr. *Kernan*, contra, referred to *Jones* v. *Jones* (1), *Floyer* v. *Banks* (2).

Mr. *Brown* referred to Lewin on Trusts (Ed. 8), p. 576—*Marker* v. *Kekewich* (3), *Marquis of Bute* v. *Ryder* (4).

The facts necessary for the purpose of this report appear from the judgment of the Court.

JUDGMENT.

KERNAN, J.—The question before the Court now is as to the relative obligation of the tenants for life, and those in remainder in respect of the money spent in extending the estate of the testator. This depends on whether it appears from the will of Ouchterlony that intended advances made by the trustees for the benefit both of the tenants for life and those in remainder are to be borne exclusively by the tenants for life or should be borne in the ordinary way by the whole estate, the tenants for life keeping **[362]** down the interest and those in remainder paying the corpus of the debt. There is no doubt as to the general principle that if an estate is given by will to a tenant for life and to a remainder man subject to debts already existing or subject to debts created by the testator by charges under his will, without any special directions as to how the debts or charges are to be paid, the tenant for life of the estate is only bound to pay the interest, and the corpus of the estate must bear the principal.

If the testator expressed himself in clear terms that the tenant for life should bear the burden, he must bear the burden. The estate belonged to the testator to devise it as he pleased.

Now the will enables the trustees of their own absolute and uncontrolled discretion to sell any portion of the estate, he directs that after payments of debts all the residue of his estate, should form a trust fund, as he devised—five-sixteenth part thereof to James William Ouchterlony for his own absolute use and benefit, also five-sixteenth thereof to his other son, G. A. Ouchterlony, for his own absolute use and benefit. As regards those five-sixteenths no question arises. As to two-sixteenth other parts of the trust funds, the testator directs his trustees to pay the annual income arising therefrom to his daughter, Helen Harriett Johnson, during her life, and, after her decease, as to the capital as well of the said two-sixteenth and the securities on which they are invested in trust for her child or children absolutely. Then, in the same way, and in the same terms, there is a trust created for Fanny Ouchterlony, his daughter-in-law for life, in two-sixteenth of the estate, with remainder to her children. The other two-sixteenth is given to Mrs. Wapshare for life, with remainder to her children, in the same terms. The will provides it should be

(1) 5 Hare 440.
(2) L.R. 8 Eq. 115.
(3) 8 Hare 291.
(4) L.R. 27 Ch. D. 196.

lawful for the trustees for the time being, so long as they should think fit to carry on and continue the business of a coffee planter carried on by him, by means of the capital employed therein, and any further capital which the trustees may think requisite for that purpose, such additional capital to be obtained either on loan or out of his general estate. It then declares that his trustees for the time being should, while they carry on the said business, have the fullest discretionary power in all matters relating thereto, as if they were absolute proprietors or owners, but the actual management thereof may be delegated to managers; and that the trustees should, out of the profits, pay all rents, rates, taxes, insurance, [363] salaries, wages and other expenses of, and incidental to, the said business, and also remuneration to such as they shall think fit. Then it declares that the net profits arising from the said business shall be applied in the same manner in all respects hereinbefore declared, as if the same were income arising from investment of the trust funds. Such net profits are to go to the tenants for life during their lives. Then there is a declaration that while the said business should be carried on by the said trustees, no person interested under his will, nor any other person, except such trustees, shall have any right of control or management over, or in relation to, the management or carrying on of the said business or the mode or time of ascertaining and applying the profits thereof, but the same shall be wholly in the discretion of the trustees.

Upon the will it is perfectly plain that the testator intended that the different tenants for life should each have their own share of the net profits. The proviso against interference with the trustees as to the time or mode of application of profits shows that complete control was given them over the management of the profits. The trustees might have applied the whole of these profits for the extension of the estate; they might have realised by sale or mortgage. If they had realised by sale or mortgage, it is plain that the corpus of the estate would have to pay the principal of the mortgage, and the tenants for life would only have to pay the interest. After this suit was filed, a receiver was appointed, and the receiver was also the manager of the property. After he was sometime in possession, the parties, including the trustees, agreed that as there was a large estate belonging to the deceased adjoining the estate on which he carried on the business of coffee planter, it would be to their benefit and to the benefit of all parties that the estate should be extended, and that for that purpose, additional capital should be raised. A question arises whether apart from the consent of the parties, the trustees were justified in raising money for the purpose of those extensions. Looking at the circumstances of the testator and of his estate at his death, I think, they were. The proviso authorises them as long as they carried on the business of coffee planter. Coffee-planting might, perhaps, include in it planting of cinchona or planting of tea according to circumstances. When we come to look at the circumstances of the testator at his death, from which time the will speaks, we find the circumstances are these. He had spent 18,000 rupees or there- [364] abouts in planting tea, he had planted some hundred trees of cinchona and, therefore, he was a tea-planter and cinchona-planter. The words used are "absolute proprietors or owners." Taking these circumstances, I think, the trustees were perfectly justified in raising the additional capital not only for the purpose of coffee-planting but also for tea-planting and cinchona-planting. They, therefore, made an application to the Court on more than one occasion, and notice was given to all parties, all parties appeared and consented that the receiver

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should be at liberty to raise by loan from a bank money sufficient for the purpose of making the extensions on the pledge of the growing crops. The extensions were carried out, and were intended to be, and, in fact, as it turned out, were to the benefit not only of those in remainder but the tenants for life. It is unnecessary to refer to the particular sums, the decree will state the same limiting the sums and separate accounts made for these extensions. The money expended on the extensions were raised out of the net profits of the estate to which profits the tenants for life were entitled. The trustees had power so to raise money as they had power if they thought fit to raise money on sale or mortgage. Their power could not beinterfered with by the beneficiaries; but the selection by the trustees to raise the money out of the growing crops, or net profits, did not affect the question between the beneficiaries how the burden should be borne between them. The decision in the case of the *Marquis of Bute* v. *Ryder* (1) was based on facts not unlike the facts of this case. The trustees under the will of the plaintiff's father finding that there was a large annual surplus of income applied that surplus to the payment of the improvements which are said to have amounted to a million. They paid the whole of the surplus to these improvements. What was done here was the whole of these extensions were paid for out of the income. It was there contended that the trustees having spent the income of the property towards improvements, that it was not open to the Marquis of Bute, the plaintiff, to obtain a charge on the estate for the amount. It was argued that as the trustees had power to apply any portion of the produce of estate or the income of the estate inasmuch as the trustees applied the income for payment of the improvements, the plaintiff, [365] as tenant for life, could not dispose such application or it was contended that if the trustees had honestly applied the income of the estate in discharge of the improvements it was not open to the tenant for life to question that. No doubt, if the trustees honestly applied the income, then as between those trustees and the tenants for life the accounts were right; but that was not the point in that case, nor is it in this case. The point in this case is what are the rights as between the tenant for life and the tenant in remainder. The question is not whether the trustees were right in doing what they did. The point decided in that case is to be found at the end of the judgment when it is said "if they, the trustees, had raised the money by sale or by mortgage, they would have charged the corpus of the estate; that they were at liberty to charge the estate cannot be disputed, but there is clear authority for holding that in no case can the exercise by the trustees of their discretion affect the rights of the parties *inter se*." Applying the principle of that answer to the provisos in this will giving them the absolute power of disposal, the exercise of the power by applying the moneys to the extension does not affect the rights of the parties *inter se*. In Story's Equity Jurisprudence, Section 558, he refers to the marshalling of estates, securities and liens and says: "In the next place as to marshalling assets (strictly so-called) in the course of the administration. In the sense of the lexicographers to marshal is to arrange or rank in order, and in this sense the marshalling of assets would be to arrange or rank assets in the due order of administration. This primary sense of the language has been transferred into the vocabulary of Courts of Equity, and has there received a somewhat peculiar and technical sense, although still germane to its original signification.

(1) L. R. 27 Ch. D. 196.

In the sense of the Courts of Equity, the marshalling of assets is such an arrangement of the different funds under administration as shall enable all the parties having equities thereon, to receive their due proportions notwithstanding any intervening interests, liens or other claims of particular persons to prior satisfaction out of a portion of these funds. Thus where there exist two or more funds and there are several claimants against them and at law one of the parties may resort to either fund for satisfaction, but the others can come upon one only; there, Courts of Equity exercise the authority to marshal the funds and by this means enable the parties whose remedy at law is confined to one fund only, to **[366]** receive due satisfaction. The general principle upon which Courts of Equity interfere in these cases is that without such interference "he who has a title to the double fund would possess an unreasonable power of defeating the claimants upon either fund by taking his satisfaction out of the other to the exclusion of them," so that, in fact, it would be entirely in his election whether they should receive any satisfaction or not. Now Courts of Equity treat such an exercise of power as wholly unjust and unconscionable, and, therefore, will interfere not indeed to modify or absolutely to destroy the power but to prevent it from being made an instrument of caprice, injustice or imposition. Equity in affording redress in such cases does little more than apply the maxim: *Nemo ex alterius detrimento fieri debet locupletior.* Now apply that principle here. Suppose the trustees said, we will apply all the income of these ladies for several years for improvements; if they were not to get anything out of the estate for several years, the trustees would be increasing the value of the estate in remainder at the expense of the tenants for life. Both these sets of parties are the objects of the testator's will, each having different rights; therefore, whatever is necessary to increase the general estate, these parties must, according to the rules, contribute, and the tenants for life must bear the interest and those in remainder the capital. It seems to me, therefore, that the very extensive power which the beneficiaries could not interfere with, really has nothing whatever to do with the rights of the parties *inter se.* As to the case *Jones* v. *Jones* (1), the testator there left a general estate and directed that the income of the general estate was to go to the tenant for life, and the residue to the tenant in remainder, therefore, in the absence of any special proviso, the ordinary rule would apply, and when the estate would be realised, the income arising from the realisation of the funds would go to the tenant for life, and the residue to the tenant in remainder; but in the will, it was provided that until the estate was sold, the tenant for life should be entitled to the income and the general rule was held not to apply, as such was plainly the meaning of the will. I can see nothing in the will here to show any intention of the testator that he intended that anything but the ordinary rule should apply.

[367] There must, therefore, be a declaration that as between the parties the several tenants for life and their children, the tenants for life are each entitled to a charge on the remainder of the two-sixteents blimited to their children, but that the tenants for life must each bear during their respective lives the interest that accrues upon the sum charged on the two-sixteenths remainder. As regards the shape of the decree, the decree will therefore confirm the certificate and set out the terms of the certificate, converting the certificate into a decree in its several branche

(1) 5 Hare, 440.

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and with its several schedules. There will then be a recital in the decree that a sum of Rs. 3,000 mentioned in the certificate as due to the administrator of James William Ouchterlony has been paid to the administrator. Then the decree is to direct the receiver over five-sixteenths of the estate belonging to J. W. Ouchterlony and vesting in the plaintiff as executor shall continue until further orders. The decree will declare all parties to the suit entitled to their costs in the following manner. The trustees shall pay out of the funds the costs of the plaintiff when taxed and ascertained, and the costs of the trustees when taxed and ascertained, and also the costs of the several tenants for life and of the infants, after deducting from all such costs all sums of money due or paid heretofore on account thereof under the orders of this Court, dated 21st April 1886. Costs as between attorney and client. Liberty to all parties to apply.

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11 M. 367=13 Ind. Jur. 12

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

APPAYYA (*Plaintiff*), *Appellant v.* RAMIREDDI AND ANOTHER (*Defendants*), *Respondents.** [20th and 24th April, 1888.]

Civil Procedure Code, Section 146—Failure of plaintiff to prove unnecessary averments—Decree on admission of defendant—Unnecessary issues raised by Court.

In a suit brought by an undivided member of a Hindu family to set aside a sale made by the managing member and to recover a moiety cf the land sold, the plaintiff alleged that he had been adopted by his deceased uncle and claimed as adopted son. The purchaser denied the adoption, alleged that plaintiff was the natural brother of the vendor, and justified the sale under Hindu law.

[368] The lower Courts found that the adoption was not proved, and, on the plaintiff urging that if the adoption was not proved yet he was entitled to recover by virtue of the admission that he was the natural brother of the vendor, held that the latter claim was inconsistent with the claim as adopted son.

The suit was therefore dismissed :

Held, on appeal, that the suit was improperly dismissed, and that if the purchaser could not justify the sale the plaintiff was entitled to succeed.

The rule that the decree should be in accordance with what is alleged and proved, is intended to prevent surprise and is not applicable to a case in which the defendant's own admission is adopted as the ground of decision against him.

APPEAL from the decree of C.S. Crole, District Judge of North Arcot, confirming the decree of M. Jayaram Rau, District Munsif of Chittoor, in Suit 501 of 1885.

The facts are set out in the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

Mr. *Ramasami Raju*, for appellant.

Narayana Rau, for respondents.

JUDGMENT.

The plaintiff (appellant) is a minor, and, as his next friend, his uncle, instituted the present suit to set aside a sale of joint family property and to recover for the minor the moiety to which he would be entitled as a co-parcener on partition. The plaint stated that the minor's father Surayya and one Appayya were cousins ; that the property in dispute was

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* Second Appeal No. 1044 of 1887.

1888 APRIL 24. — APPELLATE CIVIL. — 11 M. 367 = 13 Ind. Jur. 12.

joint; that Appayya adopted the minor; that defendant No. 2 (respondent) was his natural brother, and that he alienated the joint property without adequate necessity or justification in favour of defendant No. 1 (respondent). Defendant No. 2 admitted the claim and alleged that defendant No. 1 took advantage of his youth and improperly obtained a sale-deed from him. Defendant No. 1, who is the purchaser, resisted the claim. He denied that Appayya adopted the minor plaintiff, and that the property in suit was common both to Appayya and Surayya. He stated however that the plaintiff and defendant No. 2 were Surayya's sons as alleged; that the property in question belonged to Surayya, and that defendant No. 2 sold it to him in payment of a debt contracted by Surayya's widow for the benefit of the joint family. Upon the pleadings the co-parcenary relation in regard to the property in suit and the minor's title to a half share were admitted subject to the special case set up by defendant No. 1, *viz.*, that there was a sale in his favour which bound the minor's interest. The District Munsif recorded three issues with reference to the question of title, *viz.*, (1) whether **[369]** the property in litigation was common to Appayya and Surayya, (2) whether Appayya adopted the appellant, and (3) whether the sale was for family benefit. He recorded, however, no issue as to whether if the sale were not valid, the plaintiff was entitled to the relief claimed by him on the admissions made by defendant No. 1. He decided the first two issues against the minor, and the third issue against the purchaser, and dismissed the suit with costs. In his judgment he referred to the plaintiff's contention that he was entitled to the relief prayed for on his natural admitted birthright, but overruled it on the ground that it was inconsistent with his alleged right as an adopted son. On appeal, the District Judge concurred with the District Munsif that the case set up in the plaint was not proved and confirmed the original decree. It is urged in second appeal that the plaintiff was entitled to a decree on the ground that the special case set up by defendant No. 1 was not proved, and that the plaintiff's title as a co-parcener in respect of the property in question was admitted.

It seems to us that the contention is well founded. The plaintiff was entitled at the first hearing to adopt the admissions of defendant No. 1 as proof of his *prima facie* title to the relief claimed and to put him to the proof of the special case set up by him. In dealing with questions of alleged variance between the ground of claim and the ground of decision, regard should be had more to the substance of the issue than to the form in which it is raised. The substantial issue in the case was whether the plaintiff was a co-parcener at the time of sale with respect to the property in dispute, and, if so, whether the sale set up by defendant No. 1 was made for family benefit. Whether co-parcenary was deduced from his *status* as the son of Surayya or as the adopted son of Surayya's cousin was not a matter necessary for the decision of this case. If the District Munsif had said that the plaintiff had a good *prima facie* title in either view of his *status* and recorded an issue only with reference to the special case set up by defendant No. 1, it could not be contended in appeal that there were false averments in the plaint, and that though they were immaterial for the purpose of determining the claim to the relief prayed for, distinct issues ought to have been raised in order that the plaintiff may be punished in some way for making untrue statements. The fact of the District Munsif having recorded issues which were not necessary to see if the plaintiff had a *prima facie* title, could make no **[370]** difference. It is, on this view, that when the plaintiff asserts one kanam and the defendant relies

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on a different kanam, and the former claims a decree on the admitted kanam, a decree has been passed in his favour by this Court. Again, a decree has been passed in plaintiff's favour when the plaint avers a lease and jenm title and the former is not, and the latter is alone established. If the plaint in this case stated that the plaintiff claimed either by reason of his *status* as Surayya's son by birth, or as Appayya's son by adoption, it could not be said as supposed by the District Munsif, that the plaintiff was not entitled to rely on such alternative ground of claim. Having regard to Section 146 of the Code of Civil Procedure, the absence of an express allusion to alternative averments in the plaint should not be permitted to prove fatal to the plaintiff's claim when the alternative is raised by the pleadings as a ground of decision. The rule that the decree should be in accordance with what is alleged and proved has for its object to prevent surprise and preclude the adoption, as a ground of decision, of what is not suggested by the pleadings and other materials on which issues may be framed and presumably not in the contemplation of the parties when they proceed to trial. There can be no surprise upon a party when his own admissions are adopted as the basis of a decision against him. If the course adopted by the District Munsif in this case misled defendant No. 1, and he thereby failed to prove his special case, an opportunity should be given him to prove it; but we do not think that the suit should be dismissed because the District Munsif raised issues which were unnecessary for the purpose of determining whether the plaintiff had a *prima facie* title, and then refused to recognise the plaintiff's right to claim a decree on the admissions made by the defendant and on the finding that the latter failed to prove his special case.

We set aside the decree appealed against and direct that the appeal be re-heard with reference to the foregoing observations, and that leave be given to both parties to produce fresh evidence with reference to the third issue. We further direct that, under the circumstances, each party do bear his own costs of this appeal. The other costs will be provided for in the revised judgment.

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11 M. 371.

[371] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SITARAMAYYA (*Defendant*), *Appellant v.* VENKATRAMANNA (*Plaintiff*), *Respondent.** [6th April, 1888.]

Transfer of Property Act, Sections 67, 83, 84—*Suit by mortgagee instituted before payment into Court—Right of mortgagee to a decree and to full costs.*

In a suit to recover money due on a mortgage, defendant paid the money into Court and a notice was issued to the mortgagee under Section 83 of the Transfer of Property Act. The mortgagee filed his suit before notice was served on him, and it was not proved that the mortgagee was aware of the fact of the payment into Court when he filed his suit:

Held that the plaintiff was not debarred by Section 67 of the Transfer of Property Act from obtaining a decree, and that under the rules of Court the pleader's fee was properly assessed as in a contested suit and not as in a case where there is a confession of judgment.

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* Second Appeal No. 674 of 1887.

1888 APRIL 6. — APPELLATE CIVIL. — 11 M. 371.

APPEAL from the decree of Venkata Rangayyar, Subordinate Judge at Ellore (Godavari), confirming the decree of O. S. R. H. Krishnamma, District Munsif of Ellore, in suit No. 185 of 1886.

Plaintiff sued to recover Rs. 1,172-7-6 due under a bond, whereby certain property was hypothecated as security for a loan.

Defendant pleaded tender on 5th September 1886 and alleged that the sum due had been deposited in Court on 6th September, and that on 7th September a notice had been issued to plaintiff under Section 83 of the Transfer of Property Act, 1882.

On the same day, but before service of notice, which took place at 4 P.M., the plaint was filed.

The Munsif found no tender had been made on 5th September and decreed for plaintiff.

On appeal this decree was confirmed.

Defendant appealed on the following grounds, *inter alia*.

(1) The admitted fact that defendant deposited the amount in Court under the provisions of the Transfer of Property Act on 6th September 1886 being a day previous to the [372] institution of the suit disentitles the plaintiff to any costs.

(2) The observations of the Court of first instance not questioned by the Lower Appellate Court virtually show that plaintiff had knowledge of the money raised to pay his debt and the deposit made.

(3) At any rate the vakil's fee ought not to have been calculated upon the full amount of the debt which was not questioned, but only upon the amount of costs which was only the point of dispute.

(4) The Lower Appellate Court failed to record its finding on the material point, namely, whether or not plaintiff had knowledge of the fact of the deposit made before he actually instituted the suit.

(5) Under the circumstances of the case the defendant is entitled to his costs in both the courts below.

Ramachandra Rau Saheb, for appellant.

Bhashyam Ayyangar, for respondent.

The Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.) delivered the following

JUDGMENT.

The first objection taken in appeal is that the deposit of what was due to the plaintiff in Court precluded him from instituting the suit whether he was aware of such deposit or not, and reliance is placed on Section 67 of the Transfer of Property Act. We are of opinion that this objection cannot be supported. Reading Section 67 together with Sections 83 and 84, we do not consider that it was intended to take away the plaintiff's right of suit before there was a notice to him or knowledge on his part of the deposit. Another contention is that no issue was recorded with reference to the plea that the plaintiff had knowledge of the deposit. The second issue was sufficient to enable the appellant to prove the knowledge, if any, which he imputed to the respondent. It is next urged that, inasmuch as the liability to pay costs was the only matter in contest, the case must be treated, for the purpose of assessing the vakil's fee, as one in

1888 April 6. — Appellate Civil. — 11 M. 371.

which there was confession of judgment. This is clearly not a case in which the appellant confessed judgment, and we are not prepared to hold that it is governed by the rule framed with reference to such cases.

We dismiss this second appeal with costs.

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11 M. 373.

[373] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SITARAMAYYA (*Defendant No.* 3), *Appellant v.* VENKATRAMANNA (*Plaintiff*), *Respondent.** [12th April, 1888.]

Hindu law—Son's estate liable for debt of deceased father contracted as surety—Contract Act, Section 131, *not applicable to case.*

In a suit brought to recover money from the estate of a deceased Hindu in the hands of his son on a surety bond executed by the father :

Held that the estate of the son was liable according to the principles of Hindu law, and that the question was not affected by the provisions of the Contract Act.

[F., 26 A. 611 (613) = 24 A.W.N. 142 = 1 A.L.J. 330 ; 28 M. 377 (378) ; 1 N.L.R. 173 (174) ; R., 39 C. 862 (875) = 15 C.L.J. 228 = 16 C.W.N. 519 = 12 Ind. Cas. 609 ; 27 M. 45 (48) = 12 M.L.J. 270 (272) ; 17 M.L.J. 283 (285) ; D., 13 C.W.N. 9 (10) = 4 M.L.T. 429.]

APPEAL from the decree of Venkata Rangayyar, Subordinate Judge at Ellore (Godavari), modifying the decree of O. S. R. Krishnamma, District Munsif of Ellore, in suit No. 187 of 1886.

Plaintiff sued the defendants to recover Rs. 1,161-11-4, principal and interest due under a registered deed, whereby certain land was hypothecated as security for repayment of a loan made to defendants Nos. 1 and 2. D. Narasimhulu (deceased) also executed the bond as surety for defendants Nos. 1 and 2. Defendant No. 3 was the minor son of D. Narasimhulu and was represented by his mother as guardian *ad litem.* The Munsif decreed the claim as against defendants Nos. 1 and 2, and, in default of payment by them, against the estate of D. Narasimhulu, inherited by defendant No. 3, to the extent of Rs. 369 only.

Plaintiff appealed on the ground that the estate of defendant No. 3 was liable for the whole debt, and defendant No. 3 also appealed.

The Subordinate Judge held that the estate of defendant No. 3 was liable for the whole debt and decreed accordingly.

Defendant No. 3 appealed.

Ramachandra Rau Saheb, for appellant.

Bhashyam Ayyangar, for respondent.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

[374] It is conceded by the appellant's pleader that it would be the pious obligation of the son under Hindu law to pay the debt incurred by the father as a surety for the repayment of a loan. It is also admitted that the appellant inherited ancestral property sufficient to cover the amount decreed against him, but it is contended that the question ought to be decided by the Contract Act and not by Hindu law ; and that under

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* Second Appeal No. 756 of 1887.

the former the debt incurred by the father could not be treated as a family debt.

1888 APRIL 12. — APPELLATE CIVIL. — 11 M. 373.

The decision of the Subordinate Judge rests on the ground that ancestral property inherited by a son from his father ought to be treated as assets available for the payment of the father's debts neither vicious nor immoral, and that the debt incurred by him as surety for the repayment of a loan is within the scope of that obligation.

The Smritis of Manu, Yagnavalkya, Brahaspatti, and the Mitakshara support the decision, nor is the Subordinate Judge in error in applying Hindu law for the purpose of determining whether ancestral property in the hands of the son ought to be treated as assets for the payment of the debt incurred by the father as a surety.

Another objection taken in appeal is that the decree is not in accordance with the terms of the contract set out in the District Munsif's judgment. No objection on this ground is taken in the petition of second appeal, nor was it raised in either of the Courts below.

We decline to entertain it for the first time in second appeal and dismiss the second appeal with costs.

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11 M. 375=2 Weir 163.

[375] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

QUEEN-EMPRESS v. VENKAYYA.*
[22nd February and 13th March, 1888.]

Regulation IV, 1816—*Power of Village Munsif to administer oath to witness—Criminal Procedure Code, Section* 195—*Sanction for prosecution of witness for perjury by Village Munsif.*

V was tried and convicted under Section 193 of the Penal Code for giving false evidence before the court of a village munsif in a suit in which V was defendant. The village munsif sanctioned the prosecution of V under Section 195 of the Code of Criminal Procedure. On appeal the Sessions Judge acquitted V on the grounds that a village munsif had no power to administer an oath to V (the case not being one in which either party was willing to allow the cause to be settled by the oath of the other) and because Section 195 of the Code of Criminal Procedure did not apply :

Held that both objections to the conviction were bad in law.

IN calendar case 49 of 1887 Raman Venkayya was convicted by the Joint Magistrate of Godavari (G. Hamnett) and sentenced under Section 193 of the Penal Code to three months' rigorous imprisonment.

On appeal, the Sessions Judge (A. L. Lister) acquitted the accused on the 12th December 1887.

On the 20th January 1888 the records were called for by the High Court.

The facts are set in the judgment of the Court.

The Public Prosecutor (Mr. *Powell*) in support of the conviction.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

The accused in this case was sued by the complainant before a village munsif for the rent of a house. He persisted in denying the execution

* Criminal Revision Case No. 21 of 1888,

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11 M. 375 =
2 Weir 163.

of the rent bond, and the village munsif after warning him of the consequence of committing perjury, put him on solemn affirmation and examined him. In [376] the result the village munsif found that he had executed the rent bond and gave sanction for a criminal prosecution.

The Acting Joint Magistrate convicted the accused under Section 193, Indian Penal Code, and sentenced him to three months' rigorous imprisonment. On appeal the Sessions Judge reversed the conviction on the grounds:—

(1) That a village munsif acting under Regulation IV of 1816 is not empowered to administer an oath to a party unless either party is willing to let the cause be settled by the oath of the other, hence that the defendant was not legally bound to make a declaration upon any subject (Section 191, Indian Penal Code).

(2) That as nothing in the Criminal Procedure Code applies to heads of villages, such functionaries cannot give the sanction required by Section 195, Criminal Procedure Code.

The case was called up by the High Court on revision. The accused did not appear, but the Public Prosecutor contended that the accused had been properly convicted. Section 15, Regulation IV of 1816 empowers a village munsif to require the attendance of any person in his village who may be named as a witness by a party and Clause 4 of the same section gives a village munsif authority at his discretion to cause an oath to be administered to a witness.

In the case under consideration the defendant was present at the inquiry and it is not shown that he objected to be called as a witness or to be examined. We apprehend there is nothing in the Regulation to prevent a village munsif examining as a witness any person who is present and who may not have been summoned—nor is there anything to prevent one party naming another party as a witness if he so pleases. The case referred to by the Sessions Judge in paragraph 4 of his judgment is altogether different and relates to the settlement of the cause by the oath of either party, and without trial by the village munsif on the merits (Section 14, Clause 3). We are of opinion that it was competent to the village munsif under the circumstances to examine the defendant as a witness, and that once sworn the defendant was legally bound to speak the truth (see also Section 118, Evidence Act).

A village munsif trying a cause is a Court, and though nothing in the Code of Criminal Procedure applies to heads of villages, the limitation in Section 195, Clause (*b*) is on the powers of the Courts which are governed by the Procedure Code in the entertainment [377] of complaints. The section merely prohibits the entertainment of a complaint in a Court governed by the Procedure Code without a sanction.

We set aside the acquittal and direct the Sessions Judge to rehear the appeal.

11 M. 377. (F.B.).

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FULL BENCH.

11 M. 377 (F.B.)

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, and Mr. Justice Parker.

REFERENCE UNDER THE STAMP ACT, SECTION 46.*
[23rd March, 1888.]

Stamp Act, Sections 3 (10), 55, 57—*Duly stamped—Document issued without endorsement required by rules passed and published under Sections* 55 *and* 57.

The omission of a stamp vendor to endorse on a stamped paper the particulars required by rule (9) of the revised rules published under Sections 55 and 57 of the Indian Stamp Act, 1879, by the Government of Madras, with the approval of the Governor-General in Council, does not render a document "not duly stamped" within the meaning of Section 3 (10) of the Indian Stamp Act, 1879.

REFERENCE under Section 46 of the Indian Stamp Act, 1879, by the Board of Revenue.

The case was stated by the Secretary to the Board of Revenue as follows :—

"The enclosed agreement was executed by the toddy farmer of Sidhout on a stamp paper supplied to him by the Tahsildar. By an oversight the usual endorsement required by Rule 9 (*a*) of the Madras Government Notification, No. 129, dated 24th July 1883, was not made on the document. The question for decision is—Whether the omission of the endorsement renders the document not duly stamped.

"On the one hand it may be urged that 'duly stamped' means 'stamped in accordance with the law,' Section 3 (10) of the Act. The rules framed under Section 55 have the force of law (Section 57), and one of those rules is that above referred to which prescribes that the stamp vendor 'shall write on the back of every stamp paper which he sells' a certain endorsement. It may be argued that this is a **[378]** legal obligation and that its breach renders the documents 'not duly stamped.'

"On the other hand it may be argued that these rules issued by the Local Government, subject to the control of the Governor-General in Council under Section 55, concern the executive duties of the stamp vendors, and are to be broadly distinguished from the rules framed by the Government of India Notification, No. 1288, dated 3rd March 1882, which concern the proper stamps to be issued in certain cases. It may be also contended that if an instrument was not 'duly stamped,' because the stamp vendor violated rule (9) above referred to, as regards the endorsement, it would be equally 'not duly stamped' if he failed to make the entries in his register required by the same rule. The Board are not agreed on the point and therefore deem it desirable to obtain an authoritative decision of the High Court."

The Government Pleader (Mr. *Powell*) appeared on behalf of the Board of Revenue.

The Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

We are of opinion that the document in question is duly stamped.

* Referred Case 5 of 1888.

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APPEL-LATE CIVIL.

11 M. 378.

11 M. 378.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

CHANDU (*Defendant No.* 2), *Appellant v.* RAMAN (*Plaintiff*), *Respondent.** [6th April, 1888.]

Malabar Law—Decree for maintenance against karnavan—Execution against tarwad property.

A member of a Malabar tarwad having obtained a decree for maintenance against her karnavan, assigned the decree to the plaintiff, who proceeded to execute it against the tarwad property. The then karnavan objected and his claim was allowed. In a suit by plaintiff to have it declared that he was entitled to execute the decree against tarwad property:

Held that the plaintiff was entitled to execute the decree against the tarwad property.

[F., 33 M. 31=5 Ind. Cas. 698.]

[379] APPEAL from the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, confirming the decree of J. F. Pereira, District Munsif of Kavai, in suit No. 100 of 1886.

The facts of the case, so far as they are necessary for the purpose of this report, appear from the judgment of the Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.)

Ramachandra Rau Saheb, for appellant.

Sankara Menon, for respondent.

JUDGMENT.

Defendant No. 8 obtained a decree for maintenance against defendant No. 1, the karnavan of the defendant's tarwad. The decree was assigned by defendant No. 8 to the plaintiff, and he proceeded to execute the decree against tarwad property. Defendant No. 2, who was then managing the tarwad affairs, objected to the execution and the objection was allowed. Thereupon, the present suit was brought to obtain a declaration that tarwad property was liable for the decree debt. Both the Courts below decreed the claim, and it is urged in appeal that there was no decree against defendant No. 1 in his capacity of karnavan, that the decree for maintenance in favour of a member of a Malabar tarwad created only an obligation personal to the karnavan, and that the decree is incapable of being executed against tarwad property. As to the objection that there was no decree against defendant No. 1 in his capacity of karnavan, we observe that it was not taken in the petition of appeal to the Lower Appellate Court. It must also be remembered that the suit was one brought for maintenance, which from its nature would ordinarily be brought against the karnavan. As to the contention that the decree created an obligation personal to the karnavan, we are of opinion that if the contention were to prevail, there would be no adequate means of enforcing decrees for maintenance which might be passed in favour of members of a Malabar tarwad. Our attention was called to *K. Manoki Koran Nayar* v. *P. Manoki Chanda Nayar* (1), but that case appears to show that a decree for maintenance is one for the satisfaction of which a karnavan may encumber tarwad property. We may also refer to the judgment of this Court in S. A. 340 of 1885, in

* Second Appeal No. 689 of 1887.

(1) 3 M.H.C.R. 295.

which it was held that the maintenance of members of a Malabar tarwad is a charge on the tarwad property. It is urged that the mainte- [380] nance would be a charge only when there was no tarwad income out of which it might be paid, but neither of the cases cited was decided on that ground.

The second appeal fails and we dismiss it with costs.

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11 M. 380.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

JAGANATHA AND ANOTHER (*Defendants*), *Appellants v.* RAMABHADRA AND OTHERS (*Plaintiffs*), *Respondents.**
[25th, 26th and 27th January and 13th March, 1888.]

Zamindari—Partition—Limitation Act, 1877, *Schedule II*, *Article* 127—*Limitation Act* 1859, 1 (13).

In 1803 G being in possession of the zamindari of M, the permanent settlement was made with him and a sanad was granted to him as prescribed by Regulation XXV of 1802. In 1827 C, the only son of G, being in possession of the zamindari, got into debt and the zamindari was sold in execution of a decree and bought by Government. In 1835, the zamindari was granted to J, the son of C, by Government and a sanad issued in the usual terms as prescribed by Regulation XXV of 1802. J died in 1864 leaving four sons, the three plaintiffs and C. his eldest son. C died in 1869 leaving an only son, J, the defendant. In 1869 the Court of Wards took charge of the estate on behalf of the infant defendant and allowed his uncle, plaintiff No. 1, to receive the rents of the zamindari as renter. J and his three uncles lived in the same house and participated in the joint family property until 1872, when the plaintiffs claimed to have the zamindari divided.

By an agreement between the plaintiffs and the Court of Wards, all the moveable and immoveable property, except the zamindari taluk, was divided into four shares and distributed in 1874 between the plaintiffs and defendants. In 1884, the plaintiffs sued for partition of the zamindari, alleging that their cause of action arose in 1872, when the Court of Wards denied their right to a partition of the zamindari taluk.

The defendants pleaded.

(1) that the estate was not partible ;

(2) that the suit was barred by limitation :

Held (1) distinguishing the *Hunsapore case* (12 M.I.A., 1) and the *Sivaganga case* (I.L.R., 3 Mad., 290), and following the principle laid down in the *Nuzvid case* (I.L.R., 2 Mad., 128) that the zamindari was partible ;

(2) that the suit was not barred by limitation.

[F., 17 M. 362 (365) ; R., 26 M. 686 (689) ; 29 M. 437 (442) = 16 M.L.J. 178 ; D., 24 M. 562 (606) = 11 M.L.J. 191 (203, 204).]

APPEAL from the decree of J. R. Daniel, District Judge of Ganjam, in original suit No. 27 of 1884.

[381] The facts of this case appear sufficiently for the purpose of this report from the following judgment.

The Acting Government Pleader (Mr. *Powell*) and Mr. *Norton*, for appellants.

The Acting Advocate General (Mr. *Spring Branson*) and *Subba Rau* for respondents.

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* Appeal No. 48 of 1886.

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APPELLATE CIVIL.

11 M. 380.

JUDGMENT.

KERNAN, J.—This is an appeal from a decree, dated the 14th December 1885, of the District Judge of Ganjam, declaring that the zamindari of Merangi is partible, and decreeing partition to be made between the three plaintiffs and the infant defendant, their nephew.

The appellant's grounds of appeal are—

(1) that the zamindari is impartible;
(2) that the plaintiff's claim is barred by limitation;
(3) that the plaintiffs are precluded from suing during the minority of the infant defendant by agreement between them and the Court of Wards made in 1872.

The Judge has given, what appears to me, a correct judgment on all the above points. I would be satisfied to rest my judgment on that of the District Judge, except that the appellant's arguments present some views not presented to the District Judge.

On the question whether the zamindari was partible there is no evidence that it was at any time a raj or sovereign principality. But the defendants contend

(1) that, as it was found by the Judge (referring to Carmichael's Vizagapatam Manual, pp. 284, 303) to have been held on military service, he should have held it was impartible;
(2) that there was evidence to prove that by custom the zamindari had always descended as impartible, and there was no evidence to the contrary, and, therefore, should have been held to be impartible;
(3) that under the circumstances there was a strong presumption in favour of the alleged custom.

The only evidence on record as to the zamindari is that to be found in Carmichael's Vizagapatam Manual, pp. 301-3, in which it is stated: that this hunda came into the possession of the present family in the time of Visvambhara Deo of Jeypore—that Dharmaraz Dora, zamindar of Merangi, endeavoured to make himself independent, and Jeypore having advanced with a large force [382] against him, he was given up and put to death and his estate was given over to Jaganatharaz, a principal Jeyporean, who was installed zamindar, with the title of Satrucherla (destroyer of the enemy); that about the time the French were expelled (1758 to 1760) Merangi zamindari was incorporated in the neighbouring zamindari of Kurupam by Sivaramaraz; that the latter was overthrown by Sitaramaraz, and both zamindaris were under Vijayanagaram until its dismemberment in 1795 when they were restored to the old families, Satrucherla Gangaraz getting Merangi.

Paragraph 22 of exhibit C shows that at that date, 10th June 1802, Gangaraz was in possession of the Merangi zamindari. Paragraph 18 of exhibit D, 22nd September 1803, explains that in 1795 Mr. Webb recommended C. Gangaraz being appointed zamindar as well on account of his better claim than that of Venkataraz, a representative of a younger branch, as that he was descended from the elder branch of the family. Exhibit E (Government Order, dated the 22nd of October 1803) states that Government approved of the permanent settlement being made with C. Ganga raz. A family tree agreed on between the parties shows the following, *viz.* :—

Tammiraz.

Ramachandraraz. Venkatapatiraz.

Gangaraz. Jaganatharaz. Virabhadraraz. Chinna Venkatapati.

Chandrasekhararaz.

Jaganatharaz.

Chandrasekhara. Ramabhadra, Plaintiff No. 1. Somasekhara. Plaintiff No. 2. Jogiraz, Plaintiff No. 3.

Jaganatharaz [minor defendant].

The defendant alleges that Chandrasekhara, son of Gangaraz, had three sons, but the plaintiffs deny this.

It is not shown what relation, if any, there was between Tammiraz, the propositus in the family tree, and Jaganatharaz, the principal Jeyporean; but apparently Tammiraz, or his son Ramachandraraz were never in possession of the zamindari. Apparently also C. Gangaraz, the grandson of Tammiraz, was put into possession of the zamindari in 1795 without any grant being made to him by the Government, and that he held at a rent [383] which (paragraph 24 in exhibit C) shows he had a difficulty in paying, and which it is recommended in that paragraph should be reduced from Rs. 19,697-0-10 to Rs. 18,500.

No sanad to C. Gangaraz was produced, but a kabuliat or instrument of assent (exhibit B) was produced, dated the 25th April 1804, which refers to a sanad-i-milkiat-i-istimirar to him by the Government. Clause 6 provides that he had the right, without assent of Government, to transfer all or any part of his estate, provided such transfer should be according to Hindu law.

No doubt there was a sanad in the ordinary terms executed by Government to C. Gangaraz as prescribed by the Regulation XXV of 1802.

Exhibit D, paragraphs 18, 19 and 20 show that Jaganatharaz, or a cousin of C. Gangaraz, had claimed a share of the zamindari from Gangaraz and had got possession of a certain part of the estate, but the Government declined to recognize the arrangements and left it to Gangaraz to arrange as he pleased with Jaganatha. Gangaraz died, but the date is not proved. Jaganatha then filed a suit against Chandrasekhara, son of Gangaraz, alleging he was illegitimate; but the plaintiff died and the suit was revived by Virabhadraraz, and was ultimately dismissed.

Chandrasekhara, the only son of Gangaraz, got into debt, and, being sued by a creditor, the zamindari was set up for sale in suit No. 23 of 1827, and was bought by Government and thus the rights acquired under the sanad of 1803 became extinguished.

Exhibit G is a sanad-i-milkiat-i-istimirar, dated the 22nd September 1835, by the Governor-in-Council to Jaganatha, son of Chandrasekhara, therein called ex-zamindar of Merangi. It recites the sale by Court process to pay debts of the ex-zamindar, and that the zamindari was bought on account of Government, and that the Government, impressed with the services rendered by the dewan and others of the zamindari during the late disturbance in the Vizagapatam district, in compliance

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with their request, and to notify their approbation of their meritorious conduct and attachment to the family of their ancient zamindars, resolved that the zamindari should be granted to Jaganatha, son of Chandrasekhara.

The sanad provides that the zamindari shall not be liable for any debt contracted before the sanad, except the balance due to Government. Paragraph 6 contains the power to the zamindar to [384] transfer, without the authority of Government, all or any part of the zamindari, and contains the usual terms of such documents of permanent settlement.

Exhibit H, dated 25th November 1835, is a kabuliat executed by the guardian of the infant Jaganatharaz corresponding with the terms of sanad.

Jaganatha died in 1864 leaving four sons, the three plaintiffs, who were then infants under 18 years, and Chandrasekhara, his eldest son. The latter died in 1869 leaving the plaintiffs, his brothers, and an only son, Jaganatha, the infant defendant, and a widow.

The appellant contends that the zamindari was held by military tenure. The Judge assumes this was so before Jeypore took possession from Dharmaraz and afterwards when he gave the zamindari to C. Gangaraz: probably it was so, though I do not see the evidence of it.

There is no evidence how or by whom it was held from Kurupam or Vijayanagaram, or that it was held on military tenure. There is nothing to prove that it was held by any of the family of C. Jaganatharaz after he was dispossessed by Kurupam. There was thus a break in the possession of the zamindari by any of the former family from about 1760 up to 1795. After the zamindari was taken possession of by the English in 1795 from Vijayanagaram it certainly was not held on military tenure. In 1795 Gangaraz received possession from Mr. Webb, but nothing was then settled as to the terms on which he was to hold the zamindari as he was not then restored absolutely to the possession of the zamindari or for seven years afterwards. In the meantime he was in possession on sufferance. It was properly taken from one family and given to a member of the family of a former owner without any special circumstances to prove that the intention of the grant was to create an impartible estate which is an exception from the ordinary Hindu law. Though Gangaraz as representing the elder branch was preferred, there seems no reason why, in addition to this grant of an ordinary estate, the incident of impartibility should have been intended to be granted. Gangaraz does not appear to have been a man of influence or a leader of people. He was fortunate to get the zamindari as a zamindar on the ordinary terms of Hindu law, and I am unable to see any reasonable ground for presuming that the intention of the Government as [385] evidenced by the circumstances either of Gangaraz or of the zamindari was to create an impartible zamindari.

The terms of the kabuliat of the 25th April 1804 to which the sanad no doubt corresponded do not lead to the conclusion that the Government intended to grant or did grant the zamindari as impartible. On the contrary the terms of paragraph 6 show that the zamindar was at liberty to transfer all or any part of the zamindari without the consent of Government, so as the transfer was not contrary to Hindu law. This is inconsistent with the idea that the zamindari was impartible and was to remain so.

It was argued, however, that a clause, the same as No. 6, has been introduced into all grants of permanent settlement made as directed by

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Regulation XXV of 1802. In the *Nuzvid case* (1) it appeared that the jagir was in the nature of a principality before it was taken possession of by Government in 1783 when Narayya rebelled, and it was granted to Venkata Narasimha, his eldest son, in 1784. The Privy Council assumed it was restored in 1783 in its entirety, and that the rule of impartibility and descent continued as before. But when the ancient zamindari was resumed for arrears of revenue in 1793, the zamindari had ceased to be held on military tenure. There was then no reason on the 8th of December 1802, the date of the grant to Ramachandra, son of Venkata Narasimha, why the rule of impartibility or descent to a single heir according to the rule of primogeniture should be extended to the newly-created estates.

The Privy Council observed that there was no State policy which required that the new estate should be indivisible ; otherwise Clauses 7 (the same as Clause 6 in this case) would not have been inserted in the sanad, and that if the grantee had transferred by gift, sale, or otherwise any portion of his zamindari, such portion would not have been impartible descending according to the rule of primogeniture to the single heir of the transferee of a Hindu or Muhammadan. Their Lordships further observed that it was expressly stipulated in the sanad that transfers in whole or in part should be valid provided they should not be repugnant to the Hindu or Muhammadan laws which they would have been if they were limited to the eldest son or other single heir of Hindu or Muhammadan transferee. That was no reason why the new **[386]** zamindari should have been made impartible or limited to the grantee and his heirs according to the rule of primogeniture when so far as Government were concerned he might have divided it by will among his several devisees.

Their Lordships then decided that the limitation to the heirs of the grantee in the sanad was a limitation according to the ordinary rule of Hindu law, and not a limitation to a single heir according to the rule of primogeniture, as the grantor at the date of the grant did not hold an estate descendible to a single heir according to the rule of primogeniture, and that if the Government intended to make the estate impartible and to limit the succession to a single heir according to the rule of primogeniture instead of to the heirs of the grantee according to Hindu law there was no doubt that they would have expressed their intention in unambiguous language. Their Lordships referred to the *Hunsapore case* (2), which was confiscated in 1767 and kept by Government in their possession until 1790 and then granted in that year to a younger member of the family, on whom the title of raja was afterwards conferred. Their Lordships observed that there was no fresh sanad granted, and the question was whether it was a fresh grant of the family raj with its customary rule of descent, or merely a grant of the lands formerly included in the raj to be held as an ordinary zamindari, that in that case the zemindari had not been broken up, and it was held that it was the intention of the Government to restore the zamindari as it existed before the confiscation, and that the transaction was not so much the creation of a new zamindari as the change of the tenant by a *vis major*. That in the case before them (*Nuzvid case*) the estate was divided into two zamindaris, and a new sanad granted allowing the same to be alienated in part or in whole and making it inheritable by a person and his heirs and

(1) 7 I.A. 38=2 M. 128. (2) 12 M.I A. 1.

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assigns for ever, that person being one who had never held an estate (in the lands) descendible to his eldest male heir.

No doubt the fact that the old Nuzvid estate, which was granted in 1784 and was then presumed to be impartible, had been broken up and divided on the 8th December 1802 into two zamindaris, was of much importance. But the decision did not turn on that ground alone. That fact was only one of several [387] circumstances which led their Lordships to the decision they made. There was in that case the fact as here that the grantee had never held an impartible estate in the zamindari, and that he was a member of the old family, and the fact that the grant of 8th December 1802 was made after the Regulation XXV of 1802, and contained a clause like Clause 6 in this case. The observation of their Lordships as to the intention manifested by that clause and as to the absence of any policy leading to any desirability to confer an impartible estate apply equally to this case as it seems to me.

The Hunsapore estate and the Sivaganga had been principalities held by chiefs as impartible estate. The Hunsapore estate was confiscated in 1767, and in 1790 a junior member of the family was put in possession as of the old tenure. In the *Sivaganga case* (1), the estate was granted by proclamation in 1801. There was a sanad granted in 1803 with a clause the same as No. 6 in the case. Their Lordships observe everything points to the installation of the istimirar zamindar not merely as proprietor but as ruler of the district, and that the policy of the Government clearly was to appoint a new ruler whom the rebellious inhabitants would obey: that the policy of the permanent settlement was applied to the Sivaganga as well as to other estates, but that if there were any general intention of introducing the principle of partibility it was certainly not followed in that instance.

Observing the principles laid down by the Privy Council in the *Nuzvid case*, it appears to me that the zamindari of Merangi was intended by Government to be held by Gangaraz and was granted to Chandrasekhara's son, Jaganatha, by the sanad of 22nd September 1835, and was held by him as an ordinary zamindari estate subject to the ordinary rule of descent according to the rule of Hindu law. Chandrasekhara's estate was sold at the instance of a creditor and was purchased by the Government on the 22nd September 1833. At that time three leaders of the Palkonda rebellion were lurking, with their retainers, in the jungles, and the late dewan of Chandrasekhara, with hill peons assembled by him, attacked and killed those leaders. For this service the dewan and the peons were entitled to a reward offered by Government; but on their request through the Collector, the Governor in Council, in lieu of the reward, and to notify approval of the assistance [388] given against the rebels, agreed to grant, and did grant, the sanad already stated on the 22nd of September 1835 to Jaganatha, son of Chandrasekhara, a boy five years old with special provision that no debts prior to the grant except the balance due to the Government should be a charge on the estate. I do not see that the circumstance under which the grant of 1835 was made, or the terms of the grant, lead to the conclusion that Government intended to grant, or that they did grant in 1835, this zamindari as an impartible estate. The estate was granted to the son, five years old, of Chandrasekhara who was then alive. It appears to me, therefore, that the grant of 1835

(1) 3 M. 290.

only conferred on the grantee an estate in the zemindari of the like nature that his father held in it, that is, as an ordinary zamindar subject to the ordinary incidents of Hindu law. It was contended that Gangaraz had, besides his son Chandrasekhara, two other sons, Ramabhadra and Somasekhara, and that they did not set up any claim to have the zamindari divided, inasmuch as it was the custom of the family that it should not be divided. But there is no legal evidence that Gangaraz had any son except Chandrasekhara. In June 1859 a petition (exhibit No. 7) was filed in the office of the Agent of the Governor in Vizagapatam district by Somasekhara stating that the fathers of the zemindar and petitioner were brothers, and that he was entitled to a share in the zamin. The Agent referred the petitioner to a civil suit. There is no evidence that any suit was brought.

The next question is whether the claim of plaintiff is barred by limitation. Jaganatha died in 1864 leaving four sons, namely, the three plaintiffs, all then infants under 18 years of age, and Chandrasekhara, his eldest son. The four sons had lived with their father up to his death, and continued to live after his death in the same house as their brother, Chandrasekhara, up to his death in 9th September 1869, and were maintained in common with their brother Chandrasekhara. Plaintiff No. 1 was then 20, No. 2, 18, and No. 3, 15 years old. Chandrasekhara left at his death an only son, the infant defendant Jaganatha, then of the age of 7 years. On the 10th September 1869 the widow of Chandrasekhara sent notice (exhibit III) to the Collector stating the death of her husband, and also stating that before his death he gave direction to her that the estate should be registered in her son's name, and that she and plaintiff No. 1, and the dewan should manage the [389] affairs of the taluk, as well as other affairs, and that they would be brought to the Collector's notice. This notice purports to be signed by plaintiff No. 1 and by the dewan and initialled by the widow. Plaintiff No. 1 says the signature of his name is like his, but he does not recollect that he signed it. However this may be, it appears that the Court of Wards took charge of the infant defendant's estate and appointed the dewan guardian, and allowed plaintiff No. 1 as renter to receive the rents of the taluk, and also of some inam and other immoveable and moveable properties acquired up to the death of the father of the infant defendant. There was a considerable amount of Government promissory notes and cash and monies due. There were also immoveable properties other than the taluk left by Chandrasekhara, the infant's father. But it is not stated whether such Government notes, cash, debts, or immoveable properties other than the taluk were acquired by the infant's father or by his grandfather : most probably it was by both. It is to be gathered from the award (exhibit M) 30th December 1873, after stated that plaintiff No. 1 acted with the apparent assent of the Court of Wards as receiver of the rents of the taluk and of the other immoveable properties from the death of the infant's father until the end of fasli 1022, *i.e.*, about July 1873, and lodged in the treasury of the Court of Wards or of the Collector large receipts, and that plaintiff No. 1 also received large sums in Government promissory notes and cash. It further appears that the three plaintiffs and the infant defendant (when the latter was not at school) all lived together in the house of the infant's father (see paragraph 20, exhibit M), and were maintained out of the part of the produce so received by plaintiff No. 1. No question as to the rights of any of the parties, either to the zamindari or as to the other properties received by plaintiff No. 1 was made until April 1872.

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Exhibit J is a copy of the Proceedings of the Court of Wards, 13th May 1872, acknowledging a letter from Mr. Melville, the Collector of Vizagapatam, dated 15th April 1872, forwarding an arzi from the two first plaintiffs, soliciting the division of the Merangi zamindari and moveable and immoveable property. The Court sanctioned the division of the personal estate and approved of the Collector's proposition to appoint a panchayat to carry out details.

Exhibit II, dated the 24th of August 1872, is addressed to the [390] Collector, and is called kararnama, written by the three plaintiffs. It referred to the arzi before suit to the Collector to divide the property, and to the approval of the Board for the appointment of a panchayat, and requested the issue of an order for the meeting of the panchayatdars. It stated that the zamindari and the moveable and the immoveable property necessary for the zamindari insignia were not to be divided and were to be settled by the arbitrators, and that they, plaintiffs, agreed to divide with the infant defendant all the other moveable and immoveable property after the above items were excluded. It states that as it was written by the Collector that the zamindari and insignia were not partible, that it is so written then, but that, they clearly state, they will not agree to the above condition, that as regards a civil suit they would institute it for the division of the taluk, with strength of right they were entitled to after having been quiet until the minor zamindar's minority ceases.

By exhibit No. 1 the Court of Wards approved of the karar, provided there was a clause that nothing in it should be deemed to imply the slightest admission of any claim by the plaintiffs to demand a division of the zamindari.

Exhibit M is the panachayat decision. It recites an agreement of the 20th of September 1873 by the plaintiffs, and by the guardian of the infant defendant binding themselves to exclude the zamindari and the royal insignia, and to divide and take the whole of the remaining moveable and immoveable property as might be passed by the panchayatdars. It also recited that the accounts and other papers were in a saparate list attached thereto. The list referred to is taken as part of M and precedes the decision. It is divided into numbers from No. 1 to No. 28.

In No. 1, amongst other monies, a sum of Rs. 1,74,485-13-10 is set down as paid into the Vizagapatam Collector's office, being the amount of the income for faslis 1280 to 1282 after the taluk passed into the minor's possession, deducting Rs. 1,20,659-15-9 Sircar peshkash and other expenses, and strikes a balance of Rs. 53,825-14-1. This balance, with Rupees 91,957-5-1, being Government bond and monies which should be in the treasury, amounted to Rs. 1,45,783-3-2. The sum actually in the treasury was Rs. 92,783-3-2, to which was to be added "concealed and kept by renter for his own purpose, Rs. 53,000." These two sums make Rupees 1,45,783-3-2.

[391] The fifth paragraph of exhibit M directs that the sums of Rs. 92,783-3-2 and Rs. 53,000 should be divided into four equal shares between the three plaintiffs and the infant defendant.

It is not necessary to go through any further details of the decision. It is enough to say all the items of immoveable and moveable property except the zamindari and the insignia were divided into four shares and one-fourth given to each of the plaintiffs and the infant defendant. It is clear that the profits of the zamindari taluk down to June 1873, after payment of peshkush to Government, was divided amongst other property between the plaintiffs and the infant defendant.

It was contended that personal property only was agreed by the Court of Wards to be divided. But it is clear that what was considered personal property included rents received from the taluk zemindari up to June 1873 as well as all other moveable and immoveable property except the zemindari and insignia. That decision was acted on by the Collector, who directed further inquiry to ascertain the exact sum to be paid to each of the four shares in the sum of Rs. 92,783-3-2, and the panchayatdars on the 7th of October 1874 ascertained and reported the sums so payable to each of them, the plaintiffs and the infant defendant, and directed them to be distributed by the Collector, which presumably was done.

The plaintiffs allege their cause of action commenced on the 13th May 1872, when the Court of Wards denied their title to a division of the zemindari and relied on Article 127 of Schedule II of the Limitation Act, 1877. The defendants relied, in the Court below, on the Act of 1859 in which limitation begins from the death of the deceased owner, but were met by the decision in *Govindan Pillai* v. *Chidambara Pillai* (1), that unless the claimant was entirely out of, and excluded from, possession, limitation did not run. Before this Court in appeal the defendants relied on the prior ground of limitation, and also on the ground that the plaintiffs were excluded from the joint family property in 1864 and up to and after the death of the infant's father in 1869. I am not able to see that the plaintiffs were excluded from the joint family property consisting of the zemindari until the 13th of May 1872 when the Court of Wards denied their title to a division of the [392] zemindari. The plaintiffs lived with their father in his house down to his death in 1864, and continued to live with their brother without any objection raised to their right to do so down to his death in 1869. From that time until the plaintiffs asked for division of the zemindari in April and were refused in 1872 the plaintiffs also lived in the house with their nephew, the infant defendant, and no objection was made to their participation in the joint family property. The letter of the defendant's mother (exhibit No. III) was relied on as excluding the plaintiffs from the zemindari, but it did not amount to exclusion of the plaintiffs, on the contrary it proposed that plaintiff No. 1 should be manager. She must have been then well aware there was a large amount of other joint property. The infant defendant and the plaintiff lived after that for upwards of two years in the same house. Finally the plaintiffs were actually paid in 1873 in cash one-fourth share of the income of the zemindari from 1280 to 1282, and got one-fourth share each of the other undivided family property, moveable and immoveable.

When a party is not in possession of any joint property and does not receive any of the proceeds of the property he may be said to be excluded from joint property, but not if he is living on the property with the other joint owners and is supported in the family by the proceeds of the family property. The principle of the decision in *Govindan Pillai* v. *Chidambara Pillai* applies. I think the plaintiff's claim is not barred by limitation. The defendant's counsel alleged that there was a custom in the family that the zamindari should be impartible. But there was no family of any possessor before the father of the plaintiffs. The allegation of such custom is entirely unsupported. The allegation of presumption that the zemindari was impartible is, I think, also unfounded. The next question is whether the suit is premature until the infant defendant attains 21 years. I am unable to see that there was any

(1) 3 M.H.C.R. 99.

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contract of agreement between the plaintiffs and the guardian of the infant defendant or the Court of Wards that the plaintiffs would not bring a civil suit until the infant defendant attained 21 years. What took place amounted to no more than this, that the division agreed on was not to prejudice the question whether the zemindari was or was not impartible and there was no admission on either side of the claim of the opposite party. The plaintiffs added that they would be [393] quiet during the minority of the zemindar and would bring this suit afterwards. This addition it seems to me was no part of this agreement. The parties could not by such agreement stay the operation of the Statute of Limitation and if the plaintiffs had waited to bring suit until the minor attained 21 years they might find that their claim was barred by limitation, which certainly never was intended. If such alleged agreement was made, as it would limit the time within which the plaintiffs could enforce their rights, it would be void under Section 28 of the Contract Act. As to costs, I think, the Judge should have awarded the plaintiffs their costs of the suit. We modify the decree of the District Judge by awarding the costs of suit and of this appeal to the plaintiffs, and confirm the decree in other respects.

MUTTUSAMI AYYAR, J.—I concur.

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11 M. 393 = 12 Ind. Jur. 421.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

VENKU (*Defendant*), *Appellant v.* MAHALINGA (*Plaintiff*), *Respondent.* [9th, 10th and 27th April, 1888.]

Hindu law—Adoption by Naikin or dancing girl—Adoption of more than one daughter at a time—Rights of adopted daughter—Custom of adopting more than one girl at a time not proved.

Ammu, a Naikin, or dancing girl, in South Canara, affiliated prior to 1849 three girls and a boy. These four persons lived together as a joint family till 1849, when a partition of their joint property was decreed between them in equal shares. T., one of the girls, died in 1880, leaving certain property. V claiming to be the sister by adoption of T., sued to recover T.'s estate from M., T.'s uterine brother:

Held, (1) that an adoption of a daughter by a Naikin or dancing girl can be recognized by the Civil Courts and does confer rights on the girl adopted—*Mathura Naikin* v. *Esu Naikin* (I.L.R., 4 Bom., 545) dissented from;

(2) that there being no warrant for a plurality of adoptions in the analogies of Hindu law, and no special custom having been proved, V could not claim T.'s estate.

[Diss., 37 B. 116 (120) = 14 Bom.L.R. 1129 = 17 Ind. Cas. 834 (835); F., 28 M. 517 (519) = 15 M.L.J. 466; 44 P.R. 1908; R., 14 B. 90 (92); 16 B. 737 (743); 34 B. 553 = 12 Bom. L.R. 545 (550) = 7 Ind.Cas. 459; 32 C. 749 (754) = 9 C.W.N. 466 = 1 C.L.J. 176; 12 M. 214 (218); 12 M. 273 (276); 15 M. 323 (330) = 1 Weir 372; 19 M. 127 (136); 30 M. 461 (463) = 17 M.L.J. 250; 11 C.L.J. 461 = 6 Ind. Cas. 554 (560); 14 Or. L J. 33 (34) = 18 Ind. Cas. 257 = 24 M.L.J. 211 = 13 M.L.T. 131 = (1913) M.W.N. 207; 17 Ind. Cas. 422 (423) = 23 M.L.J. 493 = 12 M.L.T. 467 = (1912) M.W.N. 1138; 13 C.P.L.R. 81 (84), 14 C.P.L.R. 109 (110, 111); 2 O.C. 261; 8 O. C. 37 (40, 43).]

APPEAL from the decree of C. Gopalan Nayar, Subordinate Judge of South Canara, confirming the decree of A. Venkatramana Pai, District Munsif of Mangalore, in suit 1888 of 1887.

* Second Appeal No. 188 of 1887.

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[394] The facts appear from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

Bhashyam Ayyangar and *Narayana Rau*, for appellant.

The decision in 1849 cannot operate as *res jŭdicata*—*Parthasaradi* v. *Chinnakrishna* (I.L.R., 5 Mad. 304). Even if, since the date of the Penal Code, no rights pass by adóption by a dancing girl, rights created prior to 1860 cannot be affected. In all the Presidencies prior to 1860, dancing girls could lawfully adopt. It is doubtful if such adoption is illegal under the Penal Code. Reference was made to S.A. 579 of 1876—*Mathura Naikin* v. *Esu Naikin* (I.L.R., 4 Bom. 545), *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (2 M.H.C.R., 56. (75), *Mayna Bai* v. *Uttaram* (2 M.H.C.R., 202), and Strange's Manual, Section 351. The adoption of a girl by a dancing girl need not necessarily be for prostitution. The minor commits no offence and should not suffer. No issue was raised as to the validity of plurality of adoption.

Ramachandra Rau Saheb, for respondent.

Respondent is in possession. Appellant must show she has a better title. He relied on *Chinna Ummayi* v. *Tegarai Chetti* (I.L.R., 1 Mad. 168) and *Mathura Naikin* v. *Esu Naikin*)I.L.R., 4 Bom. 563.)

JUDGMENT.

MUTTUSAMI AYYAR, J.—The contest in this Second Appeal is as to the right of succession to the property of one Timmu, deceased, who was of the Naikin, or of what is ordinarily called the dancing girl caste. The deceased and the appellant Venku, together with another girl and a boy, were affiliated sometime prior to 1849 by a woman of the same caste named Ammu, who had emigrated from Goa and settled in South Canara. They had lived together as one joint family until 1849. when a disagreement arose between them and resulted in litigation. In Original Suit 217 of 1849, a partition was decreed among four persons who then survived in the family, including the deceased and the appellant, and a quarter share of their joint property was állotted to each. By virtue of that partition, the garden in suit became the separate property of Timmu, and she died in December 1880, leaving her surviving the appellant (defendant) her sister by adoption, and the respondent (plaintiff) her natural brother, and each of the survivors contended that he or she was entitled to the garden in preference to the other. As it was land paying revenue to Government, the Collector of South Canara altered its registry in [393] his books from the name of the deceased to that of the appellant. Thereupon the respondent brought the present suit to have it declared that he was entitled to have his name registered in the revenue accounts in preference to the appellant. Two issues were recorded for decision, *viz.*,(1) whether the natural brother was entitled to succeed to the property in dispute in preference to the adoptive sister, and (2) whether he was entitled to have the kuditale or registry altered to his name. The Collector was not made a party to the suit, and both the Lower Courts treated it therefore substantially as one for a declaration of title. They held that as between the natural brother and the sister by adoption of a dancing girl, the former was the preferable heir, and accordingly decreed the claim. It is urged in Second Appeal (1) that according to Hindu law the sister is the preferable heir, (2) that at all events the respondent is not the heir-at-law, and (3) that the decision in the suit of 1849 is conclusive as between the parties to this appeal on the question of title. On the other hand it is contended for the respondent (1) that assuming that the adoption of a

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daughter by a dancing girl is valid, no second adoption can be lawfully made during the lifetime of the daughter first adopted, and (2) that the respondent being the party in possession, the appeal must fail unless it is shown that the appellant is the preferable heir.

I do not consider that the question of title is *res judicata.* The ground of claim in the case before us is that the natural brother of a dancing girl excludes her adoptive sister, and it was not adjudicated upon in the suit of 1849. Further it was necessary in the former suit to consider whether the property then in litigation was joint, whereas the sole question for decision in the present suit is whether the natural brother or the adoptive sister is the better heir. Though it was decided in 1849 that the appellant and the deceased were sisters by adoption and their relationship as such was the source of a right to demand a share of joint property, that decision is conclusive only as to the *factum* of the relationship. As to the contention that if it is the source of a right to insist on partition, it must likewise be a valid ground of succession to a collateral relation, I may observe that it was held by a Divisional Bench of this Court in *Parthasaradhi Ayyangar* v. *Chinna Krishna Ayyangar* (1) that the doctrine of *res judicata* **[396]** does not necessitate a repetition of an error of law, if any, and preclude an inquiry into the soundness of the rule of decision which was adopted in a previous suit save as to the precise object matter or immediate purpose of that suit. I must therefore overrule the preliminary objection taken in this appeal.

Turning then to the merits, the relationship of the rival claimants to the deceased woman is found to be a fact. I see also no reason to doubt that prior to the introduction of the Indian Penal Code, a dancing girl without a daughter was, by the custom of her caste, entitled to adopt a daughter so as to constitute between them the legal relation of mother and daughter. That a valid adoption could be made as mentioned above according to custom is clear from the decision in the suit of 1849 and the decision in *Mathura Naikin* v. *Esu Naikin* (2) relied on by the Lower Courts. In this connection we may refer to *Venkatachalam* v. *Venkatasami* (3) wherein it was held in accordance with the opinion of the Law Officers attached to the Court that such adoption constituted the relation of mother and daughter for purposes of inheritance. I take it then that the adoption of a daughter by a dancing woman was valid by custom prior to the date on which the Indian Penal Code came into force, *viz.*, May 1861.

I observe, further, that the Courts did not omit to consider the ethical aspect of the question suggested by the professional prostitution practised by this class of women. In *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (4) it was decided by the High Court that a dancing girl and her adopted daughter constituted together a joint Hindu family in which the right of managing the joint property was vested in the eldest member by Hindu law. In delivering the judgment of the Court, Mr. Justice Holloway said "it would not be possible for us to decline adjudicating upon the matter, *viz.*, that the rule of Hindu law applicable to ordinary gains of science is also applicable in suits between dancing girls on account of the immoral source from which the gains have been derived. Precedents, not indeed numerous but uniform, have recognized rights of property and of inheritance." Referring to the *status* of the defendant

(1) 5 M. 304.
(2) 4 B. 545.
(3) M.S.D. (1856) 65.
(4) 2 M.H.C.R. 56.

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in that suit as an adopted daughter, he said that for the purpose of this cause the mother and the adopted daughter must be treated as the mother and daughter of **[397]** an undivided family. The answer to the ethical objection was that the trade of prostitution was recognized and regulated by Hindu law.

Again, this Court decided in *Kamakshi* v. *Nagarathnum* (1) in January 1870 that the law of co-parcenary obtaining in respect of right of survivorship among male co-parceners of an ordinary Hindu family was applicable as between a dancing girl and her sister's adopted daughter. That case was decided by the Chief Justice Sir Colley Scotland and Mr. Justice Collett, who said : "There appears to be no doubt that the daughters of dancing women like the parties to this suit take the place of sons, and our decision founded upon this view of law is that in the absence of any further positive rule, daughters must be regarded as sons and held to take estates of inheritance from their mother similarly to sons under the general law of inheritance."

Another case to which we were referred at the hearing is *Mayna Bai* v. *Uttaram* (2). Though it is not an authority for the position that a dancing woman may adopt, it is a clear authority in support of the view that even when the rival claimants are the adulterous issue of a Brahman woman living with an Englishman, they may be considered to be Hindus, and their rights of inheritance and their rights, *inter se*, may be determined with reference to some local custom, or usage or the analogies of Hindu law. Mr. Justice Holloway referred to the opinion of the Privy Council that the adulterous issues were properly considered to be Hindus, and that further inquiry ought to be made in order to ascertain whether the opinion of the law officers is not well founded with reference to some local custom or usage—*Mayna Bai* v. *Uttaram*, adding that in the absence of such custom the Courts are bound to reason analogically and to apply to them the rules observable by classes of Hindus to whom the adulterous issue bears the greatest resemblance, and that the rule so deduced was the rule of equity and good conscience which by the Charter they were bound to apply. It was not then considered to be legal to treat them as persons without any *status* and to put them beyond the pale of Hindu law because their mother lived in adultery. The answer given there to the ethical objection is this : "All the analogies of Hindu law are against the view of a bastard taken by the law of England. **[398]** There is an element in that law, the doctrine of Christianity which would render any argument drawn from its provisions merely deluding. There is, and there can be, no analogy." It was therefore held in that case that there was heritable blood between the illegitimate sons of Hughes by the Hindu mother. Another case mentioned during the hearing was cited from a publication called the Law Reporter. It appears that a partition suit brought by the adopted daughter of a dancing woman was dismissed by the High Court. According to the report the learned Judges who decided that case (Sir Walter Morgan, C.J., and Mr. Justice Holloway) observed "that adoption by a dancing woman amounted to the decoying of a minor for the purpose of prostitution." There is no written judgment on the record. Nor does the decision appear in the regular reports. The opinion imputed to Mr. Justice Holloway is at variance with the opinion expressed by the same learned Judge in previous decisions. That decision therefore appears to me to be of questionable authority.

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(1) M. H. C. R. 161. (2) 2 M.H.C.R. 196.

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The next two cases cited during the argument are *Chinna Ummayi* v. *Tegarai Chetti* (1) and *Kamalam* v. *Sadagopa Sami* (2). In the first case, which was decided in 1876, the right set up by dancing women attached to a Hindu temple against the dharmakartas was a right to have by custom a *veto* upon the introduction of new dancing girls into the service of the temple. The Court, consisting of Mr. Justice Innes and Mr. Justice Kernan, held that the right asserted was that of an association of dancing women to enjoy a monopoly of the gains of prostitution, and that such a right no Court of justice could countenance. In the second case, which was decided in 1878, a similar right was asserted and recognized, the Court observing that in the first case there was no allegation of any endowment attached to the office, whilst in the other there were various honors and more or less valuable sources of income alleged to be appurtenant to the hereditary office, and that it was necessary to inquire into the existence of such an hereditary office with endowments or emoluments attached to it, as it would materially affect the question of whether the plaintiff had sustained injury by the interference of the defendant. It is not however clear how, if the custom which is the source of the hereditary right to the office is an immoral custom and one to **[399]** monopolize the gains of prostitution, the existence of an endowment or emolument makes a difference and removes the legal taint in the source of the right. Even assuming that the second case did not overrule the first, the latter is only an authority to this extent, *viz.*, where the right asserted has for its direct and immediate object a monopoly of gains of prostitution, such right cannot form the basis of a judicial decision.

The last case cited is that of *Boologam* v. *Swornam* (3). The only point decided in that case was that property acquired with income derived from prostitution by a Hindu dancing girl who has received the ordinary education in music and dancing is not partible. It is only an authority for the position that the rule of Hindu law as to the ordinary and extraordinary gains of science is applicable in suits between dancing women. It is clear then, if we are to be guided by the course of decisions in this Presidency as a whole both prior and subsequent to 1861, that a dancing woman may make an adoption, that such adoption may be the source of a civil right for purposes of inheritance and collateral succession, and that such right is to be adjudicated upon in the absence of a positive rule of law to the contrary with reference to the custom of the caste and the analogies of Hindu law as indicated in 5 Madras High Court Reports, 161.

The case, however, relied on by the Lower Courts is that of *Mathura Naikin* v. *Esu Naikin and others* (4), decided in June 1880. That was a suit by the adopted daughter of a Naikin or professional prostitute like a dancing woman to recover a share of the property in the hands of her adoptive mother which was alleged to be family property. In a very learned judgment, Mr. Justice West came to the conclusion that the suit must be dismissed. Apart from the professional prostitution referred to as tainting the custom of the caste, there are several special grounds on which the decision can be supported. Among those, it is stated, first, that, according to the very custom set up, a daughter cannot call for a partition during her adoptive mother's life. It is observed further that there were natural-born daughters and that they excluded the

(1) 1 M. (2) 1 M. 356. (3) 4 M. 330. (4) 4 B. 545.

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adopted daughter. The remarks then made in regard to the usage, though very instructive, were not necessary for the decision of that case. It is there observed that usage is law because it is [400] followed from a conviction that it is law. Though reference is made to Austin's opinion that the tacit sanction of the sovereign is necessary to the binding force of custom, yet the cases decided in this Presidency wherein adoption by a dancing woman was recognized as the source of a civil right are also mentioned. In advertence to the practice of an abandoned class of women like dancing girls, it is admitted that it was recognized by Hindu law. It is also admitted that it is only according to the standards of Hindu law that a usage has coercive force among Hindus. But it is remarked that the usage which the Courts are bound to follow according to the Charter is not to be understood in the sense that it shuts out all amelioration. The learned Judge then observes that the practices of an abandoned class are no doubt a usage in the sense of a tolerably uniform series of acts, but they do not therefore spring from a consciousness of compulsion but rather from habit, imitation, and ignorance, and that such usage is not a law, for, over it presides the higher usage of the community at large from whose approval it must have derived any conceivable original validity and in opposition to which it cannot subsist; and as the community comes to recognize certain principles as essential to the common welfare, it will no longer lend its sanction to sectional practices at variance with the principles thus recognized. This seems to be the jural theory suggested in regard to sectional usage, and from it a power is deduced by the learned Judge for Courts of justice to decline to recognize adoption by a dancing girl when the popular sentiment would no longer give validity to such adoption. In *Abraham* v. *Abraham* (1), the Privy Council say that customs and usages as to dealing with property unless their continuance is enjoined by law, as they are adopted voluntarily, may be changed or lost by desuetude. Would not they, the class of dancing women, cease to exist as a distinct class when there is such a complete change in the sentiment of the general mass of the Hindu community as to render the adoption of the jural theory feasible and just for the amelioration or abrogation of what was once recognized as a valid special custom? Is not therefore the cessation of the usage indicated by the Privy Council the sound basis for judiciary action especially when there is a standing Legislative Council and when only very imperfect material is [401] available to a Judge who is bound to decide according to evidence for ascertaining whether to any and what extent there has been a substantial change in the sentiments of the large mass of the Hindu community in regard to a particular usage of a section of the Hindus? How would this theory work as the basis of judiciary action if a Judge in Malabar or South Canara were to hold that according to a very considerable body of Hindus the non-recognition of marriage as a legal institution is pernicious and that he would therefore decree tarwad or Aliyasantanam property to the sons and daughters of those who now follow the special law of the nephews? Is it not also a sound rule of legislative policy that judiciary legislation of the earlier period should gradually retire within the narrow limits of judicial interpretation in proportion to the increased activity of direct legislation through organized bodies? I may observe that whatever may be the change in the sentiments of the general mass of Hindus in regard

(1) 9 M. I. A. 195.

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to dancing women in Bombay and Poona I am unable to say that there is a considerable change in this Presidency in the opinion of the general mass of the Hindu community as contra-distinguished from a comparatively small section that has come under the influence of Western culture. With all deference to the learned Judge who decided the Bombay case, I do not see my way to follow his decision or adopt the jural theory as propounded by him as the basis of judiciary action.

It is then urged that whatever might have been at one time accepted as custom in regard to the adoption, it could not be recognized as valid since the introduction of the Penal Code. That enactment, however, contains no provision which expressly prohibits adoption by dancing girls or others. It only enacts (Section 372) that whoever sells, lets to hire, or otherwise disposes of any minor under the age of sixteen years with intent that such minor shall be employed or used for the purposes of prostitution, or knowing it likely that such minor will be employed or used for such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to a fine. The act prohibited is the disposition of a minor for the purpose of prostitution, and the reason of the prohibition is the protection of the chastity of girls under sixteen years of age. Taking it then that the rule of public law embodied in Section 372 controls the private law and is an index of public policy [402] the further question arises whether it operates to prevent a dancing girl from adopting a daughter altogether, or to prevent her only either from prostituting or from entering into a contract for prostituting the adopted daughter so long as she is under sixteen years of age. Adoption as recognized in Hindu law is allowed partly for continuing the family and partly for securing a person competent according to the custom of the caste to perform the funeral obsequies of the adoptive parents and to take their property. It should not therefore in the case of dancing girls be confounded with prostitution which is neither its essential condition nor *necessary* consequence, but an incident due to social influences. The extent to which the rule of public policy has been given effect to in this Presidency appears to me to indicate the legitimate limits within which we can recognize it as a rule of private law. We may set aside or decline to enforce a contract or disposition which has for its immediate object the prostitution of a minor during her minority so as to leave her no choice of married life when she is over sixteen years. The policy of the Penal Code, as it seems to me, is not to obliterate altogether the line of distinction between the province of ethics and that of law, but to protect the chastity of minors and to assure to them the freedom of choosing married life when they attain their age, whether they are the natural or adopted daughters of dancing women, and to leave otherwise the incidents of their legal *status* as daughters untouched, whether the parties concerned are dancing women or ordinary Hindus. Moreover I may observe that the adoption in question in the case before us was made prior to 1849 long before the Indian Penal Code became law, and it can have no retrospective effect and operate to take away a *status* which was validly created prior to 1861. According to the course of decisions in the Presidency both before and after 1861, the conclusion I come to is that Ammu was competent to adopt a daughter though she was a dancing woman.

This view is not however sufficient for the disposal of this second appeal. The appellant's case is that the woman Ammu made more adoptions than one, and that all those adoptions are valid. There is no warrant for a

plurality of adoptions in the analogies of Hindu law, but it is contended by the appellant's pleader that there is a custom to that effect, and that there was no specific issue on the point. Not only is the alleged custom [403] inconsistent with the analogies of Hindu law, but there is also no authority as far as we are aware in its support. It appears further that evidence of custom was adduced by the appellant in this case under the second issue and the Subordinate Judge did not consider it satisfactory. I agree with him in the opinion that both the appellant and Timmu could not have been validly adopted and that the relation of sisters could not have been lawfully constituted on the analogy of Hindu law. On this ground I do not consider that the appeal can be supported, and dismiss it with costs.

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PARKER, J.—I agree.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

PERAYYA (*Defendant*), *Appellant v.* VENKATA (*Plaintiff*), *Respondent.**
[5th and 27th April, 1888.]

Transfer of Property Act, 1882, *Section* 60.

The breach of a condition in a mortgage deed to the effect that on default of payment on a certain date, the mortgage shall be deemed an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of the proviso to Section 60 of the Transfer of Property Act, 1882.

[F., 24 M. 449 (461); R., 23 B. 146 (173); 21 M. 110 (111); 6 S.L.R. 178 (180).]

APPEAL from the decree of J. Kelsall, District Judge of Vizagapatam, reversing the decree of K. Murtirazu, District Munsif of Yellamanchili, in suit No. 317 of 1886.

Plaintiff alleged that on 24th October 1885 he borrowed Rs. 200 from defendant and executed a deed mortgaging certain land to defendant; that he retained possession thereof under a lease from defendant (which had expired) and that he tendered the amount due on the 14th April 1886, but that defendant refused to receive the amount or to return the mortgage bond. The deed contained a condition that if the amount due was not paid on the 4th April the mortgage-deed was to be considered as a deed of absolute sale.

The defendant pleaded that the condition "was intentionally inserted for enforcement, and not for the purpose of fear," as alleged in the plaint.

[404] The Munsif framed an issue as to whether it was the intention of the parties that the condition for sale should take effect absolutely on the expiry of the term fixed for payment. No evidence was led, and the Munsif decided in favour of the defendant, on the ground that plaintiff adduced no evidence to show that it was not the intention of the parties that the condition should take effect.

On appeal, the District Judge decreed for plaintiff, holding that Section 60 of the Transfer of Property Act was enacted to carry out the

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* Second Appeal No. 594 of 1887.

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recommendations of the Privy Council in *Thumbusawmy Moodelly* v. *Hossain Rowthen* (1), and that the provision in the mortgage deed was not an extinguishment by act of parties.

Subba Rau and *Venkata Subba Rao*, for appellant.

Mr. *Powell*, for the respondent.

The Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.) delivered the following

JUDGMENT.

The defendant appeals against a decree for redemption of a mortgage, dated the 24th October 1885, and his contention is that the Lower Appellate Court was wrong in having granted such a decree, inasmuch as the plaintiff possessed no right of redemption, the mortgage being by way of conditional sale. It was necessarily admitted that the case was governed by the Transfer of Property Act, but the point taken was that the proviso to Section 60 was applicable to the circumstances. It was said that, if there was otherwise a right of redemption, that right was extinguished by act of the parties within the meaning of the proviso to Section 60. According to this argument the stipulation in the mortgage instrument, that if the money is not paid within the date fixed, the instrument shall itself be considered as an absolute sale-deed, coupled with the fact of failure to pay within the time fixed, must be deemed to be an act of the parties extinguishing the right of redemption. In our judgment this is not a tenable position, and the act of parties, a phrase used here and elsewhere in the Act in contradiction to "operation of law," must denote a release or other such transaction standing apart from the mortgage transaction under which the right of redemption comes into existence. There is no extinguishment of the right by act of parties when, by virtue of a stipulation contained in the very contract under which the right is created, that right ceases to exist. It was further argued that, notwithstanding the provisions of the Act, effect must be given to the decisions with **[405]** regard to mortgages by conditional sale delivered before the Act came into force, *Pattabhiramier* v. *Vencatarow Naicken* (2), *Thumbusawmy Moodelly* v. *Hossain Rowthen* (1), and reference was made to cases in which the Judicial Committee held that in this Presidency there was no right of redemption remaining after the sale had once become absolute by reason of default in payment of the amount due within the appointed time. In our judgment, it is to the Act, and not to these decisions with reference to the law as it stood independently of legislation, that regard must now be had. According to the Act, an instrument such as that here in question is a mortgage, and there is nothing in Section 60 to show that any distinction was to be made between one class of mortgage and another. The words "in the absence of a contract to the contrary," which are to be found in the section declaring the rights of the mortgagee (Section 67), are not to be found in this section.

Although the law with regard to conditional sale has, by the operation of this Act, been altered as far as this Presidency is concerned, by conferring on the mortgagor a right which he did not possess before, it is otherwise in the territories to which the Bengal Regulations I of 1798 and XVII of 1806 applied. Under those Regulations, the mortgagor enjoyed a right of redemption, which the common law did not allow him; and those Regulations are repealed by the Act. The result, according to the appellant's contention, would be that in Bengal a mortgagor under an

(1) 1 M. 1. (1) 13 M.I.A. 560.

instrument of conditional sale would be deprived of the right of redemption, which under the above-mentioned Regulations he has hitherto enjoyed. It would be difficult to accept a view which led to such a result, and this view of the operation of the Act has not even been suggested in the cases in which the question has been discussed whether the plaintiff-mortgagee should obtain a decree in the manner provided in the Regulations or in the terms of Section 86 of the Transfer of Property Act, a section which prescribes a form of decree wholly inappropriate to a case where the right of redemption is not recognized, *Bay Nath Pershad Narain Singh* v. *Moheswari Pershad Narain Singh* (1) and cases there cited. For these reasons, we hold that the Lower Appellate Court was right in granting the plaintiff a decree for redemption, and we dismiss the appeal with costs.

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11 M. 406.

[406] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

PEDDAYYA (*Defendant*), *Appellant* v. RAMALINGAM (*Plaintiff*), *Respondent*.* [6th April and 2nd July, 1888.]

Hindu law—Release by a co-parcener of his rights in favor of another co-parcener.

In a joint Hindu family, consisting of four brothers—A, B, C, D—A and B obtained their shares by a partition suit. In the plaint they stated that they relinquished their shares of the moveable property in favor of C. In a suit by C against D to recover his share C claimed three-fourths of the movable property. D contended that the release by A and B in favor of C could not, according to Hindu law, add to the share of C as a coparcener.

Held, that C was entitled to the share claimed.

[R., 25 M. 149 (157) = 11 M.L.J. 353.]

APPEAL from the decree of John Kelsall, District Judge of Vizagapatam, confirming the decree of C. Rangayyar, District Munsif of Vizagapatam, in suit No. 370 of 1885.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.).

Mr. *Michell*, for appellant.

Ramachandra Rau Saheb, for respondent.

JUDGMENT.

There were originally five brothers, who, together with their father, Viranna, formed a joint Hindu family governed by the Mitakshara law. Viranna died in December 1870, and one of the brothers, Bhimalingam, died since. A dispute arose among the survivors regarding the right of succession to the moveable property left by Viranna, and it was secured in a room which was locked and sealed by each of the rival claimants. The plaintiff claimed the whole of the moveable property under an arrangement said to have been made by Viranna prior to his death. Two of the brothers, Bogalingam and Gangayya, since obtained partition in original suit No. 127 of 1882, and by their plaint in that suit they relinquished their half share in the moveable property, stating that it was their father's

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* Second Appeal No. 669 of 1887.

(1) 14 C. 451.

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wish that it should go to the present plaintiff. The defendant repudiated throughout the arrangement which was alleged to have been made by Viranna. In the present [407] suit the plaintiff claimed a quarter share in two houses and three-quarter shares in the moveable property, on the ground that Bogalingam and Gangayya had relinquished their interest in his favor.

Both the Courts below decreed the claim, and this second appeal is restricted to the moveable property, of which partition has been decreed. Two questions were argued before us. As to limitation the decision of the Judge is clearly right. Having regard to the mode in which the moveable property has been secured, its possession must be taken to have been joint, neither party having exclusive control over it. The main contention for the defendant is that the relinquishment by Bogalingam and Gangayya could not under Hindu law add to the plaintiff's share as a coparcener, even though Bogalingam and Gangayya desired that he should take their shares. On referring to the plaint in original suit No. 127 of 1882, we entertain no doubt that such was their intention, the renunciation being expressly made in plaintiff's favour, or in part execution of the alleged suggestion of Viranna, which they accepted so far as their undivided interest in the moveable property was concerned. That a coparcener is competent under Hindu law to renounce his share, there can be no doubt. Manu says: "If any one of the brethren has a competence from his own occupation and desires not the property, he may be debarred from his share, giving him a trifle in lieu of maintenance"—Manu, Chapter ix, p. 207. Yajnavalkya says: "The separation of one who is able to support himself, and is not desirous of participation, may be completed by giving him some trifle"—Yajnavalkya, 2-117.

According to the Smritis, then, the renunciation operates as alienation of one coparcener's interest in favour of the others. If he can alienate in favor of the other coparceners as a body, there is no reason why he should not do so in favor of one of them, who alone may need such help. No question of survivorship can arise because Bogalingam and Gangayya are admittedly alive. In regular appeal No. 58 of 1884 this Court upheld an arrangement made by an undivided son with reference to his share, observing that, "having regard to the circumstances, although Exhibit A is in form a gift, the whole transaction was in fulfilment of a natural obligation founded upon the consent of the father to the severance of the alienator's interest in the coparcenary." In this case Bogalingam and Gangayya, in fulfilment of their natural obliga- [408] tion to give effect to what they believed to be the wish of their father, gave up their interest in plaintiff's favour, and their act may be regarded as the severance of their interest coupled with a direction to make over their shares to the respondents when he should separate.

It has been held that when some of the coparceners only obtain partition, it must be taken that the partition was general and that there was a reunion among those who live afterwards in coparcenary. This view also supports the conclusion that there was a severance of interest on the lines indicated by Bogalingam and Gangayya.

We do not consider that this second appeal can be supported, and we dismiss it with costs.

11 M. 408.

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APPELLATE CIVIL.

11 M. 408.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SUBBANNA (*Defendant*), *Appellant* v. VENKATAKRISHNAN (*Plaintiff*), *Respondent*.* [20th and 27th March, 1888.]

Hindu Law—Representation of estate by mother—Decree against mother when adopted son in existence, null.

Plaintiff obtained a decree on a bond executed by S against the mother of S, whom he believed to be the heiress of S. In attempting to execute this decree against the estate of S, plaintiff was obstructed by the defendant, who was the adopted son of S. Plaintiff sued the defendant for a declaration that he was entitled to execute his decree against the estate of S in the hands of the defendant:

Held that the suit must fail, inasmuch as the estate of S was not properly, represented in the former suit. *S. C. Lahiry* v. *N. C. Lahiry* (I.L.R., 11 Call 45) distinguished.

[F., 33 M. 75 (77)=3 Ind. Cas. 737=19 M.L.J. 651=6 M.L.T. 199; R., 19 B. 821 (827).]

APPEAL from the decree of C. Venkoba Rau, Subordinate Judge of South Canara, confirming the decree of K. Krishna Rau, District Munsif of Udipi, in suit No. 406 of 1884.

The facts stated in the plaint were as follows:—

(1) That plaintiff obtained a decree in suit No. 315 of 1878 against Santharamma, mother of Subbaraya, adoptive father of defendant, on a bond executed by Subbaraya.

[409] (2) That it was held in suit No. 443 of 1883 that, as defendant was not a party to the decree aforesaid, all the proceedings taken in execution thereof against the estate of Subbaraya were invalid.

(3) That plaintiff was not aware of the adoption of defendant when he sued Santharamma, whom he believed to be the heiress of Subbaraya.

(4) That as defendant had taken the estate of Subbaraya as adopted son, he was bound to pay the decree-debt aforesaid.

(5) Plaintiff, therefore, prayed for a decree declaring that defendant was bound to pay the decree debt aforesaid, and that plaintiff was entitled to execute the same against defendant and the estate of Subbaraya.

Defendant, *inter alia*, pleaded that plaintiff was not entitled to sue for a declaratory decree after having obtained the decree in suit No. 315 of 1878.

The second issue was whether the suit as framed was maintainable.

The Munsif held—

(1) that, as Subbaraya was addicted to drinking and adultery, the debt was only binding on the share of Subbaraya mortgaged to plaintiff as security for the bond:

(2) that the fact that the judgment-debtor was the mother and not the widow of Subbaraya did not take the case out of the principle of *S. C. Lahiry* v. *N. C. Lahiry*, and that the half share of Subbaraya in the property mortgaged to plaintiff

* Second Appeals Nos. 899 of 1885 and 216 of 1887.

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was liable to be sold in execution of the decree in suit No. 315 of 1878 after making defendant a party to the proceedings.

Both parties appealed from this decree and both appeals were dismissed.

Defendant appealed in No. 899 of 1885; plaintiff in No. 216 of 1887.

Ramachandra Rau Saheb, for plaintiff.

Narayana Rau, for defendant.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

The only question in these second appeals is whether the suit was maintainable.

The plaintiff obtained a decree against Subbaraya's widow in [410] original suit No. 315 of 1878 as representing her late husband's estate in ignorance of the adoption of the defendant. It is found that the decree-debt is a family debt, such as would bind the son, but it is contended that Subbaraya's estate was never really represented in original suit No. 315.

The Courts below have decreed in the plaintiff's favour, on the strength of *S. C. Lahiry* v. *N. C. Lahiry* (1), holding that the decree in original suit No. 315 was in fact against the husband's estate and obtained against the widow as representing that estate, and that it will therefore bind the estate whether the widow or adopted son is the representative.

It is contended that the decision in that case is not applicable and is opposed to that in *Siva Bhagiam* v. *Palani Padiachi* (2), with which the Bombay Court agreed in *Akoba Dada* v. *Sakharam* (3).

It appears to us that the decisions clearly establish that a widow does not represent the estate so as to bind the son when the existence of the son is from whatever cause ignored, and when there is nothing on the face of the proceedings to show that the widow is sued as representing a minor son.

On reviewing the cases that were quoted at the bar we find that in the *Raj Durbhunga case* (4) the minor as well as the widow were made parties to the suit. In I.L.R., 4 Mad., 401, it was held that the decree and sale did not bind the estate when by mistake the widow of the father had been made defendant instead of the minor widow of the son, who was the last full owner; and in I.L.R., 9 Bom., 429, which was a case somewhat similar in its facts to the present, except that the parties were marshalled differently (that being a suit for redemption), it was held that, the son having been ignored, the inheritance had not been substantially represented in a suit against the mother alone.

The decision relied upon by the Courts below (I.L.R., 11 Cal., 45) is, when examined, in no way in conflict with these authorities. The suit was brought in 1862 against the widow and two minor sons as representing the estate of one Romanath Lahiry deceased. The inheritance was therefore fully represented at the institution of the proceedings. During the progress of the suit the two minor sons died and the widow then adopted another son just before the [411] decree was passed. It was held that the proceedings had clearly shown an intention to bind the estate, the widow having been originally included as representing minor sons, and that the

(1) 11 C. 45. (2) 4 M. 401. (3) 9 B. 429. (4) 14 M.I.A. 605.

decree could be executed on making the minor adopted son a party to the proceedings.

In the case before us the mother was alone impleaded as the sole representative of the estate, though there was at the time an adopted son. We are therefore of opinion that the inheritance was not properly represented and that the decree will not bind the son.

The case quoted on the other side—*Ramakrishna* v. *Namasivaya* (1)—has no application to such a case as the present. There the suit was to have it declared that the shares of the sons were liable to be sold in execution of a decree against the father,—in other words, that the father had represented the sons in the transaction,—but here there is no question but that the mother did not represent the son.

The defendants' appeal must be allowed and the decrees of the Courts below reversed, the plaintiff's suit being dismissed with all costs throughout.

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11 M. 411 = 1 Weir 549.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

QUEEN-EMPRESS *v.* SABAPATI.* [5th July, 1888.]

Penal Code, Section 471—Using a forged document—Fabrication of a receipt as a voucher to cover a contemporaneous embezzlement.

A postmaster misappropriated a certain sum of money, and at the same time made a false document purporting to be a receipt signed by the person to whom the money was payable. He was convicted of using a forged document under Section 471 of the Indian Penal Code. It was contended that no forgery had been committed, because the receipt was made merely to cover the embezzlement —*Empress of India* v. *Jiwanand* (I.L.R., 5 All., 222) :

Held, that the conviction was right.

A debtor, who fabricates a release to screen himself from liability to pay the [412] debt, cannot be said not to be guilty of forgery, because he intended by the fabrication to cover a dishonest purpose.

[F., 22 C. 313 (322) ; 2 Bom. L.R. 115 (122) = 15 Bom. L.R. 708 ; 4 Ind. Cas. 1089 (1090) = U.B.R. 1909 Penal Code, 29 ; 1 Weir 554 (556) ; R., 8 P.L.R. 1904.]

APPEAL from the sentence of J. A. Davies, Sessions Judge of Tanjore in calendar case No. 48 of 1887.

The facts found by the Sessions Court were as follows :—

Prisoner was a local postmaster, and, as such, received Rs. 15 transmitted by a money-order from Ceylon to pay to one Subramanyam. On the 20th January 1887, prisoner credited himself with the amount in his books and certified the payment on a receipt which purported to be marked by Subramanyam on January 20th. It was proved that Subramanyam did not receive the money until October 1887, after a complaint had been made to the postal authorities. The Court found that the prisoner misappropriated the money and had forged the receipt as a voucher in support of payment, and that, embezzlement being proved, the receipt was used by the prisoner with a guilty knowledge.

It was contended for the prisoner that if the receipt was false it was made to hide the prisoner's guilt, and, therefore, there was no forgery—

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* Criminal Appeal No. 76 of 1888.

(1) 7 M. 295.

1888 JULY 5. — APPELLATE CRIMINAL. — 11 M. 413= 1 Weir 549.

Empress of India v. *Fateh* (I.L.R., 5 All., 217)—and that the prisoner had had not used the receipt, as it was his successor who forwarded it to head-quarters and not himself.

The prisoner was convicted under Sections 409 and 471 of the Indian Penal Code and sentenced to three years' rigorous imprisonment and a fine of Rs. 15.

Sadagopacharyar, for appellant.

The Public Prosecutor (Mr. *Powell*), for the Crown.

The Court (MUTTUSAMI AYYAR and WILKINSON, JJ.) delivered the following

JUDGMENT.

The prisoner, who was recently the Postmaster of Orathanad, has been found guilty of (1) using as genuine an alleged forged document, and (2) of criminal breach of trust. With reference to the first charge, it is urged that the receipt found to be a forgery was not made with the intention of causing wrongful loss to Government, nor with the intention of defrauding Government, but if made by the prisoner was merely made with the intention of concealing the embezzlement of the money. Such an intention does not, it is argued, in law, render the case one of forgery; and we are referred to *Empress of India* v. *Fateh* (1), and *Empress of India* v. *Jiwanand* (2). The Sessions Judge was of [413] opinion that the cases were not in point, because in the present case it was not shown that the false document was made subsequent to the embezzlement. We entertain no doubt that the forgery and the criminal misappropriation form parts of one criminal transaction. Having regard to the definition of forgery, we are unable to hold that there was no forgery. There was clearly an intention to cause wrongful loss to Government by conveying the false impression that the receipt contained an acknowledgment of payment by the payee, and the fact of misappropriation in our opinion merely shows that there was an intention to cause wrongful gain to himself. A debtor who forges a release to screen himself from liability to pay the debt cannot be said not to be guilty of forgery, because he intended by the forgery to cover a dishonest purpose.

On the merits the appeal was dismissed.

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11 M. 413.

APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

ARIABUDRA AND ANOTHER (*Defendants*), *Appellants v.* DORASAMI (*Plaintiff*), *Respondent.** [27th February and 15th March, 1888.]

Civil Procedure Code, Section 244, Questions to be decided under—Hindu Law, Obligation of son to pay debt of deceased father—Nature of obligation.

D obtained a decree against the father of A and R, Hindus, on a hypothecation bond whereby certain land was pledged as security for repayment of a loan. The decree declared the land liable to be sold for repayment of the debt. The judgment-debtor having died before the decree was executed, A and R were made parties to the proceedings in execution and the land was attached. A and R

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* Second Appeal No. 568 of 1887.

(1) 5 A. 217.

(2) 5 A. 221 (222).

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objected to the attachment on the ground that their shares in the land were not liable to be sold in execution of the decree as they were not parties to the suit. This objection was allowed, and D brought a suit for a declaration that the property was liable to be sold. That suit was dismissed on the ground that a suit for a declaration would not lie. D then sued to recover from A and R the balance due under the decree against their father after crediting the amount recovered by the sale of their father's share. It was objected that the suit was barred by Section 244 of the Code of Civil Procedure.

[414] *Held*, that the duty of a son under Hindu law to pay his father's debt out of his own share of ancestral estate is not a matter which can be decided under Section 244 of the Code of Civil Procedure.

The questions contemplated by Section 244 are those which relate to the enforcement of the obligation created by the decree. The obligation to pay the father's debts out of the son's share of the ancestral estate is not an obligation created by a decree against the father.

[**N.F.**, 20 B. 385 (389) ; 16 C.P.L.R. 19 (26) ; **F.**, 16 A. 449 (461, 462) ; 29 A. 544 (549, 550) = (1907) A.W.N. 159 = 4 A.L J. 424 ; 13 M. 265 (266) ; 105 P.R. 1900 ; **R.**, 21 A. 301 (306) ; 34 C. 642 (654) (**F B.**) = 11 C.W.N. 593 = 5 C.L.J. 491 = 2 M.L.T. 207 (**F.B.**) ; **D.**, 13 Ind. Cas. 670 = 243 P.W.R. 1912.]

APPEAL from the decree of J. A. Davies, District Judge of Tanjore, confirming the decree of S. Subbayyar, District Munsif of Negapatam, in suit No. 349 of 1884.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

Subramanya Ayyar, for appellants.

Bhashyam Ayyangar, for respondent.

JUDGMENT.

In original suit No. 329 of 1876 the respondent obtained a decree against the appellants' father upon a hypothecation bond executed by him in 1866. To this suit, however, the appellants were not parties, but the decree passed therein declared that the hypothecated property was liable to be sold, if necessary, in execution. The judgment-debtor having died before the decree was executed, execution was taken out against the appellants as his legal representatives and the property under hypothecation was placed under attachment. They objected to the attachment and the sale of their interest in the hypothecated property in execution of a decree to which they were not made parties, and their objection being allowed, the execution-creditor instituted original suit No. 83 of 1880 to have it declared that their shares were also liable for his debt. In second appeal No. 618 of 1881 it was held that the suit was not maintainable on the ground that the respondent sought for a declaratory decree only, though he was entitled to further relief. The High Court, however, observed that the execution-creditor, the respondent, would not be precluded from instituting an independent suit against the appellants to recover from them the balance of the judgment-debt which remained unsatisfied to the extent of the value of the ancestral property which had come to their hands. Thereupon the suit from which this second appeal arises was instituted by the respondent, and both the lower Courts decreed his claim on the ground that the decree-debt was neither illegal nor immoral, and therefore one which the appellants were bound to satisfy out of the ancestral property in their hands.

[415] It is argued in second appeal that the liability of the ancestral property in their hands was a matter which ought to have been dealt with in execution proceedings, and that no separate suit will lie under

1888 MARCH 15. — APPEL-LATE CIVIL. — 11 M. 413.

Section 244 of the Code of Civil Procedure, and that the observation of the High Court in second appeal No. 618 of 1881 was a mere *obiter dictum* by which the appellants are not bound; and our attention is drawn to the decision of the Privy Council in *Chowdhry Wahed Ali* v. *Mussamut Jumaee* (1) and to the decision of this Court in *Kuriyali* v. *Mayan* (2). It is provided by Section 244 that all questions arising between the parties to the suit in which the decree is passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by order of the Court executing the decree and not by a separate suit. The question, therefore, for decision in this second appeal is whether the son's pious obligation under the Hindu law to pay the debt of his father out of his share in the ancestral property is a matter which relates to the execution of a decree against his father within the meaning of that section. We are of opinion that it is an obligation distinct from that created by the decree which was passed against the father, that if the decree-debt was either illegal or immoral, the sons would be under no obligation to satisfy it, though the decree against the father might be perfectly valid, and that the questions contemplated by Section 244 are those which relate to the enforcement of the obligation created by the decree. It is one thing to execute a decree as we find it, and another to add to the obligation created by it so as to extend its scope. The cases cited by the appellants' pleader do not in our opinion support his contention. In *Chowdry Wahed Ali* v. *Mussamut Jumaee*, the Privy Council observed that the question whether the property proceeded against in execution belonged to the judgment-debtor or to his legal representative in his own right was material for the purpose of fixing the legal representative with a liability *qua* legal representative, and therefore one which related to the execution of the decree. The same view was taken by this Court in *Kuriyali* v. *Mayan*; and Section 234 of the Code of Civil Procedure is referred to as showing the nature of the inquiry which it is necessary to make an order to fix the legal representative with liability as such in execution. Though the **[416]** legal representative is, as ruled by the Privy Council, certainly a party to the decree under execution, he is so only for the purpose of the obligation created by it being enforced against him and the execution creditor is not at liberty to insist on the enforcement of any obligation which is not included in it. In *Suraj Bunsi Koer* v. *Sheo Proshad Sing* (3), the claim asserted by sons to the recovery of their shares in ancestral property sold in execution of a decree against their father was entertained and decreed by the Privy Council in a subsequent suit, and the present suit, though brought by the execution-creditor, rests onthe same principle, *viz.*, the obligation on which the second suit is based is distinct from that created by the decree in the first suit. Another contention in appeal is that the claim is barred by limitation. The suit was clearly one to enforce payment of money charged on immoveable property, and the contest was whether the charge was validly created by the father as against his son. The claim is therefore not barred by limitation, and we dismiss the second appeal with costs.

(1) 11 B.L.R. 149. (2) 7 M. 255. (3) 6 I.A. 88.

11 M. 416.

1888 APRIL 17.

APPELLATE CIVIL.

11 M. 416.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MOIDIN AND ANOTHER (*Defendants*), *Appellants* v. OOTHUMANGANNI (*Plaintiff*), *Respondent*.*
[17th April, 1888.]

Limitation—Adverse possession—Redemption of land by one of two co-mortgagors and re-mortgage thereof—Possession unde second mortgage for more than 12 years.

A and B, two brothers, being entitled to certain land, mortgaged it in 1852 to C. In 1864 A redeemed the mortgage and re-mortgaged the land to D for the same amount. In 1885 the defendants (sons of A) redeemed the mortgage to D. In 1886 the plaintiff (son of B) sued defendants and the representatives of C and D to redeem a moiety of the land on payment of a moiety of the amount due on the mortgage of 1852. The defendants pleaded, *inter alia*, that the suit was barred by limitation as the land had been held adversely since the mortgage of 1864.

Held, that in the absence of proof that the land was held with an assertion of adverse title the plaintiff was entitled to a decree.

[R., 26 A. 227 (232) = A.W.N. (1904) 3; 27 B. 43 (60); 21 M. 18 (26); 8 M.L.J. 92 (103); 4 O.C. 273 (275); U.B.R. (1897–1901) 469; U.B.R. (1892–1896) 502; D., 9 C.W.N. 865.]

APPEAL from the decree of T. Kanagasabai Mudaliar, Subordinate Judge of Tanjore, confirming the decree of T. Venkatrama [417] Chetti, District Munsif of Pattukota, in suit No. 279 of 1886. The facts necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

Krishnasami Ayyar, for appellant.

Ambrose, for respondent.

JUDGMENT.

The appellants' father and the respondent's father were brothers, and in 1852 they jointly mortgaged the property in dispute for Rs. 200 to the grandfather of defendant No. 1. In 1864 the appellants' father redeemed the mortgage and re-mortgaged the property for the same amount and on the same terms to defendant No. 4, and in 1885 the appellants redeemed the second mortgage. Thereupon, the respondent brought the present suit to redeem the mortgage with respect to his moiety of the property in suit. Both the Courts below decreed the claim, and several objections are taken in second appeal.

It is urged that the mortgage which the respondent sought to redeem is stated in the plaint to be the mortgage of 1852, though it ceased to exist in 1864, and that the lower Courts were in error in passing a decree in his favour. We observe, however, that the appellants resisted the respondent's claim and relied, *inter alia*, on the redemption of the first mortgage in 1864. The Court of first instance recorded the fourth issue to ascertain the effect which such redemption had on the respondent's claim as co-mortgagor. We see no reason for saying that the appellants were taken by surprise, and that the Court ought not to have decreed to the plaintiff the relief he was entitled to upon the facts found.

Another objection urged in appeal is, that the respondent's claim is barred by limitation, and that the appellants' possession through defendant

* Second Appeal No. 849 of 1887.

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No. 4 from 1864 was adverse to it. The redemption of the original mortgage by the appellants' father in 1864 created in his favour only a charge on the share of respondent's father in the property mortgaged for his proportion of the mortgage-debt and the expenses incurred in redeeming and obtaining possession of the mortgaged property. The possession arising from such redemption is then referable to the first mortgage, so far as the respondent's interest in the property is concerned, in the absence of distinct evidence to show it was acquired or retained with an assertion of adverse title and thereby became hostile to the respondent's claim. The finding of the Courts below on this point is that there is no satisfactory evidence **[418]** of adverse title. It is said that the separate residence of the appellants' branch of the family, the division of a few salt pans which originally formed family property, and the recital in (exhibit I) that the property is that of the appellants, constitute sufficient evidence of adverse title, and that the lower Courts have failed to give due effect to it. We are not prepared to hold that the evidence relied on has not been considered, on the other hand the lower Courts have come to the conclusion that it is consistent with the appellants' possession as trustees in respect of the respondent's moiety of the property in dispute. Although the respondent attested exhibit I, and although there is a recital in it that the property in question is that of the appellants, we must construe the expression as intended to have application as between them and the party in whose favour it was executed. The impression which the respondent's attestation conveys is rather in favour of a belief that he had an interest in the property than that he had no interest in it. We may also refer, in support of our view that the period of limitation did not run from 1864, to the decision of the Bombay High Court in *Ramachandra* v. *Sadashiv* (1). As to the decision on *Umr-un-nissa* v. *Muhammad* (2) to which the appellants' pleader draws our attention, we observe that it is not a case in point, the only question decided there being that the period of limitation could not be taken to have run from the date of the death of the co-mortgagor's predecessor in title. The appellants' pleader next relies on Sections 74 and 95 of the Transfer of Property Act, as showing that, notwithstanding the redemption by the appellants' father, they were not entitled to obtain possession of the property under mortgage, and that the possession which they actually obtained must, therefore, be taken to have been adverse to the respondent's claim. This contention cannot be upheld; the true construction of Section 95 is that the co-mortgagor redeeming the whole of the mortgaged property has as well a right of obtaining possession as of treating the co-mortgagor's share of the mortgage-debt as a charge on the latter's interest in the property redeemed.

The second appeal must fail, and we dismiss it with costs.

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(1) 11 B. 422. (2) 3 A. 24.

11 M. 419=12 Ind. Jur. 298.

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298.

[419] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

MORGAN (*Defendant*), *Appellant* v. THE GOVERNMENT OF HAIDARABAD (*Plaintiff*), *Respondent*.*
[15th, 16th, 17th, 21st, 22nd, 23rd and 24th February and 22nd March, 1888.]

Contract Act, *Sections* 17, 19—*Contract induced by fraud—Right to rescind.*

If a vendor has been guilty of fraud within the meaning of Section 17 of the Indian Contract Act by actively concealing a fact which it was material for the purchaser to know, and the purchaser was induced thereby to purchase, the fact that the purchaser by exercise of ordinary diligence might have ascertained the truth affords no answer to a suit to recover the purchase money. Such a case does not fall within the exception to Section 19 of the Contract Act.

APPEAL from the decree of W. E. Clarke, Subordinate Judge, Nilgiris, in suit No. 57 of 1885.

The facts appear from the judgment of the Court (KERNAN and Muttusami Ayyar, JJ.).

Mr. *Norton*, for appellant.

The Acting Advocate-General (Mr. *Spring Branson*) and Mr. *Brown*, for respondent.

The material portion of the argument for the purpose of this report was as follows :—

Mr. *Norton*.—There was no suppression of material defect which vendor was bound to disclose. If there was suppression, it did not influence plaintiff. If it did influence plaintiff, he could have discovered the facts by reasonable diligence (Section 17 of the Contract Act). Simple concealment is not fraud, and even active concealment must be with intent to deceive or to induce the party to enter into a contract. The concealment must be *dans locum contractui—Pulsford* v. *Richards* (1), *Attwood* v. *Small* (2) ; as to *scienter* being the gist of the action, *Dickson* v. *Reuter's Telegraph Company* (3) ; as to representation being not one of fact but of law only—

[420] (KERNAN, J.—Lady Souter's statement as to tenancy at will is not absolute. She merely says it appears to be a tenancy at will and refers to quarrels between landlord and tenant.)

(MUTTUSAMI AYYAR, J.—The statement is not her own, but purports to be received from Mrs. Morgan.)

Trower v. *Newcome* (4) ; where representations are vague purchaser cannot rely on them—*Rashdall* v. *Ford* (5) ; misrepresentation of law—*Lewis* v. *Bowen Jones* (6).

(MUTTUSAMI AYYAR, J.—In all the cases you quote the facts in reference to which the mistake arose were known to both parties. In this case plaintiff knew nothing about the lease.)

When opportunity is afforded for inspection, party cannot complain of misrepresentation—*Keates* v. *Cadogan* (7).

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* Appeal No. 8 of 1887.

(1) 17 Beav. 87. (2) 6 C. & F. 444, 447. (3) L.R. 3 C.P.D. 1.
(4) 3 Merrivale 704. (5) L.R. 2 Eq. 750. (6) 4 B. & C. 506.
(7) 10 C.B. 591.

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As to Section 18 of the Contract Act and the exception there was no duty on us to disclose lease.

As to Section 55 of the Transfer of Property Act, the lease is registered and could have been discovered —*Peat* v. *Gurney* (1).

If time is not originally of the essence of a contract, it cannot be imported—Contract Act, Sections 39, 55. *Macbryde* v. *Weekes* (2) shows that a party cannot plead misrepresentation if, with knowledge thereof, he extends the time, because it shows he did not consider such misrepresentation essential, and also that time, if reasonable, can be imported into the contract. Here time was extended from 19th February to 2nd June, and the letters show a re-affirmation of the contract—*Webb* v. *Hughes* (3), *Crawford* v. *Toogood* (4) contract for immediate possession, vendor could not complete, *held*, time was not of the essence of the contract, and, as there were negotiations after date of agreed possession, there was a waiver. At the most plaintiff is entitled to damages only; he has never tendered conveyance or purchase money—(Contract Act, Section 55).

Mr. *Spring Branson*.

(KERNAN, J.—The only blot in plaintiff's case is negligence in not making inquiries of Sir F. Roberts as to terms of tenancy. This and the question of constructive notice is all there is in defendant's favour).

[421] As to notice of tenancy being notice of terms, *Crofton* v. *Ornsby* (5), *Taylor* v. *Stibbert* (6), *Caballero* v. *Henty* (7).

(MUTTUSAMI AYYAR, J.—Is there any case which shows that it is not the duty of the vendor to disclose all facts material to the purchase?)

As to argument that statement of a tenancy at will is one of law and not of fact, *Gibson* v. *Ingo* (8). The doctrine of constructive notice is based on the irresistible presumption that the agent must have informed the principal. Here the presumption has no place. Cowdell admits he never gave notice and that the Morgans consented—*Rolland* v. *Hart* (9).

JUDGMENT.

KERNAN, J.—This is an appeal from a decree made by the Subordinate Judge, Nilgiris, on the 18th of August 1886, whereby a contract between the plaintiff and the defendant for the sale of a house and cottage and 25 acres of land at Ootacamund, called Snowdon, was rescinded and the defendant was decreed to pay to the plaintiff 40,000 rupees and interest.

The defendant is the owner of the property, of which she made a lease to Sir F. Roberts on the 13th April 1883 for the term of four years from that date, or for such less time as his then appointment of Commander-in-Chief of the Madras Army should remain unchanged, or as he might hold an appointment enabling him to remain at Ootacamund. Sir F. Roberts went into possession and remained there until September 1885.

That lease contains restrictive provisions against certain acts being done by the lessee, and there was in it a provision that, on breach of any of those provisions, the defendant should be at liberty to re-enter and terminate the lease.

Lady Souter, who resided at Bombay House, Ootacamund, was, in the years 1883 and 1884, a friend of the defendant, who informed her of the lease. In 1884 the defendant was desirous of selling her property at

(1) 1 Eng. & Ir. App. 377. (2) 22 Beav. 533. (3) L. R. 10 Eq. 281.
(4) L. R. 13 Ch. D. 153. (5) 3 Sch. & L. (Ir. Rep.) 591.) (6) 2 Veseyjr 437.
(7) L. R. 9 Ch. App. 447. (8) 6 Hare 124. (9) L.R. 6 Ch. App. 678.

Snowdon, of which the property leased was part, and she communicated the desire to Lady Souter. In a letter from Lady Souter to the defendant, dated 19th August 1884, the former writes that she had received a telegram from the plaintiff stating he was anxious to buy her house, and also saying she wished to do the defendant a good turn and sell her (defendant's) [422] house for her for Rs. 1,20,000 and, if agreeable to defendant, she would telegraph as follows :—

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"Bombay House not for sale, but Snowdon, a magnificent property, would suit your Highness' requirements. Will send particulars telegraph wishes." Lady Souter's letter proceeds thus :—"To prove that the Nizam is coming here, I have just had the enclosure from Nawab Sahib (Muneer Ool Moolku, the Revenue Minister to plaintiff), who was here a few days ago, and in that letter you will see he hopes to be here in the hot weather if it would suit you to sell."

In reply to that letter, the defendant wrote exhibit 31 saying: "I am exceedingly obliged by your kind offer of help in selling Snowdon to the Nizam, and which we have already placed before the Nawab. Your proposed telegram will do splendidly. I leave all in your hands. I shall be content if I get my price, 1 lakh." By exhibit AT to the defendant, 30th August 1884, Lady Souter replied she had telegraphed to the Nawab Sahib and the Prime Minister.

A letter written by the defendant to Lady Souter (AV without date) says, that immediate reply could not be expected; that they, the plaintiff and his Prime Minister, apparently were not in haste to secure a house, and might wish to consult the Nawab who came there and had seen all the houses offered for sale, and that General Morgan long ago offered Snowdon for sale. Perhaps he might draw a reply.

Lady Souter wrote to the Nawab a letter (exhibit AX), 12th October 1884. After referring to matters not material, she referred to the attractions of Ootacamund and to her telegraph to the Prime Minister, and gave particulars of the number of rooms and measurement of them in Snowdon. Lady Souter also wrote a letter (exhibit AY), to the Nawab, dated 18th October 1884, in reply to a letter of his, no copy of which was produced, and after referring to Mrs. Morgan's desire to sell for 1 lakh she says : "Mrs. Morgan has not shown me any paper or agreement with her tenants, the Roberts, but she has told me they are tenants at will only, and that she could at any time get rid of them on giving a month's notice. I took care to tell Mrs. Morgan what you told me when here, that H. H. and nobles and staff would very probably come up here next March or April for the hot months, and they would require houses to live in."

[423] The plaintiff or any of his Ministers did not give any reply to that letter of Lady Souter, and on the 10th December 1884 the defendant wrote to Lady Souter (exhibit AZ) as follows :—"The sale of Snowdon to the Nizam seems a hopeless matter. If he had wanted it, I suppose he would have said so. I cannot ask you to write again. I think I shall write myself and see what will come of it."

Accordingly on the 11th of December 1884 the defendant wrote exhibit A to the Nawab Sahib, which was as follows :—

"SIR,—Sometime ago I heard from Lady Souter that you had written to her regarding your wish to purchase a house in Ootacamund, on which that lady very kindly suggested Snowdon House.

"I should feel greatly obliged by your letting me know if any such intention still exists on your part, and if so, whether my house is likely

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to suit, as I am asked to enter into arrangements which will prevent my selling for five years to come, and these arrangements will take place early in 1885.

"An early answer will greatly oblige."

On the 17th of December 1884 Major Gough, Private Secretary to the Nawab, wrote to the defendant: "The Nawab has asked me to acknowledge your letter of the 11th instant and to say that if the house referred to by you is the one regarding which Lady Souter had written to him, the Nawab would like to see the plan and particulars." In reply the defendant, on the 22nd of December 1885, wrote (exhibit C):—

"Snowdon House is the same that my very good friend Lady Souter wrote about.

"I beg to enclose a plan of the land, traced from the Government map, and also a rough sketch of the house and out-houses to give you an idea of their proportions and relative position.

"This plan of land includes the cottage, but I am not aware if this is wanted also.

"Should only the house be wanted, then the division of land would be guided by the swamp, which divides the properties, subject of course to any wish expressed for more land on the opposite side of the valley; in such case I would ask that an offer be made me for the house alone and a stated portion of land. The price I ask for the house and cottage is Rs. 80,000 (eighty thousand).

[424] "I am now drawing Rs. 450 monthly rent, which represents a capitalized value of 70,000 at 8 per cent. exclusive of the timbered land. Water is abundant.

"The position and view are second to none on the hills: the road to church and library is in splendid order and by measured mile is 1¼ mile only.

"Government House land adjoins that of Snowdon, to which residence there is a fine and direct approach. I beg that you will give me as early an intimation as you can of the Nawab's wishes, as I fear to become too deeply involved in arrangements now pending, and which I do not wish to jeopardize; therefore I beg this matter may be private until you express a desire to buy.

"I should mention that Rs. 130 represents the cottage rent out of the 450."

The defendant wrote to Major Gough the exhibit D, dated 22nd of December 1884, telling him not to lose time in laying before the Nawab any information which may be required: she says she enclosed a rough sketch of the cottage rooms and that she let to her present tenant as he made concessions, and would not let so low to another tenant, and that with higher rent the capitalized value would be increased, and that she understated the value at Rs. 70,000 at Rs. 8 per cent.

Major Gough replied by letter of the 27th of December, exhibit E, acknowledging her two letters and enclosures and saying he laid them before the Nawab, who had requested him to ask the price of the cottage alone. By telegram F and letter of the 3rd of January 1885 to Major Gough the defendant stated she would take Rs. 15,000 for the cottage. On the 20th January Major Gough wrote exhibit H to defendant, stating he would inform her as soon as he was able to ascertain from His Highness what his intentions were.

On the 21st January 1885, Major Gough sent Exhibit I, a telegram, as follows :—

"Since writing you yesterday, I am authorized by the Minister to inform you that H.H. the Nizam will purchase your house and cottage with land for Rs. 80,000 according to terms of your letter of December twenty-second."

By letter of the same date as the telegram Major Gough confirmed the telegram.

By telegram (Exhibit T), 22nd January 1885, and by letter of **[425]** the same date to Major Gough the defendant, agreeing to the proposal for Rs. 80,000 in the same letter, says : "should HH have no lawyer in these parts, may I suggest Messrs. Cowdell and Woolley, to whom, if you will kindly send Rs. 40,000, the title-deeds will be immediately handed over by Mr. Rowlandson, Solicitor, Madras, and the balance can stand over till the deed of sale is complete."

The contract was thus concluded.

On the 24th of January 1885 the defendant wrote Exhibit M, pressing Major Gough to send Rs. 40,000.

On the 27th of January 1885, Major Gough telegraphed (Exhibit N) to Messrs. Cowdell :—" Remitting you through Bank of Madras Rs. 40,000, half cost of Snowdon. Please attend to legal conveyancing for Nizam's Government."

On the 28th of January 1885 defendant wrote to Cowdell and Co., giving a plan, but requesting them to keep the new arrangement private for a few days (Exhibit 55). By letter of the 4th February (Exhibit Q) the defendant says: "Cowdell received the deeds and paid over the money," and requested arrangement that the balance should be paid to her credit on the deed being signed.

By letter (Exhibit S) Major Gough replied :—

"I am in receipt of your letter, dated the 4th instant, and in reply beg to inform you that the remaining moiety of the purchase money will be remitted to Messrs. Cowdell and Co., who will pay it to you as soon as you have signed the deed of sale and the registration of the property is completed in favour of His Highness the Nizam's Government. Please, therefore, communicate with Messrs. Cowdell and Co., as to where you wish the amount paid to your credit."

The remaining 40,000 and 1,000 rupees for stamps and fees were remitted to Messrs. Cowdell by Major Gough on the 7th day of February 1885. On the 12th February 1885, with a letter of that date, U. Cowdell and Co., sent a draft of the proposed deed to the Nizam's Government. Pending the negotiation, the defendant, on the 9th of January, by letter (Exhibit No. 37) to Messrs. Cowdell, writes that in August 1883 she wrote to the Commander-in-Chief that, in consequence of breaches of the special contract lease he had rendered it void, and if he remained, he should do so as tenant-at-will, and that he gave no reply; and she **[426]** says : "now I want formally to break that lease and give notice to quit ; " and on the 22nd of January Messrs. Cowdell and Co. wrote a letter of that date to the Chief, referring to the agreement of 17th March 1883, also referring to the defendant's letter of 31st August 1883, cancelling, as it said, the lease, and they thereby give notice to him to deliver possession on the 1st February 1885. On the 26th January Messrs. Barclay and Morgan, on behalf of the Chief, by letter of that date to Messrs. Cowdell and Co., denied that there was any ground for cancelling the lease and declined to give possession.

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By letter (Exhibit W) dated 13th February 1885, Mr. Cunningham, at request of Sir F. Roberts, wrote to the Nawab, stating that Sir F. Roberts had a lease of Snowdon as long as he remained in Madras. On the 17th of February Major Gough, by Exhibit X to Messrs. Cowdell and Co., directed further proceedings to be stayed.

On the same day Messrs. Cowdell wrote to Mr. Morgan stating Major Gough's letter.

On the 18th of February 1885, Messrs. Smith and Wilkins, Solicitors, wrote Exhibit AA:—

"Mrs. Morgan has placed in our hands your letter to her of the 17th instant on the subject of the sale of Snowdon premises with instructions to reply to same. Mrs. Morgan is greatly surprised at His Highness' action in attempting to stop the sale on the grounds alleged, as His Highness had due notice of the premises being let and it was consequently his duty to ascertain terms of lease, before making the contract, Mrs. Morgan being totally ignorant of the purposes for which His Highness required the premises. However, as you are aware of the conditions of the lease and the alleged breaches thereof, in respect of which Mrs. Morgan has terminated the lease under the power in that behalf contained therein, and given the tenant through you notice of termination, you are in a position to advise your client thereon, and of his rights of action to recover possession.

"Mrs. Morgan will be happy to do every legal act in her power to assist your client in recovering possession; but she requires the due performance of the contract for sale."

On the 19th February Major Gough wrote (Exhibit AC) to the defendant: "Under instructions from His Highness' Government, I have the honor to enclose a copy of my letter to Messrs. Cowdell and Co., the Solicitors of His Highness' Government. [427] His Highness' Government was rather taken by surprise when informed through the Residency of the existence of a lease of Snowdon, &c., for an indefinite period. However, Messrs. Cowdell and Co. will, in the course of business, communicate with you in regard to the subject."

On the 23rd February Major Gough wrote to the defendant (Exhibit AE):

"I beg to acknowledge receipt of your letter, dated the 19th instant, in which you make mention for the first time in your correspondence with me regarding the sale of Snowdon, of the existence of a lease under which possession is held by Sir Frederick Roberts.

"There is, of course, no idea of accusing you of suppressing the fact of the house being rented; but there is no doubt that the lease was, and is, an obstacle to the house being available for the use for which it was to have been purchased, and had the existence of the lease been made known, His Highness' Government would not have cared to purchase it.

"I am also desired to say that His Highness' Government is very averse to causing the slightest inconvenience to Sir Frederick Roberts, and the fact of the transaction involving any such inconvenience would alone have been sufficient to deter the Government from the purchase. It is, therefore, to be hoped that, under the circumstances, you will see fit to agree to the cancelment of the transaction, without there being any necessity for legal proceedings."

"P.S.—I think it will be right that I should send a copy of your letter and this reply to Messrs. Cowdell and Co."

On the 25th February Messrs. Smith and Wilkins wrote to Messrs. Cowdell:

"Yours of 24th instant to hand with copy of letters from the Private Secretary of the Nizam, dated the 17th and 19th instant, which were apparently written before His Highness could have received from you a copy of our letter to you of the 18th instant, and your advice on the subject of same. The lease to Sir Frederick Roberts, as it existed, was not for 'an indefinite period' as alleged, but for a certain term, or such less term as Sir Frederick Roberts' official duties might allow him to remain on the hills as therein stated, with right of renewal; so that, according to present information, even if the lease now existed, it would anyhow termi- [428] nate on the 29th of November 1886 with Sir Frederick Roberts' appointment of Commander-in-Chief of the Madras Army. You are aware, however, that the lease does not exist, the same having been terminated by Sir Frederick Roberts' breaches, &c., as already advised, and your client will, on completion of the sale, be in a position to take action against, and eject Sir Frederick Roberts, by reason of such breaches, &c. Our client is at a loss to understand the statement in His Highness' letter of the 19th instant that His Highness' Government 'from the beginning had been led to believe, and were under the impresssion that possession for occupancy would be given immediately on the completion of the purchase.' Our client never led His Highness to any such belief or impression, and had no idea as to the purposes for which His Highness required the premises. In fact, His Highness was not only duly informed of the tenancy by our client's letters of the 21st and 22nd December 1884 and otherwise, but His Highness subsequently (and without making any inquiries from our client as to the nature of the tenancy) made an unconditional purchase of the premises, which was duly ratified, and in respect of which His Highness through you paid our client on account Rs. 40,000, which money was paid by you to the mortgagees on account of our client to redeem the mortgage and deeds. We must request you will not part with these documents, but hold the same on account of our client, who, we submit, is solely entitled to same, pending completion. Our client cannot, as you are aware, execute a conveyance under the terms stated in His Highness' letter of the 19th instant, or permit him to withdraw from the contract. Our client, however, as stated in our letter to you of the 18th instant, will be happy to do every legal act in her power to assist His Highness in recovering possession; and she now awaits a definite reply from him to our letter of the 18th instant, as well as this letter, which reply she requests may be sent by telegram as she has made arrangements to leave for England on the 1st of April and wishes to have matters definitely settled before her departure."

On the 4th March 1885 Major Gough wrote to the defendant (Exhibit AK):

"In acknowledging the receipt of your letter, dated the 25th ultimo, I have been requested to say that a discussion on the *legal* merits of the matter is really unnecessary. His Highness' [429] Government considers itself very much aggrieved, and hopes, for the sake of all parties concerned in this business, that it may be brought to a satisfactory termination without further unpleasantness. His Highness' Government cannot for a moment think of having anything to do with suits for ejectment, &c., against anybody, and neither is it in a position to advise you to pursue any particular course—conciliatory or otherwise—as regards your

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present tenant. If you are, however, desirous that any specific period, not exceeding two months' should be allowed to you for the purpose of arranging privately, as you propose to put His Highness' Government in possession of the house, this will be allowed. At all events His Highness' Government desire to inform you that, unless possession is obtainable by the first week in May at the latest, the purchase cannot be proceeded with."

On the 3rd of June Messrs. Cowdell and Co., wrote to the defendant the letter (Exhibit 47).

"With reference to your letter, dated the 15th ultimo, we are directed by his His Highness the Nizam's Government to intimate that unless immediate possession of 'Snowdon' be given, His Highness' Government will decline to complete the purchase of that property, and will take legal steps for the recovery of the first moiety of the purchase money, *viz.*, Rs. 40,000, remitted to you on the 27th of last January."

On the 10th of June defendant wrote the Exhibit 49 to Messrs. Cowdell and Co:

"In reply to your letter, informing me by desire of H H. the Nizam's Government, that immediate possession of the property they have purchased is required by them, I beg to say that I am prepared to give them possession any day convenient to themselves on payment to me ot the balance still due. The right of entry on the houses I will shortly inform you of. I do not expect it will be long delayed now."

The suit was filed on the 13th of June, 1885, and alleged that defendant knew in 1884, that plaintiff wanted a house at Ootacamund for occupation early in 1885, and requested Lady Souter to write to the plaintiff's minister to mention that Snowdon was for sale; that through her agent defendant represented to the plaintiff that Sir F. Roberts was tenant-at-will, and also that defendant did not bring to the notice of the plaintiff, or his agent, that Sir F. Roberts was tenant under the lease of the 13th April 1883, or any **[430]** other lease. The plaint stated that the defendant concealed from the plaintiff the fact of the existence of the lease, though she knew that Sir F. Roberts was not a tenant-at-will as represented by her and her agent, and that she would be unable to put the plaintiff in occupation of the property. The plaint further alleges that he (plaintiff) was not aware of the existence of the lease at the time he agreed to buy, and that if he had been so aware, he would not have entered into the contract.

The relief prayed was—

1. Cancelment of the contract for sale.
2. Payment by defendant of Rs. 40,000 and interest.
3. That the plaintiff be decreed to have a lien on the property until payment and the costs of the suit.

The plaint also prayed that if the above relief be refused, in the alternative, that the defendant should convey the property sold on payment by the plaintiff of the balance of the purchase-money and for the costs of suit.

The defendant in her written statement denied that Lady Souter was her agent, and stated that on the 21st or 22nd of December 1884, the defendant sent to the plaintiff plans of the houses and lands and twice referred to the occupation by Sir F. Roberts, and that the plaintiff or his agent inspected the property with the permission of Sir F. Roberts and were aware he was the tenant thereof; that on the 21st of January 1885, after a month from defendant's offer of the 21st of December 1884, plaintiff accepted defendant's offer, and had in the interval opportunity

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of inquiring the details of Sir F. Roberts' tenancy had they wished to learn the same and whether there was a document evidencing its terms as in the ordinary course of business there would be; also that the defendant was not informed of the purpose for which the plaintiff required the property, and that there was no stipulation that immediate occupation should be given; that Sir F. Roberts had broken the terms of his lease and that defendant believes he had forfeited his right to hold under the lease, and that she had previously given him notice and believed she was entitled to exercise the power of re-entry and offered plaintiff to take steps to enforce such right without prejudice to the sale; that no time was fixed for the completion of the contract, and that time was not the essence of the contract, and that the delay in disposing of Sir F. Roberts' occupation was not unreasonable; that she [431] cannot now be restored to her former position owing to plaintiff's act, and by way of counter-claim she asks for a decree for payment of the unpaid purchase-money and interest and damages for delay in completion of the contract.

There were 22 issues framed by the Subordinate Judge; upon many of such issues there was no argument before us. The following questions deducible from the issues and the arguments were those pressed before us:—

1. Whether Lady Souter was an agent of the defendant authorized by the defendant to state to the plaintiff or his ministers that Sir F. Roberts held as tenant-at-will only, or liable to be put out of possession of the property upon issuing a month's notice?

2. Whether the defendant in the negotiations with the plaintiff through Major Gough, from the 11th of December, 1884, and up to the completion of the contract on the 21st of January, 1885, knew, or had good reason to believe, that the purpose or one of the purposes for which the plaintiff entered into the contract for the property, was that he might have the occupation thereof during the hot season of 1885, commencing from about the month of March or April, 1885?

3. Whether the plaintiff during the negotiations with Major Gough believed that if the fact of the lease was disclosed to him before the contract was agreed to, that the plaintiff would not enter into the contract?

4. Whether the defendant wilfully abstained from informing the plaintiff's agent, Major Gough, between the 10th of December, 1884, and the 21st of January, 1885, of the existence of the lease? If so, did she abstain with intent to deceive the plaintiff or induce him to enter into the contract?

5. Whether the defendant actively concealed the fact of such lease from Major Gough with intent to deceive the plaintiff or induce him to enter into the contract?

6. Whether the plaintiff had the means of discovering that such lease existed with ordinary diligence, and did the plaintiff exercise such diligence?

7. Was the plaintiff under the circumstances bound to exercise such diligence?

8. Whether plaintiff had notice of the lease through his solicitors, Cowdell & Co.?

[432] 9. Whether plaintiff, with knowledge of the existence of the lease, waived his right to rescind the contract?

On the 1st question whether Lady Souter was the defendant's agent, authorized to state that Sir F. Roberts held only at will or liable to be put out a month's notice, we think Lady Souter was such agent. In the letter

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of 18th August 1884, Lady Souter informed the defendant that the Nizam intended to go to Ootacamund in the hot weather of the next year and for that purpose required to buy a house and proposed to send a telegram to the Nawab offering Snowdon for sale and sent draft of telegram. By the letter of the defendant she accepts Lady Souter's offer and says the telegram will do splendidly and that she left all in her hands. No doubt such authority would not justify Lady Souter in making any untrue statement respecting the defendant and her property. But it would justify Lady Souter in stating any details of the circumstances of the property so far as the defendant had informed her in order to lead to a purchase. Now if Snowdon was in the possession of a tenant by lease, extending beyond the next season, it would hardly be useful to offer the place to the Nizam who wanted it, as defendant was informed, for the next hot season. It therefore was important for Lady Souter to state if she was so informed by the defendant, that, though the house was then tenanted, yet that the tenant could be obliged to leave when the Nizam might require it for occupation.

Lady Souter states that the defendant told her that she had a dispute with her tenant and had given him notice; that he had broken his covenants and should hold only as tenant-at-will. Lady Souter says that the defendant several times in the year 1884 said so, and that Mr Hodgson was present. The defendant in her evidence says: "In September 1883, I told Lady Souter of the action of the Roberts' and of my letter of the 31st of August 1883, (Exhibit No. 23.) I told her the whole story. The breaches by Sir F. Roberts took place to my own knowledge." Mr. Hodgson also says he was present when defendant said Sir F Roberts was only tenant-at-will, and he details a conversation between August 1884 and October 1884, at which he and Lady Souter and the defendant were present, in which Lady Souter remarked to the defendant: "You will of course remember the purpose for which the Nizam wants the house, and that he is coming here to live." He says the question of the occupation of [433] Sir F. Roberts then came up, and Lady Souter said: "Of course, you know the house will be wanted about March or April," and that defendant said the Roberts' were only tenants-at-will and she could give notice to go away at any time and there would be no difficulty on that head. Mrs. Morgan denies that she told Lady Souter that the Roberts were tenants-at-will. But the phrase tenant-at-will was used by the defendant in her notice to Sir F. Roberts (Exhibit No. 23) of the 31st of August 1883. She tells him: "If you remain it must be as my tenant-at-will subject to the usual notice to vacate the premises and not as a lessee." Moreover, Lady Souter in August and in October (Exhibits AQ and AX) told the Nawab that the defendant had said that the Roberts were only tenants-at-will and could be turned out on a month's notice. At the time Lady Souter wrote those letters she could not have anticipated any dispute on the matter, nor can it be thought she wrote so with a view to make evidence for the future.

On the 2nd question the admission of the defendant in her evidence and by her counsel at the hearing proves that she knew that the purpose, or one of the purposes of the plaintiff in contracting for Snowdon, was that he might have the occupation of Snowdon as a residence. But the defendant says she did not know when the plaintiff expected the occupation to begin. There was certainly no certain time fixed by the contract at which possession for the purpose of occupation was to begin. However, the defendant was informed by Lady Souter in August 1884 (Exhibit

AQ.), and she and Mr. Hodgson both in their evidence say that the defendant was informed by Lady Souter that the house would be wanted by the Nizam to live in for the hot season of 1885, beginning in March or April of that year. The Nawab and Mr. Furdonjee, it is proved, were in Ootacamund in the year 1884, prior to, and early, in August of that year looking at houses. In Exhibit AV defendant in writing to Lady Souter says that the Nawab had seen all the houses offered for sale. It is only in the season that it is hot in the plains that the hills are resorted to by natives for change. We think the reasonable conclusion is that the defendant was quite aware in the negotiation for the sale that plaintiff required the house for occupation for the hot season of 1885.

The 3rd and 4th questions are inseparably mixed together, and the evidence and the inferences thereupon leading to con-[434] clusions on those points are the same. We propose to take them together.

There is no doubt that the price asked by the defendant for the purchase was a very good price and was so considered by the defendant; see her letter (Exhibit B H), 11th February 1885, to Mr. Hodgson, in which she thanks him for congratulation on the sale and says: "No doubt I should not have found it so easy to get a private individual to buy a large property like that, and in such a case I should have been obliged to wait." That price was a reduction of Rs. 20,000 at least in the sum asked by Lady Souter. When the defendant asked that price making the reduction it was a great object with her to secure the amount. She knew that the lease was in existence and had not been cancelled. See her letter, 9th January 1885. She asserts she did not know whether Sir Frederick Roberts would give up possession, but we find it difficult to believe this. She knew she had received rent from her tenant up to and in January 1885. See letter of the 14th January 1885, from Sir F. Roberts. She knew that the Nizam would require possession for occupation at all events about March or the beginning of April, and she most probably feared that if he was aware there was a lease to a tenant for four years from 13th April 1883, with about two years more to run, that the plaintiff would not enter into the contract. She instructed her solicitors by letter of the 9th of January 1885 to break Sir Frederick Roberts' lease formally and to give notice to Sir F. Roberts to give her possession on the 1st of February 1885. In her letter (Exhibit B) of the 21st of December 1884, she requested Major Gough to keep the matter of the proposed sale and purchase private *until he expressed a desire to buy*. She says in the letter her reason for that request was that she was deeply involved in arrangements that she did not wish to prejudice. No doubt she had been theretofore and was then in treaty for a loan of Rs. 30,000 on the property, and in that transaction she put forward the lease. But the question is, was the reason she gave the real reason for the request, or was it that she feared, if Major Gough mentioned the matter to others, the existence of the lease might be discovered by the plaintiff or his agents? Her request for secrecy certainly tended to prevent Major Gough or the plaintiff from obtaining any information about the property or the lease from any one except from herself. Although that letter was written by her in answer to the letter of Major Gough requesting to be furnished [435] with particulars of the property, she did not mention anything about the lease, while she admits that she deliberately did not mention it, and that she did not think it necessary to mention it, as she mentioned

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there was a tenant. The defendant was aware that the Nawab Sahib had been in Snowdon in 1884 with Sir F. Roberts and knew the latter was the tenant. The effect of the request contained in the letter, if complied with, as it apparently was, would, as she most probably knew, be to prevent inquiry by the plaintiff or his agents from Sir F. Roberts until the contract was concluded, when it might be too late. The defendant contends that the contract for purchase by the plaintiff was unconditional, and that the plaintiff was informed by her of the tenancy, and was aware Sir F. Roberts was the tenant. She contends that the plaintiff and his agents had ample opportunity, by the exercise of diligence, of finding out how Sir F. Roberts held the property, and that he was bound to inquire. She also contends that she *bona fide* believed that Sir F. Roberts had by breaking of covenant forfeited his right as lessee, and was only tenant-at-will or from month to month, and that it was not necessary for her to refer to the lease for any purpose. It is true that in the letters that passed between the defendant and Major Gough, the purchase was apparently unconditional, of the estate as defendant held it—and subject to the existing tenancy, though this phrase is not used. It is also true that plaintiff's agent had opportunity of ascertaining, by the exercise of ordinary diligence, that Sir F. Roberts held, or alleged he held under the lease, and if the true result of the evidence is that the defendant was not guilty of fraud within the meaning of Section 17 of the Contract Act, by actively concealing the fact of the lease, or by suggesting that the tenancy was from month to month when she knew the lease still existed, then such unconditional purchase and the absence of inquiry by the plaintiff would be a defence so far to this suit.

But if the true result of the evidence is that she was guilty of such fraud, and if the purchaser was induced by that fraud, then the unconditional purchase and absence of inquiry with ordinary diligence by the plaintiff would not afford a defence to this suit.

As to the allegation that Sir F. Roberts had forfeited his lease, it is important to refer to Section 55 of the Transfer of Property Act, which provides that receipt of rent, except after suit, shall be a waiver of right of re-entry for breach of covenant **[436]** and the defendant had received rent in January 1885, for the month of December then ended. The conduct of Mrs. Morgan after the contract, reflects some light on her prior conduct. A letter written by Mrs. Morgan to Major Gough on the 23rd of February, 1885, (Exhibit AD) appears to show what her view, after the contract, was of the fact that she did not mention the lease. She begins by regretting that there should be a misunderstanding as to the terms on which the minister purchased Snowdon and says then : "I do not think you can accuse me of having suppressed the fact that my house was *rented*, as in both my notes of the 21st and 22nd, I mentioned the amount of rent I was drawing. The minister's offer to buy was unconditional, but though this fact renders me legally safe as I am advised, yet I shall endeavour to procure the immediate possession required, and which I hope to effect as my tenants have received notice to quit in August 1883, and again now early in January before you had bought in consequence of breaches of special covenants." Now in that letter, though she says she did not suppress the fact that the house was rented, she does not say that she did not suppress the only important fact, *viz.*, that it was leased.

In a letter from defendant to Major Gough, dated the 22nd of January 1885, the day after conclusion of the contract, the defendant asks Major

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Gough to send Rs. 40,000, and on the 24th January again wrote pressing for Rs. 40,000. In her letter of the 28th January 1885 to Messrs. Cowdell, she tells them they will that day hear, if they did not before, the new arrangements as to Snowdon, and begs them to keep the matter *private* for a *few days*, and requests them to expedite the preparation of the deed of sale.

At the date she wrote that letter Rs. 40,000 had not been paid. Her letter shows a desire to have the contract immediately carried out. It was natural she should wish the matter concluded soon. But the pressure for its completion with the request for secrecy leads to the idea that she had a special object in view in desiring completion in such haste. There is no explanation of this secrecy, and looking to her prior conduct and the knowledge she had of the circumstance, it seems to us that the desire for haste and secrecy was but the following out of the idea entertained by her before the contract was concluded, *viz.*, to prevent information reaching the plaintiff of the existence of the lease until all the money was paid and the sale completed.

[437] The defendant was bound under Section 55, clause 1 of the Transfer of Property Act to answer to the best of her information all relevant questions put to her by the plaintiff through Major Gough in respect to the property.

The request for particulars in Major Gough's letter comes within that clause, and the defendant was bound to have stated the fact that the lease had been made, although she might have stated her view that the rights under it were forfeited. It is very difficult to believe she *bona fide* thought such rights were forfeited.

In her evidence, she says that when she wrote the letters of the 21st and 22nd December and sent the telegram in January accepting the offer, she thought the Chief might refuse to go out, but she considered he held at her pleasure; that if she then knew the Chief did not consider his lease cancelled, she did not think she would have mentioned the lease to Major Gough as she would have exercised her right to put the Chief out, and she was under the impression that if she mentioned she had a tenant, it was not necessary to mention the lease. We have examined the evidence carefully to see if it affords reason to believe that defendant could have acted *bona fide*, though under mistake, in not disclosing the lease during the negotiation, but we have been unable to find any such reason. She is, as the evidence shows, a lady much accustomed to the business of managing property and perfectly capable of conducting affairs according to what she considers is for her interest. There is no doubt she knew that plaintiff required the house for occupation, but she says she did not know when exactly it was required. We see no reason to doubt that in the negotiation when she wrote the letter of the 22nd December 1884, she had very good reason to believe, and did believe, that the plaintiff required the house for occupation in the hot season of 1885, and knew he would also require possession for such occupation in March or April. The conclusion we are forced to arrive at on the facts is that the defendant in such negotiation feared and believed that, if the fact of the lease was then disclosed, the plaintiff would not accept her offer or enter into a contract for purchase with her; and that, therefore, in such negotiation she wilfully abstained from informing plaintiff through Major Gough (in reply to his request for particulars) of the existence of the lease with intent to deceive the plaintiff through his agent, Major Gough, and induce the plaintiff to enter into the contract. When it suited

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[438] her interest to state that Sir F. Roberts held under lease she did so. Mr. Hamlin states that in December 1884 or January 1885 his trustee was requested to lend the defendant Rs. 30,000 on the property, and that defendant wrote him a letter (searched for and proved to be lost), in which she stated that Sir F. Roberts held a lease.

It is necessary to refer to the information, if any, which the plaintiff's agent had as to the nature of the tenancy. We think the evidence establishes that Lady Souter was authorized, as before mentioned, by the defendant to represent that the tenant of the house was only tenant-at-will, or could be put out on a month's notice. That information was given by Lady Souter in the letter before mentioned to the Nawab Sahib. Mr. Ferdunjee, Secretary to the Nawab Sahib, says the house was wanted for no other purpose than occupation in the season of 1885, and that the purchase would not have been gone into if they were aware that anything would prevent plaintiff from occupying the house in that season. He says he knew before the purchase that Sir F. Roberts was tenant at Snowdon, that the Nawab Sahib's Finance Minister had dined there with Sir F. Roberts in 1884; but he says in the letter AY from Lady Souter it was stated the tenant was tenant-at-will. He says such statement was acted on by the plaintiff's officials (agents or ministers) and that as a fact it was on Lady Souter's letters that the property was brought to their notice and action was taken in regard to the purchase of Snowdon as far as he knows. He said the principal objection to the purchase by the plaintiff was that immediate occupation could not be given.

Major Gough in his evidence referred to the negotiation by letter and stated that the house was wanted for the Nizam to live in; that he (witness) did not know that possession could not be got immediately; that he understood the reference in defendant's letter to tenant to mean a tenancy which could be terminated at will, and that he did not understand such tenancy to mean a lease; that if he was informed there was a lease, he would not have proceeded without special instructions, and would have advised the plaintiff to have nothing to do with the purchase.

Cross-examined.—Says he drew his conclusion as to tenancy-at-will from the Revenue Minister; that he does not recollect the words of the Minister, but that he concluded that the tenancy [439] could be determined to suit the plaintiff's convenience, and that had he known of the existence of the lease, he would not have sent either of the two sums of Rs. 40,000 each to Messrs. Cowdell and Co. He states that the plaintiff went to reside in Ootacamund about the middle of May 1885.

We think the just conclusion from the evidence is that the plaintiff, through his agent, entered into the contract under information conveyed to him by the defendant through her agent, Lady Souter, that he could have the house and property for occupation by him in the hot season of 1885, commencing about March or April of that year, and that the defendant, in order to deceive the plaintiff and induce him to enter into the contract, actively concealed the fact of the execution of the lease, which she was well aware had not been cancelled, but was then in existence, and that, by reason of such concealment, the plaintiff was deceived by the defendant and did enter into the contract, being induced to do so by such concealment. We think, therefore, the contract was voidable at the option of the plaintiff under the provisions of the Contract Act, Sections 17 and 19.

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Although the plaintiff could, before concluding the contract, by the exercise of ordinary diligence, have discovered that in fact the property proposed for purchase was on lease for an unexpired period of about 1½ years, and although such ordinary diligence was not used, and though, in a case within the exception to Section 19 of the Contract Act, such diligence should be used, still this was not a case within that exception, and the absence of exercise of diligence by the plaintiff is not a defence open to the defendant, as she actively concealed the fact of the execution of the lease in order to deceive the plaintiff and induce him to enter into the contract. We do not think on the evidence that the plaintiff waived his right to avoid the contract after he discovered the fraud. On the contrary he insisted that the defendant should not compel him to accept the purchase encumbered by the lease.

The payment of Rs. 40,000 to the defendant and the remittance of the further sum of Rs. 40,000 to Mr. Cowdell were made before the plaintiff or his agent was informed of the existence of the lease.

It does not appear on what date the exhibit W. was received by the Nawab from Mr. Cunningham, saying Sir F. Roberts held under lease, but on the 17th day of February 1885 Major Gough **[440]** telegraphed to Messrs. Cowdell and Co., and wrote them a letter of the same date to stay proceedings. And Messrs. Cowdell on that day wrote to the defendant declining to proceed with the purchase on the ground of the discovered evidence of the lease, and on the 19th of February 1885 Major Gough wrote to the defendant the letter, exhibit AC, enclosing copy of his letter to Messrs. Cowdell and Co. Again on the 4th March 1885 Major Gough wrote letter, exhibit AK, stating that plaintiff's Government were very much aggrieved, but offering to allow the defendant two months to procure possession. The letter stated that unless possession was given in the first week of May, the purchase would not be completed. On the 3rd of June 1885 Messrs. Cowdell and Co., by direction of the plaintiff, wrote to the defendant exhibit No. 47, that if possession was not given immediately, His Highness' Government would decline to complete the purchase and sue for Rs. 40,000.

As to the defence on the ground of notice to the plaintiffs, though Messrs. Cowdell and Co., Solicitors for both the plaintiff and the defendant, and who knew of the existence of the lease, there is the plain answer that Messrs. Cowdell and Co. did not become solicitors or agents for the plaintiff until the 2nd of February, which was several days after the contract was concluded. Therefore any notice they had of the existence of the lease could not affect the plaintiff before the conclusion of the contract. Any such notice after the contract was made was unavailing to affect plaintiff with notice before the conclusion of the contract.

As a matter of fact, Messrs. Cowdell and Co., or any of them, did not inform the plaintiff or any of his agents of the existence of the lease. The first information to the plaintiff or his agents was given by the letter from Mr. Cunningham.

We do not find any evidence of the allegation in defendant's written statement that the plaintiff, through his agent, inspected the property or any part of it with the permission of Sir F. Roberts.

On the other hand it is clear there was no contract for immediate possession. We do not, however, think that the disinclination of the plaintiff to disturb Sir F. Roberts was at all the cause why the plaintiff did not proceed with the contract.

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The plaintiff had paid part of the purchase money and had sent Messrs. Cowdell the rest of it without notice of the lease or [441] of the suppression of it; and we think there is no doubt the existence of the lease was the sole reason why the plaintiff did not execute the contract.

We think this appeal should be dismissed with costs.

11 M. 419 =. 12 Ind. Jur. 298.

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11 M. 441 = 1 Weir 210.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS *v.* KUTTI AND OTHERS. [18th July, 1888.]

Penal Code, Section 225—*Criminal Procedure Code, Sections* 59, 239, 535 *and* 537—*Arrest of thief—Rescue from custody of private person—Irregular procedure.*

To support a conviction under Section 225 of of the Indian Penal Code, it is not necessary that the custody from which the offender is rescued should be that of a police man: it is enough that the custody is one which is authorised by law:

Held, therefore, that rescue from the custody of a private person who had arrested a thief in the act of stealing was an offence.

A Magistrate tried A for theft and B and C for rescuing A from lawful custody and convicted A, B, and C in one trial.

A appealed, and B and C appealed separately. No objection was taken in the petitions of appeal to the procedure of the Magistrate:

Held, on revision, that the convictions might stand.

[R., 27 C. 839 (845) = 4 C.W.N. 656 (F.B.); 7 P.R. 1901 = 83 P.L.R. 1901.]

IN calendar case No. 6 of 1888 before the Second-class Magistrate of Kodaikanal, Kallamangalam was charged with theft, and in calendar case No. 7 Kutti Chetti and two others were charged with rescuing Kallamangalam from lawful custody. The Magistrate tried both cases together and convicted all the accused in one trial. Two appeals were preferred, one by Kallamangalam and the other by the other prisoners. None of the appellants (who appeared by the same pleader) took exception to the procedure of the Magistrate in their appeal petitions. The joint Magistrate of Madura (C. H. Mounsey) dismissed the appeal (25) of Kallamangalam, but reversed the convictions of the other prisoners (appellants in appeal No. 21) on the ground that rescue from legal custody within the meaning of Section 225 of the Penal Code did not include [442] the case of rescuing a thief from the custody of a private person who had captured the thief in in the act of stealing.

The District Magistrate of Madura referred the case to the High Court, being of opinion that the order of acquittal in appeal No. 21 was illegal, and that the procedure of the second-class Magistrate was also illegal.

The accused did not appear.

Mr. *Wedderburn*, for the Crown.

The custody of the complainant was legal—Weir, p. 125. The procedure was illegal, but Section 537 of the Criminal Procedure Code applies. The case does not fall under Section 530, and the prisoners were not prejudiced. [See also Section 239, but see *Queen-Empress v. Chandi Singh*(1).]

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* Criminal Revision Case No. 211 of 1888.

(1) 14 C. 395.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

1888 JULY 18.

APPELLATE CRIMINAL.

11 M. 441 = 1 Weir 210.

JUDGMENT.

The appellant in case No. 25 was properly convicted of theft, and we see no reason to interfere with the order made by the joint Magistrate confirming the conviction and the sentence. The order made in appeal No. 21 cannot, however, be supported. When the appellants in case No. 21 rescued the appellant in case No. 25, the latter was, in our opinion, in lawful custody. We do not consider it necessary that the custody from which a person is rescued should be the custody of a police officer to support a conviction under section 225 of the Indian Penal Code. It is sufficient that the custody is one authorised by law. Although it was irregular to try the prisoners in both cases together, we see no reason to think that they have been prejudiced by the irregularity. We set aside the order made by the joint Magistrate in appeal No. 21 and direct that the appeal be re-heard with reference to the foregoing remarks.

We decline to interfere with the order made in appeal No. 25.

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11 M. 443 = 2 Weir 238.

[443] APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS *v.* MONU AND ANOTHER.* [18th July, 1888.]

Criminal Procedure Code, Sections 4, 191 (*a*), 200, 530, *and* 537—*Third-class Magistrate taking cognizance of case on receipt of a yadast from a Revenue officer and convicting accused without examining complainant.*

A Revenue officer sent a yadast to a third-class Magistrate, charging a certain person with having disobeyed a summons issued by the Revenue officer. The third-class Magistrate thereupon tried and convicted the accused under Section 174 of the Penal Code. The District Magistrate referred the case on the ground that the conviction was bad under Section 530 (*k*) of the Code of Criminal Procedure:

Held that as the yadast amounted to a complaint within the meaning of Section (4), although the complainant was not examined on oath as required by Section 200, the conviction was not illegal.

[R., 12 Cr.L.J. 217 = 10 Ind. Cas. 156 = 11 P.R. 1911 (Cr.) = 146 P.L.R. 1911 = 32 P.W.R. 1911; P.L.R. (1900) 63 (65).]

CASE referred by S. H. Wynne, District Magistrate of South Canara.

The facts were stated as follows :—

"Two persons were in these cases convicted of disobedience to summons under Section 174 of the Penal Code.

"The cases were taken up by the Third-class Magistrate of Uppinangadi on a yadast from the Deputy Tahsildar of Beltangadi.

"Under Section 191 of the Code of Criminal Procedure, the only way in which a Magistrate is empowered to take cognizance of a criminal case is (*a*) on complaint, (*b*) on police report, and (*c*) on information or suspicion.

"Under Section 200 the complaint must be sworn to before process can issue. It is only a first-or second-class Magistrate that can be empowered to take up cases on information or suspicion (Section 191, paragraph 3), and this Magistrate only held third-class powers. His procedure was,

* Criminal Revision Cases Nos. 181 and 182 of 1888.

1888 JULY 18. — APPELLATE CRIMINAL. — 11 M. 443 = 2 Weir 238.

therefore, illegal, and under Section 530 (*k*) of the Code of Criminal Procedure his proceedings are void.

"I do not think there has been any failure of justice, but [444] Section 537 of the Code of Criminal Procedure begins 'subject to the provisions hereinbefore contained,' which I take to refer to the preceding sections of the chapter, of which Section 530 is one. Section 537 therefore does not, I believe, apply to the case. I was about also to refer to the ruling in *Queen-Empress* v. *Chandi Singh* (1): 'We do not think that Section 537, which cures errors, omissions, or irregularities, is intended to cure or does cure an absolute illegality;' but that it has occurred to me that the Madras High Court have ruled differently on the particular point in question before the Calcutta High Court (Criminal Revision Case No. 495 of 1887).

"I request that the case be submitted for the orders of the High Court."

The defendants did not appear.

Mr. *Wedderburn*, for the Crown.

The yadast is a complaint within the meaning of Section 4 of the Criminal Procedure Code. It states that the accused failed to obey the summons issued to them by a Revenue officer and requests the Magistrate to take action. The complainant was not examined on oath as required by Section 200, but Section 530 says nothing about this irregularity. The error, therefore, falls within the purview of Section 537.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

The yadast received by the third-class Magistrate from the tahsildar contained allegations made in writing with a view to his taking action under the Criminal Procedure Code, that the accused had committed an offence. Reading together Section 4 and Section 191 of the Code of Criminal Procedure, we consider that it was a complaint of facts constituting an offence punishable under Section 174 of the Indian Penal Code. The omission to examine the tahsildar under Section 200 is only an error of procedure. As the accused have not been prejudiced by the irregularity, we decline to interfere in revision under Section 537 of the Code of Criminal Procedure.

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11 M. 445.

[445] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

RAMAKRISHNA (*Plaintiff*), *Appellant v.* KURIKAL AND ANOTHER (*Defendants*), *Respondents.** [19th and 20th April, 1888.]

Transfer of Property Act, Section 136—*Purchase of elephant with authority to recover the same from a stranger.*

The owner of certain land, in consideration of a sum of money transferred to the plaintiff, a pleader, the right to elephants caught in pits in the owner's land, and the right to sue for the recovery of such elephants from any person in possession of them. The plaintiff sued the defendants to recover possession of an elephant which had been trapped and was in defendant's possession at the time of

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* Second Appeal No. 899 of 1887.

(1) 14 C. 395.

the transfer to plaintiff. The suit was dismissed on the ground that the plaintiff had bought an actionable claim within the meaning of Section 136 of the Transfer of Property Act, 1882:

Held that the section was not applicable.

[R., 18 A. 265 (F.B.).]

APPEAL from the decree of F. H. Wilkinson, District Judge of South Malabar, reversing the decree of A. Annasami Ayyar, District Munsif of Ernad, in suit No. 607 of 1885.

The plaintiff in this case was a second-grade pleader, practising in the Court of the District Munsif of Ernad, and the defendant No. 1 was an Inspector of Police of Ernad taluk, defendant No. 2 being his son.

Plaintiff sued to recover possession of an elephant and Rs. 100 damages.

The Munsif decreed plaintiff's claim for possession of the elephant and dismissed the rest of the claim.

On appeal the District Judge found that the owner of the land on which the elephant had been captured by the defendant had, in consideration of a sum of money, authorised the plaintiff "to remove by means of suits the opposition of any one who interfered with the elephant-pits on the owner's land and the elephants trapped therein and to get possession of the elephants" for himself.

[446] His judgment then proceeded as follows:—

"But can it be said that plaintiff purchased an actionable claim? I think so. The Elaya Tirumulpad acknowledges the receipt of Rs. 1,000 as the consideration for the license (paragraph 5, Exhibit F). Sale is the exchange of property for a price. Prior to the execution of Exhibit F, plaintiff had, as I have shown, no right to any elephant which fell into any pit in the Punnapula forest, whether such pit had been prepared by his agents or otherwise. The ownership of the elephant, which was trapped on the 8th November, vested in the Kovilagam. By Exhibit F the Elaya Tirumulpad, in consideration of the receipt of Rs. 1,000, transferred to the plaintiff, *inter alia*, the right to the elephant then standing in Kader's stable, and authorised him to obtain possession of it by suit. Both plaintiff and his assignor were aware that the elephant was then in the possession of the defendants and that plaintiff would have to enforce his claim by filing a suit in the Ernad District Munsif's Court. The transaction was opposed to law.

"I reverse the decree of the Lower Court and dismiss plaintiff's suit. Each party will bear his own costs throughout."

The plaintiff appealed.

Subramanya Ayyar and *Sundara Ayyar*, for appellant.

The mere transfer of ownership is not a transfer of an actionable claim within the meaning of Section 130 of the Transfer of Property Act. It could not have been meant that the subject-matter of the several chapters of this Act should be governed by this section. The mere ownership of a moveable is not an actionable claim—*Modun Mohun Dut* v. *Futtarunnissa* (1). An observation of Lord Blackburn seems to favour this view: "If property is transferred, the right to sue for it passes as an incident." It has also been held in *Makath Unni Moyi* v. *Malabar Kundapunni Nair* (2) that the owner of the land in which the pit is dug is in law the captor of the elephant if it falls into the pit.

Narayana Rau, for respondents.

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(1) 13 C. 297.

(2) 4 M. 268.

1888 APRIL 20. — APPELLATE CIVIL. — 11 M. 445.

The Court (COLLINS, C.J., and SHEPHARD, J.) delivered the following

JUDGMENT.

This suit is brought to recover an elephant of which the defendants are in possession, having captured it on the land belonging to the Kovilagam. It is found by both Courts that **[447]** the defendants have no right to the elephant, inasmuch as the licenses under which they claim were given by one who had long previously been dismissed from the management of the Kovilagam property.

The plaintiff claims under a document dated the 10th November 1885, which, while giving him the liberty to trap elephants, appears to vest in him the property in the particular elephant now in dispute. The ownership in the elephant, originally in the Kovilagam, was transferred to the plaintiff, and as the transfer was made for good consideration, the transfer was by way of sale. The only ground on which the suit was dismissed was that the transaction was vitiated by Section 136 of the Transfer of Property Act, inasmuch as the plaintiff is a pleader in the District Munsif's Court. We cannot agree with the District Judge in thinking that there has been a transfer of an actionable claim in this case. The thing transferred was moveable property belonging to the grantor, though not actually in his possession. No doubt by acquiring ownership in the elephant, the plaintiff acquired the right to sue for its recovery, but he acquired that right of action only as incidental to his right of ownership. It has been held with regard to Section 135, in which the same phrase "actionable claim" is used, that the section does dot affect cases in which there has been a transfer of ownership of immoveable property by an owner not in possession at the time, *Modun Mohun Dut* v. *Futtarunnissa* (1). The same reasoning must apply to a transfer of moveable property. We concur with that decision and hold that the plaintiff was not the transferee of an actionable claim so as to be affected by the provisions of Section 136.

We must, therefore, reverse the decree of the Distirct Judge and restore that of the District Munsif.

The plaintiff must have his costs throughout.

The memorandum of objections is dismissed with costs.

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11 M. 448.

[448] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

BALAYYA (*Defendant No.* 1), *Appellant v.* KISTNAPPA (*Plaintiff*), *Respondent.* [28th February and 15th March, 1888.]

Madras Civil Courts Act, 1873, *Section* 16—*Suit by reversioner to recover land granted to Hindu widow—Presumption as to death of widow from absence, not question of succeession or inheritance.*

Plaintiff sued as reversioner to recover certain land granted in lieu of maintenance to a Hindu widow. The widow had left her village 16 years before suit and had not been heard of since :

Held, that the question whether a presumption arose that the widow was dead was not a question regarding succession or inheritance to be decided according

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* Second Appeal No. 700 of 1887.

(1) 13 C. 297.

to Hindu law within the meaning of Section 16 of the Madras Civil Courts Act, 1873.

1888 MARCH 15.

APPELLATE CIVIL.

11 M. 448.

PLAINTIFF, as reversioner, sued in 1885 to recover certain land which had been granted by his deceased father to one Laksmakka for maintenance. The land was in possession of the defendant who had purchased it in execution of a decree obtained against Laksmakka in 1873. It was found by the Munsif that Laksmakka had not been heard of since 1870, she having gone on a pilgrimage. The Munsif held that under Hindu law as Laksmakka was 30 years old when she left her village, 20 years must elapse before she could be presumed to be dead. He cited *Parmeshar Rai* v. *Bisheshar Singh* (1), in support of the proposition that the question was to be governed by Hindu law and not by the Evidence Act, Section 108. The suit was dismissed as premature. On appeal the District Judge held that under Hindu law 12 years was the period and not 20 years. He cited *Janmajay Mazumdar* v. *Keshab Lal Ghose* (2); *Guru Das Nag* v. *Matilal Nag* (3); and *Parmeshar Rai* v. *Bisheshar Singh*. The period fixed by the Evidence Act, Section 108, being less than 12 years, the decree was reversed and a decree was given for plaintiff.

[449] Defendant appealed.

Ramachandra Rau Saheb, for appellant.

Bhashyam Ayyangar, for respondent.

The Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

The land in dispute was given by the respondent's father to his stepmother Laksmakka to be enjoyed by her during her life on account of her maintenance. Laksmakka went on a pilgrimage and she had not been heard of for 16 years when the present suit was brought. In July 1873, the appellant purchased the land in suit in execution of a money-decree which he had obtained against her. The respondent claimed the land on the ground that Laksmakka was dead and that it reverted to him. The appellant resisted the claim. There was no evidence as to whether Laksmakka was really alive or dead. It is found that she was about 30 years of age when she left her village. The District Munsif held that no presumption of death could arise under Hindu law before the expiration of 20 years and dismissed the suit; but on appeal the District Judge observed that 12 years was the period necessary to raise a presumption of death under Hindu law and decreed the claim. The contention in second appeal is that a period of 20 years is necessary under Hindu law to raise a presumption of death. It is urged for the respondent that the question raised for decision is not one of succession, and that it is not governed by Hindu law under Section 16 of Act III of 1873.

That section provides that where in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Hindu law shall form the rule of decision in cases in which the parties are Hindus.

We are of opinion that the present case is not one of inheritance or succession, and the question raised for decision relates to the right of reversion under the terms of a grant, and is one rather of contract than of succession or inheritance. The decision of the District Judge is right, and we dismiss this second appeal with costs.

(1) 1 A. 53. (2) 2 B.L.R. A.C. 134. (3) 16 B.L.R. App. 16.

1888
MARCH 27.

APPEL-
LATE
CIVIL.

11 M. 450.

11 M. 450.

[450] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SRINIVASA (*Defendant No.* 4), *Appellant v.* TIRUVENGADA AND OTHERS *(Plaintiffs), Respondents.** [12th and 27th March, 1888.]

Civil Procedure Code, Section 11—Right to an office in a temple.

Plaintiffs sued for an injunction to prevent defendant from interfering with their right to present to certain persons at a certain festival in a certain temple a crown and water. The lower Courts found that plaintiffs possessed the right claimed and granted the injunction.

Held, that the suit was cognisable by a Civil Court under Section 11 of the Code of Civil Procedure, and that the injunction was properly granted.

[R., 32 A. 527 = 7 A.L.J. 529 (541) = 6 Ind. Cas. 223; 23 B. 122 (128); 11 M.L.J. 215 (223); D., 26 B. 174 (185) = 3 Bom. L.R 718; 2 M.L.J. 83 (86); 3 N.L.R. 131 (134).]

APPEAL from the decree of W. F. Grahame, Acting District Judge of Trichinopoly, confirming the decree of A. Kuppusami Ayyar, District Munsif of Trichinopoly, in suit No. 67 of 1885.

Plaintiffs sued for a perpetual injunction restraining defendant No. 4 (appellant) from interfering with them in the exercise of their hereditary right to distribute water and a gold crown to certain persons at a certain festival in a certain temple at Srirangam. They claimed Rs. 5, damages for loss of dignity and power, and one anna eight pice damages for loss of boiled gram.

The Munsif dismissed the claim for damages, but granted the injunction.

Both parties appealed.

The District Judge dismissed the plaintiffs' appeal as to loss of dignity, because the claim could not be assessed in money, and as to the loss of gram, because, being only 2 pice in value, *de minimis non curat lex.*

He also dismissed the appeal of defendant No. 4.

Defendant No. 4 appealed to the High Court, and plaintiffs filed objections to the decree *quoad* the claim for gram.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

[451] *Pattabhiramayyar, Sadagopacharyar* and *S. Subramanya Ayyar*, for appellant.

Parthasaradhi Ayyangar, for respondents.

JUDGMENT.

The first point contended is that the claim is not one for an office, but for a mere honor and dignity, and is, therefore, not one for which a suit will lie in a civil Court.

The Courts below have found that plaintiffs have established their claim to the *hereditary office* mentioned in the plaint. But it was also found that the pecuniary benefit said to be attached to the office and to consist in the money-value of some cooked Bengal gram was the result of voluntary offerings made by worshippers and was not a pecuniary benefit in the nature of wages payable from the income of the temple. The office itself was

* Second Appeal No. 174 of 1887.

found to consist in distributing sacred water and serving the gold crown to the adyapakals during a particular festival.

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The ordinary test is whether there is any specific pecuniary benefit attached to the office claimable in the nature of wages, however small that benefit may be. If there be, the right to such benefit is a question which the Courts are bound to entertain—*Narasimma Chariar* v. *Sri Kristna Tata Chariar* (1). This same principle was approved by the Privy Council in *Krishnama* v. *Krishnasami* (2).

This case came again before the High Court—*Krishnasami* v. *Krishnama* (3). It was there held that where the right to a particular office in a temple (there the recital of certain verses in a religious service) is established, the right should be protected by processual remedies, even though no loss of specific pecuniary benefit be established. (See I.L.R., 5 Mad., 318, 319).

In support of this contention the appellants' pleader quoted the following cases:—*Narayan Vithe Parab* v. *Krishnaji Sadashiv* (4), *Rama* v. *Shivram* (5), *Shankara Bin Marabasapa* v. *Hanma Bin Bhima* (6), *Karuppa* v. *Kolanthayan* (7), but in all these cases the claim was for a mere honor or dignity, or else for damages caused by loss of voluntary offerings.

The case recently decided in the High Court at Calcutta—*Mamat Ram Bayan* v. *Bapu Ram Atai Bura Bhakai* (8)—is very **[452]** similar to the present, and it was held that a suit for the establishment of a right to an hereditary office, such office being a trust for the performance of particular duties in a temple, would lie under Section 11 of the Code of Civil Procedure, even though the right to be established brought no profit to those claiming it.

We are, therefore, of opinion that the suit is maintainable.

It was next urged that the suit is not one in which a perpetual injunction could properly be granted. It is found, however, that the plaintiffs have a status in the temple as holders of a certain hereditary office, and when that status is violated, they are entitled to be protected by such processual remedies as are available in the circumstances of the case, even though no legal dues or damages are payable to them. The decision in second appeal No. 664 of 1887 turned upon the special circumstances of that case, and is not inconsistent with this view.

Taking this view, we are of opinion that the second appeal must fail, and we dismiss it with costs. The memorandum of objections is also dismissed with costs.

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11 M. 452.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

SESHAGIRI (*Plaintiff*), *Appellant v.* PICHU (*Defendant No.* 4), *Respondent.** [27th October and 27th December, 1887.]

Revenue Recovery Act, 1864, *Section* 35—*Contract Act, Sections* 69, 70—*Right to contribution where part owner pays revenue due on whole estate to save his own interests.*

In 1881 while the patta of certain land held on raiyatwari tenure stood in the name of defendant No. 1, the real owner being defendant No. 2, the revenue fell

* Second Appeal No. 43 of 1887.

(1) 6 M.H.C.R. 449. (2) 2 M. 62. (3) 5 M. 315. (4) 10 B. 233. (5) 6 B. 116. (6) 2 B. 470. (7) 7 M. 91. (8) 15 C. 159.

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into arrear. Subsequently plaintiff and defendant No. 3 each bought a portion of the land, and defendant No. 3 sold his portion to defendant No. 4. After this, the land in plaintiff's possession was attached for the said arrears of revenue, and plaintiff paid the whole amount to prevent a sale. Plaintiff sued to recover from defendants 1 to 4 a portion of the arrears paid by him. He also prayed that the land in the possession of defendant No. 4 might be held liable.

The claim was decreed, but on appeal by defendants 3 and 4, the suit was dismissed as against them.

[453] Plaintiff appealed making defendant No. 4 alone respondent :

Held, that plaintiff was entitled to a decree for contribution against defendant No. 4 and to a charge on the land in his possession.

[F., 17 M. 247 (249) ; 26 M. 686 (F.B.) ; R., 24 M. 96 (108) ; 34 M. 520 (525) = 9 Ind. Cas. 643 = 21 M.L J. 662 = 9 M.L T. 367 = (1911) 1 M.W.N. 257 ; 19 M.L.J. 275 (279) = 4 M.L.T. 469 ; D., 15 M. 258 (259).]

APPEAL from the decree of V. Srinivasacharyar, Subordinate Judge at Negapatam, reversing the decree of V. Malhari Rau, District Munsif of Mannargudi, in suit 366 of 1885.

Plaintiff sued to recover Rs. 85-9-0 and interest thereon from defendants 1 to 4 and for a decree in default of payment against certain land in the possession of defendant No. 4.

The Munsif decreed the claim. Defendants 3 and 4 each appealed and the suit as against them was dismissed.

Plaintiff appealed making defendant No. 4 only respondent.

The facts of this case are fully set out in the judgments of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.).

Rama Rau, for appellant.

Subramanya Ayyar, for respondent.

JUDGMENTS.

KERNAN, J.—Whether the plaintiff is entitled to contribution from defendant No. 4 with a right to recover the amount from the lands in that defendant's possession does not depend on the provisions of the Act II of 1864 as decided by the Subordinate Judge. That Act, Section 35, relates to the rights of persons having interest in land as against the "defaulter," *i.e.*, the tenant to Government.

Defendant No. 4 is not a "defaulter" within that Act. Section 69 of the Contract Act does not provide for this case.

The plaintiff's case is founded on the equitable principle that equality is equity and that he who had the advantage should bear the burden. Defendant No. 1 owned 7 velis of land subject to rent to Government. Plaintiff was the mortgagee of 4 velis, $3\frac{5}{25}$ kulis of that land from the defendant No. 1 and in suit No. 108 of 1882 plaintiff bought the interest of defendant No. 1 therein.

Defendant No. 3 in June 1882 purchased the interest of defendant No. 1 in velis 4 and odd, the residue of the 7 velis. Defendant No. 4 purchased from the defendant No. 3 on the 1st July 1882. For recovery of arrears of Government kist due by defendant No. 1 for fasli 1291 (1st July 1882), the whole 7 velis, including the 4 velis mortgaged to the plaintiff, was attached and was about to be sold, and the plaintiff in order to save his interest in the land paid off, on the 6th October 1882, Rs. 191-3-1 to Government, being the arrear on the whole 7 velis. The rent [454] due to Government is the first charge on all the land demised by the patta held by defendant No. 1, and Rs. 85-9-0 is the share of that rent which the land of defendant No. 4 ought to bear if plaintiff is entitled to recover contribution.

The lands of defendant No. 4 and of the plaintiff are both liable to a common burden, neither of them can get his land free from the claim for the revenue without paying the amount due on the whole lands. *Secretary of State for India* v. *Narayanan* (1). It would be against equity and good conscience that the common burden should be thrown exclusively on either lot of land or on either of the parties. This subject was much discussed by a Bench of five Judges in Calcutta, *Kinu Ram Das* v. *Mozaffer Hosain* (2). In that case many authorities were considered, and by a majority of three Judges to two it was decided that a plaintiff in the same position as the plaintiff here was not entitled to a decree that the lands of the defendant were subject to a charge to repay the defendant's share of the common liability for rent paid by plaintiff. I agree with the opinion of the minority for the reasons expressed by Mr. Justice Mitter in his judgment. I wish to add that *Harbert's Case* (referred to in Section 477, Story) is an authority that in case of persons liable to payment of a common burden affecting their lands, the lands of one alone shall not be liable. In that case it is said "when two or more are bound on a recognisance or statute each is bound in the whole, yet the land of one only shall not be excluded." Further it is said "so it appears by those cases that when land shall be charged by any lien, the charge ought to be equal and one alone should not bear all the burden, and the law on this point is grounded in great equity." It is there pointed out that the remedy is by common law writ. The same principle applies to this case, but the remedy given by a Court of Equity is different and more effectual. Story, Section 477, instances the case of a man owning several acres of land subject to a lien and who aliens one part of the land to each of three people. In that case, he says, if one man is compelled to pay the debt in order to save his land, he shall have contribution from the other alienees. See also Story, Sections 483—484. In *Swain* v. *Wall* (3), Chief Baron Eyre says, "If we take a view of the case both in Law and Equity, we shall **[455]** find that contribution is bottomed and fixed on general principles of justice." The observations of Story were not confined to mere personal claim against the party sued for contribution.

The argument that the transfer of the land to plaintiff was not registered is beside the question. *Mangamma* v. *Timmapaiya* (4). I would reverse the decree of the Lower Appellate Court so far as regards defendant No. 4, the respondent, with costs and the costs of this appeal and restore the decree of the Munsif.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. The contest in this second appeal has reference to the liability *inter se* of two part owners of land held under one patta on the raiyatwari tenure in respect of arrears of revenue due upon it. The first defendant owned 7 and odd velis of land in the Devadanam village in the district of Tanjore. The land was registered in the Collector's books in the name of defendant No. 2, the mother of defendant No. 1, and the patta was issued in her name. On the 22nd December 1882, the plaintiff purchased 4 and odd velis out of 7 and odd velis in execution of a mortgage decree which he obtained in O. S. 108 of 1882, and he has since been in possession of the same. In February or March 1882 defendant No. 3 purchased 3 and odd out of 7 and odd velis of land in execution of a money decree which he obtained against defendant No. 1 in O. S. 215 of 1881 on the file of the Court of First Instance.

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(1) 8 M. 130. (2) 14 C. 809. (3) 1 Ch. Rep. 149. (4) 3 M.H.C.R. 134.

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In July 1882 defendant No. 3 resold 3 and odd velis which he had purchased to defendant No. 4 and placed him in possession. On the 6th October 1882, the sum of Rs. 191-3-1 was due to Government for arrear of revenue payable on the entire holding, and in view to its realisation 7 mas and 81½ kulis out of 4 and odd velis purchased by the plaintiff was placed under attachment in order that the same might be sold under Act II of 1864. To prevent the impending sale, the plaintiff paid the whole arrear, of which Rs. 85 represented the proportion due on the 3 and odd velis purchased by defendant No. 3 and resold to defendant No. 4. Thus in October 1882 when the plaintiff paid the arrear of revenue, defendant No. 2 was the mirasidar or the registered holder, defendant No. 3 was the prior owner, and defendant No. 4 the then owner of 3 and odd velis of land; the plaintiff was the owner of 4 and odd velis, of which a part was attached under [456] Act II of 1864, and defendant No. 1 was the prior owner of the entire holding and one who had beneficial enjoyment of the produce of the land in fasli 1291 for which year the arrear became due.

The plaintiff's case was that Rs. 85 was a debt payable by defendants Nos. 1 to 4, and that it was a charge on the 3 and odd velis in the possession of defendant No. 4 There was no express contract between the plaintiff and the defendants in regard to the payment made by him, and the District Munsif considered that his decision must rest on Section 35, Madras Act II of 1864, and Sections 69 and 70 of the Contract Act, 1872. Applying those provisions of law to the facts stated above, he came to the conclusion that the amount claimed by the plaintiff was a charge on the land in the possession of defendant No. 4, and that defendants Nos. 1—3 and 4 were also personally liable, because there was an implied promise on their part to repay what the plaintiff was compelled by law to pay for their benefit and decreed the claim making defendants 1—3 and 4 personally liable, and declaring the 3 and odd velis of land in the possession of defendant No. 4 liable to be sold in default of payment. From this decree defendants Nos. 3 and 4 appealed, and the Subordinate Judge exempted them and the land claimed by them from all liability. From this decision the plaintiff has preferred this second appeal.

Defendant No. 3 has not been made a respondent to this appeal, and the decree of the Subordinate Judge is not therefore open to revision so far as it relates to him.

Nor is the decree liable to be revised so far as it relates to the defendants Nos. 1 and 2, for there was no appeal from that portion of the decree of the District Munsif which was against them to the Subordinate Court. The contest in this appeal is then confined to the liability of defendant No. 4 and of that portion of the holding which he had purchased. The special law applicable in this Presidency to the recovery of arrears of revenue is Act II of 1864, and it was urged by the appellant's pleader that Section 35 of that enactment was not applicable, because the appellant was neither a mortgagee nor a tenant and had no interest in the land in respondent's possession which was neither attached nor about to be attached. He contended also that Sections 69 and 70 of the Contract Act were likewise inapplicable.

Act II of 1864 defines first a land-holder and declares that the [457] land is security for the public revenue. It then declares when the revenue is payable every year by the land-holder, when it is to be treated as being in arrear, and that the land-holder is the real defaulter. Section 5 declares the defaulter's person and property, moveable and immoveable, responsible

for the arrear. Section 40 directs that the land brought to sale for arrears of revenue shall be sold free of all incumbrances, and Section 35 declares it lawful for any person claiming an interest in land which has been or is about to be attached to obtain its release by paying the arrears, and that if he is a *bona fide* mortgagee or other incumbrancer on the estate, the payment made by him shall constitute a debt from the defaulter to him and shall be a charge upon the land, but shall only take priority over the other charges according to the date at which the payment was made. In this connection it is also desirable to refer to Regulation XXVI of 1802 which makes the registered holder liable at the instance of Government so long as the registry stands in his name. Now as to the liability of defendant No. 4 and of the land purchased by him for the proportion of the arrear due thereon, it seems to me there can be no doubt. As I read Act II of 1864 and the prior Regulations which were consolidated by it, the arrear of revenue is a debt due by the real owner of the land and it is a charge on the whole and every part of the holding registered as one estate for purposes of revenue. As to registered holders they and their property are declared liable at the option of Government in order that Government may not be hampered on the collection of revenue by being compelled to hold a complicated enquiry as to real ownership on each occasion when the revenue is in arrear. The right which the Government has to proceed against the registered proprietor does in no way alter the liability of the real owner or of his holding for the arrear of revenue. The contention therefore between two real part owners that neither of them was the defaulter within the meaning of the Act cannot be supported. The reason is that the revenue is a debt due by the real owner and a charge on the holding, and that the registered holder who might not be the actual proprietor when the arrear accrued due is declared liable as an additional facility towards the realization of revenue by officers of Government. The legal relation then between the appellant and the respondent is that of two part owners of land held on raiyatwari tenure under a single patta subject to a joint burden. **[458]** So long therefore as they choose to hold under one patta, they do so with the knowledge that either of them or his portion of the holding is liable at the instance of Government for the arrear due on the entire holding or any portion of it. It follows that when either is thus compelled to pay the whole arrear by the attachment of his portion of the holding, the payment made by him so far as it relates to the arrear due by the other part owner on his own portion of the holding is one made under compulsion of law for his benefit and in satisfaction of a charge on his portion. The respondent who bought his 3 and odd velis subject to the statutory charge thereon for arrear of revenue and to the incidents of a joint holding is in the same position in which a principal debtor who is primarily liable for a debt stands in regard to his surety, and he is therefore clearly liable in a suit for contribution. Again his quota of arrear was a charge on his portion of the holding, and the appellant who paid it under compulsion of law and freed it from the statutory burden must be taken, in the absence of a special contract, to have intended to preserve the charge for his benefit. I do not see why a party who liquidates a statutory charge under compulsion of law ought to be treated differently from a person who advances money to satisfy a prior mortgage intending to preserve the security for his benefit. The only distinction between the two cases seems to me to consist in this, namely, the one the intention is a question of fact to be determined with reference

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to the circumstances of each case as ruled by the Privy Council, whilst in the other it is a matter of legal inference. In *Gokul Doss Gopal Doss* v. *Rambux Seochand* (1) the Judicial Committee say in advertence to the payment of a prior charge or mortgage, "The doctrine of *Toulmin* v. *Steere* (2) is not applicable to Indian transactions. The obvious question to ask in the interest of justice, equity and good conscience is what was the intention of the party paying off the charge. He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest." As to Section 35 on which much stress was laid by the appellant's pleader, it is **[459]** true that the land in respondent's possession was not attached or about to be attached and that the appellant had no interest on it. But it must be remembered that that section is not exhaustive and that it gives effect to two rights mentioned above, namely, the right to claim contribution and the right to treat the amount to be contributed as a charge subject, however, to the condition that the charge shall not prevail against prior incumbrances in cases in which the person paying the arrear does so to protect his own interest in land actually under attachment or about to be attached. The case before us is similar in principle and it is governed by the rule of equity and good conscience, if not by Section 35. The part owner made the payment not only to protect his own land but also because he was legally compellable to make the payment by reason of the joint holding. As to the case *Kinu Ram Das.* v. *Mozaffer Hosain Shaha* (3), I am inclined to agree with minority of the learned Judges who decided it, and Act II of 1864 is further not in force in Bengal. I am of opinion that the decree appealed against should be set aside and that of the District Munsif restored with costs throughout so far as it relates to defendant No. 4, respondent.

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11 M. 459=12 Ind. Jur. 335.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

VOLKART BROTHERS (*Defendants*), *Appellants v.* VETTIVELU NADAN AND ANOTHER (*Plaintiffs*), *Respondents.**
[20th December, 1887 and 27th April, 1888.]

Sale—Exchange—Trade usage, Proof of—Contract Act, Sections, 49, 77, 92, 151.

According to mercantile usage in the cotton trade in Tuticorin, where a dealer delivers cotton to the owner of a cotton press, not in pursuance of any special contract, the property in the cotton vests in the owner of the cotton press who is bound to give the merchant in exchange cotton of like quantity and quality:

The transaction is not a sale but an agreement for exchange:

Where therefore cotton thus delivered was accidentally destroyed by fire:

Held, that the loss fell on the owner of the press.

[F. 25 B. 696 (698)=3 Bom.L.R. 384; R., 3 L.B.R. 41; 1 O.C. 75 (77).]

[460] APPEAL from the decree of K. R. Krishna Menon, Subordinate Judge at Tinnevelly, in suit 21 of 1884.

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* Appeal No. 100 of 1886.

(1) 11 I.A. 126 (133). (2) 3 Mer. 210. (3) 14 C. 809.

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The facts necessary for the purpose of this report appear from the judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.).

The Acting Advocate-General (Mr. *Spring Branson*), for appellants.

Subramanya Ayyar, for respondents.

[After stating the pleadings the Judgment proceeded as follows:—]

JUDGMENT.

The contest in this case is whether the defendants are liable to pay the plaintiffs the value of 352 candies and 265 pounds of cotton alleged to have been delivered in excess of other cotton contracted for and delivered.

The first issue was whether the excess quantity of cotton called "over-delivery cotton" was delivered by the plaintiffs to the defendants or to the Press Company. We agree with the Subordinate Judge, for the reasons given by him, that such delivery was made to the defendants by the plaintiffs.

The second issue raises the question whether the over-delivery cotton was sold to the defendants by the plaintiffs or whether the property in such cotton ceased to be the property of the plaintiffs before the fire.

The contract cotton delivery was finished on the 4th of July 1884, and delivery of excess cotton made after that on different days up to and on the 30th July 1884.

The evidence for the plaintiffs uncontradicted by any evidence for the defence establishes that the plaintiffs had, prior to 1884, supplied cotton to the defendants on contract, and had also, according to the custom prevailing in Tuticorin between dealers and merchants, delivered, in excess of such contract, other cotton; and that the over-delivery of cotton was made in July 1884 according to the manner of former deliveries, and that the defendants through their agent, before accepting delivery, had such cotton examined outside the walls of the compound where their office was, and, when it was approved of, it was marked with a stamp on the cover of the bundles and moved through the gates inside the walls of the compound and taken charge of by the defendants.

The plaintiffs or any one on their behalf did not give any evidence of any special agreement between the parties as to the purpose for which, or of the terms on which, such excess cotton [461] was delivered to the defendants. The defendants allege that dealers bring such over-deliveries when they do not know where to warehouse their cotton not on contract, and that such over-deliveries are allowed as a matter of favour for the convenience of dealers, the cotton remaining entirely at their risk. But the defendants have given no evidence to support such allegation.

The plaintiffs' case is that the dealing between the plaintiffs and defendants in respect of such over-delivered cotton was subject to a usage of trade existing at Tuticorin in respect of over-deliveries.

If such usage of trade at Tuticorin is proved distinctly and if it is not inconsistent with any special contract between the parties in respect of such over-deliveries, it, according to the English Law, binds the parties. See Smith's Leading Cases, 6th Edition, 549—551, notes to *Wigglesworth* v. *Dallison*. In Chitty on Contracts, page 58, 8th Edition, it is stated that Lord Ellenborough decided that "if there be an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such custom or usage has reference a promise for the benefit of the other party in conformity with such usage or custom, provided, that is, there be no express stipulation between them

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which is inconsistent with such usage. To be binding, however, such usage must be uniform and universal, but when such invariable usage is proved, it is to be considered as the basis of the contract between the parties and their respective rights and liabilities are held to be precisely the same as if without any usage they had entered into a special agreement to the like effect." In *Ghose* v. *Manikchund* (1) Sir J. Coleridge in giving judgment says: "It remains now to consider the other ground on which plaintiff relied—the evidence of mercantile usage. To support such a ground there needs not either the antiquity, the uniformity or the notoriety of custom which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case, but in the result it is enough if it appear to be so well-known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." The usage must be **[462]** shown to be certain and reasonable and so universally acquiesced in that everybody in the particular trade knows it or might know it if he took the pains to enquire.

The parties plainly meant by the delivery and acceptance of the over-delivery cotton that there was some unexpressed agreement between them in reference to parts of an implied contract and they both with free consent so acted. We see nothing in the Contract Act to prevent the usage of trade known to both of them being adopted as the basis of their agreement or implied contract.

We do not find that the Contract Act refers expressly to contracts being qualified by the annexation of incidents by usage of any particular trade or place. Section 49 of the Evidence Act allows evidence of the opinion of third parties to be given when the Court has to form an opinion of the usages of any body of men. Section 92, proviso 5, admits parol evidence of usage or custom by which facts not expressly mentioned in any contract are usually annexed; such usage is of course usually annexed to trade contracts. It seems to us to be also according to equity and good conscience to allow such usage of trade known to both parties to be admitted in explaining the meaning of their acts when no special agreement in respect of the subject to which the usage applies was proved.

It is necessary to state, before referring to the evidence of usage of trade, that the defendants do not appear to have personally carried on trade in Tuticorin, but that they carried on the trade of merchants by agents appointed for that place, and that in the years 1883 and 1884 prior to and in July of that year Mr. Ebeling was the agent of the defendants and manager of this business there, and such business was carried on in certain buildings and other premises belonging to a company called the Volkart United Press Company. That company was registered as a Limited Company in Bombay, but was entirely separate from defendants' company. That company had a press in their building for pressing cotton, and the defendants used for several years to get cotton in their possession, whether purchased by them or held as over-delivered cotton, pressed there. Mr. Ebeling was agent of the Press Company. The evidence proves that there are several merchants at Tuticorin who also have cotton presses which they use to press cotton. On the 30th of July a fire took place in the building of the Press Company when the cotton press and the plaintiffs' **[463]** over-delivered cotton or a very large part thereof was burned and plaintiffs sue to recover the value of the whole over-delivery.

(1) 7 M.I.A. 263 (282).

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The defendants allege that twenty-two bundles were uninjured and were tendered to the plaintiffs. The evidence for the plaintiffs as to the alleged usage of trade is as follows:—

Mr. J. Milligan, a cotton merchant at Tuticorin for 13 or 14 years, says: "When loose bundles are examined at the gate, those that are accepted are stamped and taken inside the compound. Such accepted bundles are afterwards pressed at our convenience. After being pressed they are marked with the initials of the names of the persons to whom they are to be shipped. But no marks are put with reference to the names of the dealers. When cotton is once accepted and stamped it is kept at our risk. After pressing, all the bales are put in one heap. The different dealers' names cannot then be known. After cotton is once accepted and stamped we deal with it as we like. And we ship it without the slightest reference to the dealers. This I speak with reference to my own firm. We would also at any time advance money on over-delivery cotton. After cotton is once examined and stamped at the gate, I understood it is under our control. I have always understood that this is the custom prevailing all over Tuticorin. We had three or four fires during the last 13 years in our Press office alone, and in all those cases we paid in full the value of the cotton accepted by us. My Press office is not distinct from our firm. I know also Volkart United Pressing Company (Limited). This is distinct from the Volkart Brothers. Mr. Ebeling was the agent of both the companies. Now another gentleman is come, I believe, in the same capacity. But I have no knowledge of it. In the case of over-delivery cotton the dealers take their own time to settle the price. Sometimes we ask them to settle the price within a month or two. Even then they take their own time and we can't compel them. But we don't keep that cotton until the settling of the price. We ship it at our convenience. Cotton once accepted and stamped would not be bought by other firms in unpressed state. In case of over-delivery cotton after it is pressed it is within the right of the dealer to sell it to other firms after paying the pressing charges. He can carry them off and do with it as he likes, Mr. Ebeling was, I think, in Tuticorin for 5 years as the agent of both the firms mentioned above.

Cross-examined.—We have three kinds of transactions in [464] respect of cotton—(1) For ready-money purchase or on contract; (2) taking cotton on consignment; (3) receiving over-delivery cotton. The price of the over-delivery cotton is settled with reference to the market price at the time of settling and not according to the contract price. The time of settlement depends upon the will of the dealer. The European merchants will offer a certain price. When both don't agree there will be no settlement. Cotton contracts are always reduced to writing, and the contracts are regularly numbered and filed. Sometimes the contracts are made verbally and sometime afterwards they are reduced to writing. Whether I am to make advance upon over-delivery cotton or not depends upon my own will. Dealers never got back from us the cotton that is once sold to us. But in case of over-delivery cotton they may take it back. Whether I purchase the over-delivery cotton or not is a matter entirely left to my own option.

Re-examined.—In the case of written contracts the price of cotton is always fixed. But in the case of over-delivery cotton it is not settled. Sealing and stamping simply denotes that we have approved of the quality of the cotton delivered. The cotton delivered may be in fulfilment of the contract or over-delivery cotton.

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[After setting out the evidence given by other witnesses, the judgment proceeded as follows:—]

The plaintiffs gave no further evidence either as to the usage of trade at Tuticorin or the usage of the defendants on the subject of over-delivery. The only witness who gave express evidence as to the usage of trade at Tuticorin, in respect of the liability of a merchant who accepts possession of over-deliveries, was the first witness J. Milligan, who, speaking of over-deliveries accepted and stamped and brought inside the compound, says, "when cotton is once accepted and stamped it is kept at our risk." Again he says, "after cotton is once examined and stamped at the gate, I understand it is under our control. I have always understood this is the custom prevailing all over Tuticorin. We had 3 or 4 fires during the last 13 years in our Press office alone, and in all these cases we paid in full the value of the cotton accepted by us."

The fourth witness, a broker, states that there was a fire at Milligan's, that loss was sustained and Milligan paid the loss, and that it is the custom of the village. He says he speaks the custom [465] of the village as spoken amongst merchants of the village, that he does not know of any one who sustained loss and did not pay the damages.

The evidence of this witness is inaccurately given, the language is not clear, and cannot safely be much relied on. The second witness, speaking of cotton brought to his godown and accepted, says, "All cotton that is accepted and stamped is under our control. If it is in fulfilment of contract it is at our risk, and if it is over-delivery then also we are responsible."

The third witness, agent of Gaddum Bythell, says, "we take deliveries of over-delivery cotton if we are satisfied with it and stamp it. The cotton then remains at our risk. We make no charge for insuring it."

Neither of these two witnesses expressly purports to speak of the usage of trade except his own usage. But they are in the trade at Tuticorin and usage of trade may be proved by multiplying instances of usage of different merchants if it appears to be the same as that of other merchants. It does not appear how many merchants deal in the trade in Tuticorin. It appears that the defendants insured the goods in the buildings at Rs. 50,000, and moreover the fifth witness, one of defendants' witnesses, says that Mr. Ebeling, the defendants' agent, had at the time of the fire in July over-delivered cotton in the defendants' possession and was paid therefor out of the 50,000 received for the mortgage money by the defendants; the same witness says that Subba Pillai had likewise over-delivery cotton in the defendants' premises at the date of the fire and which was burnt, and that a sum was paid on account of defendants to him after the loss of the cotton and deducting an advance.

The sixth witness, who has been employed by the defendants for 20 years and is still employed by them, says that in his experience during 20 years cotton caught fire on three occasions and money was paid therefor —that the manager received the amount from the Insurance Company and paid it to the owner of the cotton. He says that cotton of Ebeling and Subba Pillai was burnt and was paid for on account of defendants, but he does not know whether such cotton was included in the insurance.

The evidence of these two witnesses, though not very precise or quite accurate, shows with reasonable certainty that when losses took place by reason of fire in the defendants' premises, the [466] owners of over-delivered cotton were paid on account of the defendants for the loss. If the payment to owners of over-deliveries so made were made

under any special circumstance, the defendants should have proved the circumstance.

The defendants have given no evidence whatever to disprove the usage of trade or to explain the evidence of payment in their account of over-delivery cotton to the owners on loss arising by fire in their premises. We think that the evidence may properly be taken as certain and reasonable and as acquiesced in by the defendants, that the merchant is, in the case of over-delivery, liable to pay the owner for loss caused by fire while the cotton was in his possession.

The plaintiffs contend that the defendants are liable as bailees, even though no such usage of trade at Tuticorin was proved. Assuming the defendants were bailees, there is no evidence to prove that defendants did not take as much care of the over-delivered cotton of the plaintiffs as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quantity and value as the goods bailed—Section 151, Contract Act. The cotton goods of the plaintiffs, their own property by purchase, were in the same place where the defendants' goods were when the fire took place, and that place was the ordinary and usual place for such goods both of the plaintiffs and of the defendants to be in at the time the fire broke out. The evidence on both sides leads me to conclude that the fire was the result of the accident by reason of some stones in the cotton being crushed by the wheels of the press machine which produced sparks which set the cotton on fire. The defendants appear to have insured their own goods in the premises against fire; and assuming they did not in like manner insure the plaintiffs' goods, we do not see that their omission to do so proves that the defendants did not take such care of plaintiffs' goods as is contemplated by Section 151 of the Contract Act. The insurance of plaintiffs' goods could not protect them against fire though the result might be to relieve the plaintiffs from loss by fire.

We therefore think the defendants were not, under the circumstances, liable in their character of bailees to make good the loss to the defendants.

There has been no finding by the Subordinate Judge on the fifth issue, *viz.*, whether the fire was caused by the negligence of **[467]** the defendants, and if either party so desire it the case must be remitted for a finding on that issue.

The scond issue is whether there was a sale of the over-delivered cotton to the defendants, and whether this ceased to be the property of the plaintiffs before the fire.

The Contract Act in Section 77 defines sale as an exchange of property for a price. It involves the transfer of the ownership of the thing sold from the buyer to seller.

The word "price" though ordinarily meaning money, also means recompense which may not be in money. Section 78 of the Contract Act provides that sale is effected by offer and acceptance of price for ascertained goods or ascertained goods for a price. The illustration to Section 78 shows that price means rupees or money.

The Transfer of Property Act in Section 4 enacts that the section in that Act relating to contract shall be taken as part of the Contract Act, Section 54 of the Transfer Act enacts that "sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. It appears, therefore, that, unless the dealing between the plaintiffs and the defendants as proved by the usage of trade and acts of the parties

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12 Ind. Jur.
335.

amounted to a transfer of the cotton for a price in money paid or to be paid, there was no sale within the Contract Act. See the English law to the same effect. Addison on Contracts, 8th Edition, p. 865.

The evidence is that after the over-delivery cotton is accepted and marked, it is under the control of the merchant and is taken from the bundles and cleaned and then pressed, and that the over-delivery cotton of any dealer is not in the cleaning and pressing kept separate from the other cotton in the merchant's possession to be cleaned and pressed, and that all such cotton becomes mixed and is divided into two classes; and that, after cleaning and pressing, the cotton of the different dealers cannot be known, and it would not be possible to return to the dealers their own cotton, but cotton of the same sort as that supplied would be returned to him—that there are 2 classes "good fair" and "fully good fair"—that the dealers are at liberty to sell the goods so pressed to others, and the merchant who has had them pressed would deliver such pressed goods to the order of the dealer on payment of pressing charges; that if the merchant who pressed the goods wishes to buy them from the dealer, he has to [468] settle the price with the latter, and that the price is the market price at the day of settlement of such price.

From this evidence it is clear that the dealing is not one in which a price is to be paid in money by the merchant for the over-delivered cotton. But according to the course of dealing, the dealer is entitled to get from the merchant cotton cleaned and pressed of the same quantity and quality as the over-delivered cotton, and the dealer may sell such pressed cotton to third parties to whom the merchant is bound to deliver according to the dealer's order. But if the merchant offers the dealer to purchase the pressed cotton, and if the dealer agrees to sell, the market price of the day of that sale is the price. We think therefore there was no sale to the defendants under the Contract Act of the over-delivered cotton.

The effect of the dealing was that the property in the over-delivered cotton necessarily passed from the plaintiffs to the defendants, as plaintiffs were not entitled to get back the same cotton delivered by them, but were only entitled to get cotton cleaned and pressed of the same quality and weight in exchange for their own cotton. The cleaned and pressed cotton might or might not be in whole or in part, or no part of it might be that which the plaintiffs had delivered to the defendants.

The dealing therefore amounted to an agreement for an exchange. Exchange is defined by the Transfer of Property Act thus:—Section 118; when two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things, being money only, the transaction is called an "exchange."

Here there was no exchange of this pressed cotton when the over-delivery was made, but the plaintiffs and defendants had prior dealings of the like kind, and we see no reason why, when the exchange was made by the plaintiffs of their goods, the agreement for the exchange by the defendants at a future day should not be valid.

The sixth witness for the plaintiffs proved delivery on previous occasions by the defendants of goods cleaned and pressed by them in place of over-delivery of plaintiffs' cotton on the order of the plaintiffs who bought such claims and pressed goods from the plaintiffs.

The property in the over-delivery of cotton delivered by the plaintiffs to the defendants therefore passed on the delivery by [469] plaintiffs to the defendants, and the defendants must therefore bear the loss arising from the fire. The circumstances of the case in *The South Australian*

Insurance Co. v. *Randell* (1) were somewhat different from those in this case, and the delivery of the property to the miller was made in order that he might sell the same as his own. The property therefore passed and the former was to receive either other grain or the price of the grain. The action was one on a policy of assurance effected by the miller who contended that the property passed to him and was rightly described as property in which he was interested and not trust property. No doubt it was stated in the judgment that there was a sale of the grain to the miller. But it is questionable whether under the Indian Contract Act such circumstances would be held to amount to a sale.

As to the amount claimed, we think the Judge is right in giving a decree for the sum admitted by the defendants, as the plaintiffs have not proved satisfactorily that they are entitled to any greater sum.

We also agree in the Judge's findings on the 3rd and 4th issues.

Unless either party desires a finding on the 5th issue, the appeal must be dismissed with costs. Neither party desires a finding on the 5th issue. We dismiss the appeal with costs.

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11 M. 469.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

THIRUMALAI (*Plaintiff*), *Appellant v.* SUNDARA (*Defendant No. 1*), *Respondent.** [16th and 18th April, 1888.]

Civil Procedure Code, Section 258—*Mortgage in satisfaction of decree—Adjustment not certified—Mortgage invalid.*

In a suit brought by a Hindu to recover certain land, defendant pleaded that he held the same under a mortgage granted to him by plaintiff's mother and guar-[470]dian in satisfaction of a decree obtained against plaintiff's deceased father. Plaintiff contended that, as the mortgage was in adjustment of a decree and the adjustment had not been certified to the Court, the mortgage could not be recognized by virtue of Section 258 of the Code of Civil Procedure :

Held that, as there had been no certified adjustment of the decree, the mortgage could not prevail against plaintiff's claim—*Haji Abdul Rahiman* v. *Khoja Khaki Aruth* (I.L.R. 11 Bom. 6) followed and *Mallamma* v. *Venkappa* (I.L.R. 8 Mad. 277) distinguished.

[R., 12 M. 61 (63).]

APPEAL from the decree of J. A. Davies, District Judge of Tanjore, modifying the decree of S. Dorasami Ayyangar, District Munsif of Valangiman, in original suit No. 139 of 1886.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and SHEPHARD, J.)

Mahadeva Ayyar, for appellant.

Rama Rau, for respondent.

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* Second Appeal No. 764 of 1887.

NOTE.—Section 258, last clause, as amended is :—

Unless such payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree.

(1) L.R. 3 P.C. 101.

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JUDGMENT.

The plaintiff brought this suit to recover his ancestral property from the defendant No. 1, who claimed to hold it on the strength of a mortgage executed by the plaintiff's mother and guardian. This mortgage is found to have been executed by the plaintiff's mother (defendant No. 5) for the purpose of satisfying a decree obtained by defendant No. 1 against her on a bond executed by the plaintiff's father, and exception is taken by the plaintiff to the mortgage on the ground that it was given in adjustment of a decree, which adjustment was not certified to the Court, and, therefore, in accordance with the provisions of Section 258 of the Civil Procedure Code, ought not to be recognized by any Court. Section 258 declares that if any money payable under a decree is paid out of Court, or the decree is otherwise adjusted to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court which should execute the decree; and, in the last clause, the section provides that no such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid. The question is whether the default on the part of the decree-holder in discharging the duty cast upon him by this section does not compel the Court to refuse recognition to the adjustment and thus render invalid against the plaintiff the mortgage which the defendant has set up. There can be no doubt that, except on the footing that the mortgage was executed in satisfaction of the decree, it would not be enforceable against the plaintiff. In order to relieve the minor's property from the obligation which the decree cast upon it, it was **[471]** competent to his guardian to execute a mortgage; but if that object failed and the decree remained unsatisfied and, therefore, enforceable against the minor's property, it seems clear that the mortgage could not be binding on him.

In a case very similar to the present, except for the circumstance that the decree-holder was the plaintiff endeavouring to enforce the mortgage which had been executed in adjustment of the decree, the Bombay High Court held that, inasmuch as the adjustment had not been certified to the Court under Section 258, the suit would not lie. This decision, which is that of a Full Bench, was put on the ground that the uncertified adjustment could not be recognized by any Court and that, therefore, there was no valid consideration for the mortgage (*Haji Abdul Rahiman* v. *Khoja Khaki Aruth*) (1). It was contended before us that Section 258 appears in a group of sections relating to the execution of decrees and that the "Court" intended in the last clause was the Court executing the decree, and that at any rate the section did not apply when a separate suit was brought on a cause of action founded on the adjustment. For this position the Full Bench decision in *Mallamma* v. *Venkappa* (2) was cited, which decision, it was argued, was in conflict with the above-cited Bombay decision. It must be allowed that Farran, J., when concurring in the latter decision, did think it necessary to disapprove of the decision of this Court. But the other two learned Judges who formed the Full Bench, so far from concurring with him on this point, suggested that the cases might be distinguished. On examining, it seems to us that a clear distinction may be drawn between it and the present case. In that case the defendant, who was the decree-holder, had, under an arrangement made with the plaintiff in adjustment of the decree against the latter, been placed in possession of certain land belonging to the plaintiff, and in her

(1) 11 B. 6. (2) 8 M. 277.

suit the plaintiff alleged that the defendant, while so enjoying the lands, had nevertheless executed the decree, and she sought to recover the loss sustained by her by reason of such enjoyment of the lands by the defendant. It was as though the plaintiff had made a money-payment in satisfaction of the decree and had, on the decree being executed notwithstanding, sought to recover the money on the ground that the consideration had wholly failed. And so in the judgment of the [472] Full Bench it was said : "The question which we have to consider is whether, when a payment has been made, or a new contract entered into for the purpose of satisfying a decree, and the object has failed by reason that the provisions of the law which are essential to its recognition as a payment or satisfaction of the decree have not been complied with, the person injured is deprived of a remedy by suit." This question was answered in the negative, it being held that full effect could be given to those provisions without construing them to debar the institution of a suit for the recovery of money paid or damages for breach of the contract to certify. The precise point decided was that the former suit would lie, *viz.*, the suit to recover the money received by the defendant, the consideration for which had wholly failed. This decision is in no way inconsistent with the decision of the Bombay High Court and does not involve any recognition of the uncertified adjustment as an adjustment of the decree. On the contrary it is because there was no adjustment that the plaintiff was held entitled to recover the money, and, similarly in the present case, it is because there has been an entire failure of consideration that we think, agreeing with the decision of the Bombay Full Bench, that the mortgage, which in the absence of such adjustment cannot be enforceable, should not prevail against the plaintiff.

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We must, therefore, reverse the decree of the District Judge and restore that of the District Munsif. The defendant must pay the costs of this appeal and of the appeal to the District Court.

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11 M. 472 (F.B.) = 1 Weir 633.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* SAMBOJI AND OTHERS.*
[23rd March and 26th April, 1888.]

Abkari Act (Madras), Sections 9, 11, 55.

Under the Madras Abkari Act, 1886, a permit is not necessary where toddy is carried from the licensee's trees to his shop within the limits of his farm, or [473] where, the licensee having a general permit, the persons carrying the toddy are in his employment.

CASE referred under Section 438 of the Code of Criminal Procedure by H. G. Turner, District Magistrate of Vizagapatam.

The case was stated as follows:—

"In this case the Taluk Magistrate acquitted illegally, I should say, 14 persons charged by the Salt and Abkari Department with having transported toddy without permits under Section 55 of the Madras Abkari Act I of 1886."

* Criminal Revision Case No. 418 of 1887.

1888 APRIL 26. — FULL BENCH. — 11 M. 472 (F.B.) = 1 Weir 633

The facts of the case are shortly these:

"A salt petty officer saw the accused conveying toddy which was 94 seers in all and asked them to show their permits. Four of them produced permits, but they turned out to be time-expired; the rest had no permits at all. They were then charged as stated above and placed before the Taluk Magistrate of Srungavarapukota, before whom they admitted they had no permits, but pleaded that they were the private shareholders of a licensed shop, and they were taking the toddy for sale to that shop. The Taluk Magistrate acquitted them on the grounds (1) that they had no intention to defraud the renter or the Government of revenue, and (2) that their omission to possess permits 'though seemingly an offence under the strict letter of the law is yet not such under the spirit of it.' The Sub-Magistrate's grounds of acquittal are erroneous. Section 55 of Act I of 1886 under which the accused are charged does not contemplate a fraudulent or dishonest intention, and the High Court have lately held that under Section 11 a permit is required for the transport of toddy from a date garden to a licensed shop though it be by the shopkeeper himself, and that time-expired permits are no permits at all.—*Vide* High Court's order, dated 25th April 1887, in Criminal Appeal 443 of 1886. I would therefore recommend that the acquittal may be set aside and such order passed in the case as the High Court may please."

On the 14th December 1887, (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) referred the case to a Full Bench.

The Public Prosecutor (Mr. *Powell*), for the Crown.

The Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR and PARKER, JJ.,) delivered the following

JUDGMENT.

It is clear from Section 11 of Act I of 1886 that the holder of a license should take a general permit in addition to the [474] license. It is also provided by that section that permits shall protect servants and other persons employed by those to whom they are granted. The accused, however, did not rely for their protection on any general permit held by the licensee to whose shop they said they were conveying the toddy from a certain date garden, and four of them produced time-expired permits, which were held to be no permits at all in Criminal Appeal No. 443 of 1886. But it was held in *The Queen* v. *Pottachi* (1) with reference to the old Act that the servants of a sub-renter might carry toddy from his trees to his shop within the limits of his farm though their inability to produce a pass from him at once might render them liable to be arrested and detained until it appears that they are protected. Reading Section 9 of Act I of 1886, which prohibits the transport of toddy from one local area into another, together with Section 55 which prescribes a penalty for unauthorised transport of liquor, it appears that a separate permit is necessary only when the toddy is carried from the area included in the licensee's farm to another local area. If it appears, therefore, that the accused were conveying toddy from the licensee's trees to his shop within the limits of his farm, or that he had a general permit, and that they were acting as his servants or persons employed by him, they are not liable to be convicted. As it is not shown that the accused were transporting toddy from the area included in the license into a different area and that the licensee had not a general permit, we decline to interfere.

(1) 7 M. 161.

11 M. 475.

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APPEL-LATE CIVIL.

11 M. 475.

[475] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Shephard.

ABRAHAM AND OTHERS (*Plaintiffs*) v. HOLMES (*Defendant*).*
[20th April, 1888.]

Army Act, 1881, *Section* 144—*Sub-Conductor, Ordnance Department, is a soldier—Civil Procedure Code, Section* 468.

A Sub-Conductor of Ordnance on the Madras Establishment of Her Majesty's Indian Military Forces, holding a warrant from the Government of Madras, is a solider within the meaning of Section 144 of the Army Act, 1881.

In a suit to recover Rs. 183-7-0 a summons having been sent by the Court to the Commissary of Ordnance to be served on the defendant, his subordinate, the Commissary of Ordnance returned the summons unserved and referred to Section 144 of the Army Act, 1881, as his reason for such action :

Held, that the Commissary of Ordnance was bound to serve the summons under Section 468 of the Code of Civil Procedure, although the defendant might be entitled to the privilege given by Section 144 of the Army Act, 1881.

CASE referred under Section 617 of the Code of Civil Procedure by A. J. Mangalam Pillai, Subordinate Judge at Tadpatri, in a Small Cause suit.

The facts were stated as follows :—

"This is a suit by Messrs. Abraham and Company of Bellary against Sub-Conductor S. Holmes for recovery of Rs. 183-7-0 due by him on account of goods purchased from plaintiffs from time to time.

"The Commissary of Ordnance, to whom the summons was sent for service on the defendant, returned the said summons unserved, stating that in accordance with Section 144, Army Act of 1881, soldiers are not liable to be sued for any debt, unless the sum exceeds thirty pounds over and above all costs of suits.

"Thereupon I requested information as to the grounds upon which he considered Sub-Conductor Holmes to be a soldier.

"In reply he stated, referring to Sub-Conductor Holmes' warrant that Sub-Conductor Holmes is a warrant officer not holding [476] an honorary commission, and therefore under Army Act, Section 190, Clause 6, is included in the expression of soldier.

"Then I requested him to forward for perusal, the warrant of Sub-Conductor Holmes. He accordingly sent a copy of the warrant.

"Upon perusal of the said warrant, I requested information whether Sub-Conductor Holmes is bound to render continuously for a term military service to Her Majesty in any part of the world. In his reply he again quoted Section 190, Clauses 6 and 8 of the Army Act of 1881.

"The warrant does not contain any condition that Sub-Conductor Holmes is bound to serve Her Majesty in any part of the world continuously for any term of years, and the Commissary of Ordnance himself admits in his letter No. 5238 of the 10th February last, that Mr. Holmes is not bound to serve Her Majesty for any particular term, and that Mr. Holmes belonging to Her Majesty's Indian Military Forces, would not ordinarily be required to serve out of India, and relies upon what he designates as instructions contained in the Manual of Military Law, *viz.*,

* Referred Case No. 13 of 1887.

1888 APRIL 20. — APPELLATE CIVIL. — 11 M. 475.

that the word soldier practically includes all persons subject to military law other than officers.

"But I think that the exemption from the jurisdiction of the civil Courts in respect of soliders relates only to soldiers of the regular forces, who, as defined in the Act, are bound to serve Her Majesty continuously for a term in any part of the world.

"I therefore submit for the decision of their Lordships the Judges of the High Court the following questions, *viz.* :—(1) Whether on the grounds stated by the Commissary of Ordnance, Sub-Conductor Holmes is exempt from the jurisdiction of the civil Courts? (2) Whether he was justified on the basis of his own view of the law in refusing to serve the summons issued by me?"

The parties did not appear.

The Government Pleader (Mr. *Powell*) was called on to show cause why the Commissary-General should not be directed to serve the summons.

The Court (COLLINS, C.J., and SHEPHARD, J.) delivered the following

JUDGMENT.

We think that Sub-Conductor Holmes is a soldier of Her Majesty's Forces within the meaning of Section 144 of the Army Act, 1881.

[477] The Commissary-General is in error in supposing that he is not bound to accept and serve the summons. He is bound to do so under Section 468 of the Civil Procedure Code, although the soldier is entitled to the protection given by Section 144 and is not compelled to appear in Court in person.

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11 M. 477 = 1 Weir 586.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

MANJAYA *v.* SESHA SHETTI* [11th and 24th April, 1888.]

Penal Code, Section 500—Statement by witness—Privilege absolute.

M.S. was convicted under Section 500 of the Indian Penal Code of defaming S.S. by making a certain statement when under cross-examination as a witness before a Court of criminal jurisdiction:

Held, that the conviction was bad.

The statements of witnesses are privileged; if false, the remedy is by indictment for perjury and not for defamation.

[**Diss.**, 32 C. 756 = 9 C.W.N. 911 = 2 Cr.L.J. 459 = 2 C.L.J. 105 (106); 14 P.R. 1893 (Cr); **N F.**, 13 Cr.L.J. 494 (495) = 15 Ind. Cas. 494 = 5 P.R. 1913 (Cr) = 244 P.L R, 1912 = 31 P.W.R. 1912 (Cr); **F.** 17 B. 127 (128); 30 M. 222 = 6 Cr.L.J. 130; L.B.R. (1893-1900) 206; **Appl**. 16 M. 235 (238) = 1 Weir. 587; **R.**, 29 A. 685 = 4 A.L.J. 605 = A.W.N. (1907) 235 = 6 Cr.L.J. 197; 17 B. 573 (576); 19 B. 340 (347); 27 C. 263 (263); 36 M. 216 (226) = 13 Cr.L.J. 275 = 14 Ind. Cas. 659 (660) = 23 M.L.J 39 (48) = 11 M.L.T. 416 = (1912) M.W.N. 476; 17 C.L.J. 105 (113); 17 C.W.N. 554 (561); 6 Ind. Cas. 309 = 21 M.L.J. 85 (87) = 8 M L.T. 55 = (1910) M.W.N. 155; L.B.R. (1893-1900) 247 (248); 3 L.B.R. 265 (272); 1 Weir 589 (591, 593); **Expl**, 15 M. 63 (64) = 2 Weir 794.]

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* Criminal Revision Case No. 126 of 1888.

1888 APRIL 24. — APPELLATE CRIMINAL. — 11 M. 477 = 1 Weir 586.

CASE referred under Section 438 of the Code of Criminal Procedure by J. W. Best, Sessions Judge of South Canara.

The petitioner was convicted by Mir Shujat Ali Khan, Head Assistant Magistrate of Canara, in Calendar Case No. 106 of 1887 and fined Rs. 15 under Section 500 of the Penal Code.

The Sessions Judge stated the case as follows:—

"The contention on behalf of the petitioner is that the words constituting the alleged defamation were elicited from him in the course of his cross-examination as a witness in a case under trial before the Third-class Magistrate at Kundapur, and are therefore privileged.

"Such no doubt, is the law in England. *Seaman* v. *Netherclift* (1) and *Goffin* v. *Donnelly* (2). As stated by Cockburn, C.J., in the former case, page 56, 'if there is anything as to which the authority is overwhelming, it is that a witness is privileged to the [478] extent of what he says in course of his exmination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be and are constantly asked which are not strictly relevant to the issue;' and as remarked by Field, J., in *Goffin* v. *Donnelly*, 'it may be a hardship upon individuals that statements of a defamatory nature should be made concerning them, but the interest of the individual is subordinated by the law to a higher interest, *viz.*, that of public justice, to the administration of which it is necessary that witnesses should be free to give their evidence without fear of consequences.'

"I have been unable to find any decision of the Indian Courts exactly in point, but in the case of *Hinde* v. *Baudry* (3) in which the defamatory statements complained of were contained in a petition presented to a Court by third parties with reference to a pending suit, it is stated by the learned Judges, 'if they (the petitioners) were rightfully making an application in the suit, *the principle of public policy which guards the statement of a party or witness* against an action would protect them *whether the statement was malicious* or *not*;' and in support of this proposition the case of *Seaman* v. *Netherclift* above referred to is cited.

"With reference to the above authorities I submit the case for the consideration and orders of the High Court."

The complainant did not appear.

Narayana Rau, for defendant.

The Court (COLLINS, C.J., and SHEPHARD, J.) delivered the following

JUDGMENTS.

COLLINS, C.J.—I am of opinion that the petitioner (defendant) was wrongfully convicted of defamation. The petitioner had brought a charge against a man named Sesha Shetti and was under cross-examination as a witness, and in answer to a question by one of the defendants, he said that Sesha Shetti was "not a Nadawar and was not a member of his family." Sesha Shetti then charged the petitioner with defamation under Section 500, Indian Penal Code, and the Head Assistant Magistrate being of opinion that the petitioner's answer as above caused harm to the reputation of Sesha Shetti, convicted him and fined him Rs. 15 and Rs. 2-12-0, costs, being of opinion that even if petitioner did not know the answers [479] to be false, yet he did not know them to be true, and the circumstances under which the statements were made indicated a total absence

(1) L.R. 2 C.P.D. 53. (2) L.R 6 Q.B.D. 307. (3) 2 M. 13.

1888 APRIL 24. — APPELLATE CRIMINAL. — 11 M. 477 = 1 Weir 586.

of legal and actual good faith. I apply the observations of Cockburn, C.J., in the case of *Seaman* v. *Netherclift* (1) and of Field, J., in *Goffin* v. *Donnelly* (2) as to the rules of public policy which subordinated the interest of the individual to that of a higher interest, *viz.*, public justice and of this Court, in the case of *Hinde* v. *Baudry* (3). The Judges there said that the principle of public policy guards the statements of a witness against an action whether the statements were malicious or not. I think the same observations will apply if the criminal law is set in motion and proceedings are taken under Section 500 of the Indian Penal Code. If the petitioner gave false evidence, he can be punished for that offence. I therefore hold that the petitioner was wrongfully convicted of defamation, and I set the conviction aside and direct the fine and costs to be refunded if paid, to the petitioner.

SHEPHARD, J.—I agree with the learned Chief Justice in thinking that the accused has been wrongly convicted, and I would only refer to the opinion strongly expressed by the Judicial Committee in *Baboo Gunnesh* v. *Mugneeram* (4) that witnesses are free from any other consequences with respect to statements made by them as such, except that of indictment for perjury. This opinion was expressed with reference to a civil action for damages, but that, as it appears to me, makes no difference. If the ground of the principle is that "it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages," public policy must no less require that they should not be exposed to the fear of prosecution except, as I have observed, the prosecution for perjury.

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11 M. 480 = 1 Weir 200.

[480] APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS *v.* POTADU.* [4th September, 1888.]

Penal Code, Section 224—Criminal Procedure Code, Section 59—Escape from legal custody.

The accused was arrested in the act of stealing and was handed over to the Village Magistrate, who forwarded him in custody of the village servants to a police station. The accused escaped on the way. He was convicted under Section 224 of the Penal Code. On appeal the conviction was reversed on the ground that the custody was not legal:

Held, that the conviction was right. Section 59 of the Code of Criminal Procedure which requires a private person who arrests a thief in the act to take the thief to the nearest police station, is sufficiently complied by sending the offender in custody of a servant.

[F., 29 A. 575 = 4 A.L.J. 483 (485) = A.W.N. (1907) 179 = 6 Cr. L.J. 10; R., 23 A. 266 (268) = 21 A.W.N. 77; 17 M. 103 (104) = 1 Weir 201.]

REFERENCE under Section 438 of the Code of Criminal Procedure by G. T. Mackenzie, Sessions Judge of Kistna.

The case was stated as follows:—

"The accused was caught in the act of stealing cattle from a yard. He was arrested and was handed over to the Village Magistrate. The

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* Criminal Revision Case No. 144 of 1888.

(1) L R. 2 C.P.D. 53.
(2) L R. 6 Q.B.D. 307.
(3) 2 M. 13.
(4) 11 B.L.R. 321, followed in 15 C. 264.

1888 SEP. 4. — APPELLATE CRIMINAL. — 11 M. 480= 1 Weir 200.

karnam wrote a report and the Village Magistrate ordered two village servants to take accused with the report to the police station. On his way the accused escaped from the custody of the village servants. The Repalle Taluk Magistrate convicted the accused under Section 379 and under Section 224 of the Penal Code. The Joint Magistrate confirmed the conviction of theft, but has reversed the conviction of escape from lawful custody. The Joint Magistrate relies on the decision of the High Court in *The Queen* v. *Bojjigan* (1), where village servants had arrested a man on suspicion of his being a thief. The present case can be distinguished as the arrest was legal under Section 59 and as the prisoner was made over to the Village Magistrate, but the Joint Magistrate does not distinguish and says: 'This ruling seems **[481]** to me to apply exactly to the present case.' The arrest was legal under Section 59, and I submit that the custody of the village servants conducting the prisoner to the police station was legal custody. It must be admitted that Section 59 empowers only the person who saw the offence and made the arrest to take the prisoner to the police station, and that Section 42 does not justify any other person in assisting him, but to construe the Code thus strictly would lead to strange results. In this case the age of the witness who saw accused stealing the calf is not given, but possibly he is a mere boy. When he called for help three men came to his assistance and that is usually what happens, although the Code does not expressly permit such assistance. I therefore submit that after a private person has made an arrest under Section 59, other private persons may lawfully conduct the prisoner to the police station.

"Moreover, in this case, the person who made the arrest carried the prisoner before the Village Magistrate. The Code saves the powers of a village magistrate and he has power to try cases of petty theft. In this case the Village Magistrate decided to send the case for trial before the Taluk Second-Class Magistrate, and the accused was despatched with a report in custody of the village servants. This is the usual course, and if the Joint Magistrate is right in holding that it was illegal, the decision will much impair the utility of Village Magistrates.

"The High Court have held that a Village Magistrate, being a magistrate, has inherent powers, such as that of sending a summons, although no specific mention of such powers is made in the regulation. I submit that a Village Magistrate in a case such as this is, where a thief has been legally arrested and has been made over to him, has power to send the prisoner to the police station in custody."

Counsel did not appear.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

We agree with the Sessions Judge that the custody from which the accused made his escape was lawful. The accused was arrested by a person in whose view the offence of theft was committed, and the arrest was therefore legal under Section 59 of the Code of Criminal Procedure. The direction that **[482]** he shall make over the person arrested to a police officer without unreasonable delay is sufficiently complied with by his being forwarded in the custody of a servant or of the village servant in this case. The intention is to prevent arrest by a private person on mere suspicion or information, and *not* to impose on him the obligation of

(1) 5 M. 22.

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taking the party arrested in person to a police station. The original custody continued and did not terminate. This case is distinguishable from *The Queen* v. *Bojjigan* (1). We set aside the order of discharge made by the Joint Magistrate in Revision Case No. 144 of 1888, but having regard to the lapse of time, we will not direct any further proceedings.

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11 M. 482 = 13 Ind. Jur. 13.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

YACOOB (*Plaintiff*), *Appellant v.* MOHAN SINGH (*Defendant No.* 2), *Respondent.** [23rd July and 2nd August, 1888.]

Civil Procedure Code, Section 57—*Return of plaint when Court has no jurisdiction.*

An Appellate Court is not bound to return the plaint under all circumstances where defect of jurisdiction appears.

APPEAL from the decree of C. S. Crole, District Judge of North Arcot, modifying the decree of V. Subramanya Sastri, District Munsif of Vellorè, in suit No. 417 of 1886.

The facts necessary for the purpose of this report appear from the judgments of the Court (MUTTUSAMI AYYAR and WILKINSON, JJ.).

Bhashyam Ayyangar, *Sadagopacharyar*, and *Subramanya Ayyar*, for appellant.

The Acting Advocate-General (Mr. *Spring Branson*) and *Seshagiri Ayyar*, for respondent.

JUDGMENTS.

WILKINSON, J.—In his plaint plaintiff prayed for a decree declaring his right to grant pattas to, and to collect rent from, [483] the raiyats of Virdampet, for possession and for a declaration that the lease of defendant No. 2 was inoperative against him.

The defendants demurred to the jurisdiction of the District Munsif's Court urging that the suit should have been filed in the District Court. Thereupon plaintiff's vakil maintained that the suit was one for specific performance. Defendant's vakil accepted this contention, and as remarked by the Munsif, "the suit" in his Court "was all along treated as one for specific performance." He gave plaintiff a decree for possession against both the defendants. Defendant No. 2 alone appealed to the District Court on the ground *inter alia* that the suit was not "wholly" a suit for specific performance. The District Judge reversed the decree of the Munsif so far as defendant No. 2 was concerned, holding that the suit as a suit for specific performance would not lie. Defendant No. 2 was no party to, and had no notice of, the contract, specific performance of which was sought, and that, if it had been a suit for possession, the District Munsif would have had no jurisdiction. Plaintiff appeals. It is admitted by his pleader that the suit was not a suit for specific performance of a contract and that the District Munsif had no jurisdiction to try the suit for possession, but it is contended that the plaint should be returned for presentation in the proper Court.

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* Second Appeal No. 1072 of 1887.

(1) 5 M. 22.

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11 M. 482= 13 Ind. Jur. 13.

I have no doubt that the suit was one for possession, that it was not rightly valued, and that had it been, it would not have been cognizable by the District Munsif.

But in order to wrest jurisdiction plaintiff's pleader elected to treat the suit as one for specific performance and the suit was tried as if it had been so framed. The plaintiff is bound by the statement of his pleader and this second appeal must therefore fail as it is conceded that the contention of the pleader for plaintiff in the Court of first instance cannot be maintained.

With reference to the question whether or not the plaint should be returned for presentation to a Court having jurisdiction, I remark that the question does not really arise. The plaintiff may have the right now to institute in the proper Court a suit for possession, but I cannot treat the present suit as such. I do not agree with the contention of the learned pleader for the plaintiff that Section 57 of the Civil Procedure Code is *imperative* at this stage of the case. No doubt it is so at the institution of a suit. If on presentation of plaint the Court finds that it has no jurisdiction, [484] it is bound to return the plaint. But this is before the issue of process to the defendant.

This Court has no doubt in many cases returned the plaint for presentation to the proper Court, even in second appeal, but the principle on which it has acted is that laid down by the Privy Council in the case of *Mohummud Zahoor Alikhan* v. *Mussumat Thakooranee Rutta Koer* (1), *viz.*, that this Court has the power to do what the Judge of the Court of first instance might, under the Civil Procedure Code, have done at an earlier stage of the case.

Had the Legislature disapproved of the practice, a rule would have been introduced into the Code when it was recast by Act XIV of 1882. The absence of any provision for the return of a plaint at the later stages of a case seems to me to indicate that the Legislature desired to leave the matter to the discretion of the Court, so that where, as in the present case, the suit may have been persisted in with full knowledge that as a suit for possession it would not lie in the Court of a District Munsif, the Court might refuse to exercise the power it undoubtedly has of returning the plaint.

Moreover in the present case there is the decree of the District Munsif against defendant No. 1 still subsisting so that the Court having acted judicially upon the plaint, it must be retained as part of the record.

This second appeal therefore fails and is dismissed with costs.

MUTTUSAMI AYYAR, J.—I am also of opinion that this appeal must be dismissed with costs. As a suit for specific performance, this action must fail, for, it is found that the respondent had no notice of the lease in favour of the appellant. As a suit by a lessee to recover possession of the property demised, the District Munsif, it is conceded, had no jurisdiction to entertain it. The question then for consideration is whether the plaint should be returned to the appellant for presentation to the proper Court. The appellant's pleader refers to Section 57, Civil Procedure Code, and contends that it is imperative and applicable in all stages of the suit. That section is inserted in the chapter on the institution of suits and it prescribes the procedure to be followed on the presentation of plaints and before the issue of summons. If the plaint is returned at a later stage of the suit, it is returned not because [485] Section 57 is

(1) 11 M. I. A. 468 (486).

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in terms applicable, but because the Court *may* do at any stage of the suit what it might have done at an earlier stage. On this principle the plaint is ordinarily returned at whatever stage defect of jurisdiction may appear. But it is not correct to say that the Court has not only the power but is bound to order the return of the plaint though there was craft in the mode in which the appellant conducted the suit in the Court of first instance and though there was no appeal from its decree so far as it affected one of the defendants. In the case before us the District Munsif directed defendant No. 1 to pay the plaintiff's costs: and as he preferred no appeal, the District Judge reversed the decree only so far as it related to defendant No. 2 who was the appellant before him. As the case stands before us the suit cannot be treated as if it were never instituted, and the plaint must be on the record because the original decree is operative so far as it relates to the first defendant in respect of costs.

It is no doubt true that as the plaint was originally framed, the suit was one for possession of the land demised, but when the respondent pleaded to the jurisdiction of the Court, the appellant's vakil contended that it was a suit for specific performance and therefore was not governed by Section 7 of the Court Fees Act. Thereupon the respondent's pleader withdrew his plea and both parties proceeded to trial on the footing that the suit was one brought for specific performance. It is not clear whether the appellant's vakil misled the respondent's vakil from an erroneous belief that he was at liberty to alter the frame of the suit at or before the first hearing or from a desire to induce the latter to give up the plea of jurisdiction; but there is no doubt that the respondent was misled. It is not in my opinion fair to allow the appellant to say in second appeal that he is not bound by the election made by his vakil even for the purposes of this suit. The principle on which the Courts follow the procedure prescribed by Section 57 after issues are settled and evidence is recorded and in appeal is discussed by the Full Bench of the Bombay High Court and the limitations subject to which it is to be applied are also discussed there. *Prabhakarbhat* v. *Vishwambhar Pandit* (1).

The appellant's pleader appears to me to overlook the fact that during the progress of a suit, special circumstances may [486] supervene which might render it impossible to treat the suit as if it was never instituted at all or unfair to the respondent to permit the appellant to ignore the basis on which the parties proceeded to trial in the Court of first instance.

(1) 8 B. 313.

11 M. 486 (P.C.) = 15 I.A. 176 = 5 Sar. P.C.J. 190 = 12 Ind. Jur. 250.

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PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Sir B. Peacock and Sir R. Couch.

[*On appeal from the High Court at Madras.*]

SRI AMMI DEVI (*Plaintiff*) *v.* SRI VIKRAMA DEVU, A MINOR, BY THE AGENT TO THE COURT OF WARDS (*Defendant*).
[1st, 2nd, 3rd and 8th March and 21st April, 1888.]

Failure to prove alleged authority to widow who had purported to adopt to her deceased husband. Query; as to effect upon an adoption of an adopted child being the only son of his father.

Whether an elder widow who had purported to adopt a son to her deceased husband under his authority had received such authority orally or by will, was disputed by a junior widow, the Courts below differing as to the question of fact. Upon the evidence, the finding of the Subordinate Judge, that no such authority had been given, was maintained.

The Courts below also differed as to whether the adoption if authorized was validly effected, the boy adopted having been the only son of his natural father. Whether this is a disqualification invalidating an adoption, is a question that has not come before Her Majesty in Council for decision.

[R., 14 A. 67 (100) (F.B.); 14 B. 249 (258); 24 B. 367 (380) (F.B.); 18 M. 53 (60).]

APPEAL from a decree (20th December 1884) of the High Court reversing a decree (17th March 1882) of the Subordinate Judge of Vizagapatam.

As to the fact of an authority to adopt having been given orally or by will, and as to the legal competency of the subject of an alleged adoption, the Courts below had differed in opinion.

The suit was brought by the appellant's mother, Sri Nilamani Patta Maha Devi, the junior widow of Krishna Bhupati Devu, zemindar of Madgole, in the Vizagapatam District, deceased, on the 25th December 1875.

The defendants were Sita Patta Maha Devi, the senior widow of the deceased raja, and Vikrama Devu, whom she had purported to adopt. The plaint alleged that the late zemindar who left no **[487]** male issue had given no authority either oral or written to the widow to adopt a son to him; and that it was without any authority that she had purported to adopt the second defendant, who besides was the only son of his father, and, therefore, could not according to the sastras be adopted. On both these grounds it was claimed that the adoption should be set aside. The defence was that the authority to adopt had been given by the deceased raja to the senior widow both orally on the 20th December 1875, and again by his will executed on the following day, 21st, in the presence of witnesses. It was also asserted that although the boy adopted was now the only surviving son of his natural father, he was his second-born son; and that the adoption was valid.

The Board of Revenue in its capacity as Court of Wards was directed by the Madras Government on 19th October 1877 to apply to intervene for the protection of the widows; but on the application of the plaintiff, the High Court having received a report from the District Judge (Section 7, Clause 3, Regulation V of 1804) that she was competent to manage her affairs without a guardian, submitted a certificate to that effect to the Government.

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After the filing of the plaint the suit was before the Subordinate Judge for settlement of issues, when the Collector having obtained sanction to defend on behalf of the minor, filed his written statement to the effect that on the 20th December 1875 the late zemindar of Madgole orally authorized his senior wife, the first defendant, to adopt a son to him, and on the following day executed a will providing for the adoption of a boy. In accordance with the above, she duly adopted on the 8th November 1876 the second defendant, who, though now the only surviving son of his natural father, was his second-born son; and that the adoption of even an only son when complete was valid according to Hindu Law.

Sri Krishna Chandra Devu, the natural father of the second defendant, then was, on his own application, added as a defendant. He filed a written statement to the same effect. The issues raised the questions of the giving of the authority by the late zemindar either orally or by will, and also as to the validity of the adoption authorized.

The alleged will was as follows :—

"Will executed on the 21st day of December 1875 by (us) Sri [488] Sri Sri Krishna Bhupati Devu Maharajulungaru, zamindar of Madgole, in favour of our senior wife Sri Sita Patta Mahadevigaru.

"1. Thinking that our end is approaching—as you have become sonless owing to our having no male issue—you will at least after our death make one or two adoptions for the continuance of the family and continue the line.

"2. Till the person you may adopt comes of age, you will yourself, in co-operation with the *varisu* (heir) Vaddadi Gopala Bhupatigaru, manage carefully the affairs of the whole of our Madgole zemindari, and after that will deliver over possession of the same to the person whom you may adopt.

"3. From the said zemindari estate itself the debts which we justly owe to the zemindar of Jeypore and others shall be paid.

"4. You may, as you choose, continue the mokhasas, inams, lands, and other grants made by us from the zemindari to the respective parties in enjoyment of such grants.

"5. After the discharge of debts you will give to Ammi Devi, daughter by our junior wife Sri Nilamani Devigaru, a village yielding a cist of Rs. 1,200 per annum on account of her 'pasupu kunkumu.'

"6. You will cause to be paid to our junior wife, the said Sri Nilamani Mahadevi, Rs. 2,400 per annum for her maintenance.

"7. You will yourself cause to be paid to our mistresses, Sitama and Nilamani, Rs. 600 each per annum as long as they live.

"8. Having resolved that you should act as stated above, authority is by this will itself granted to you to take possession of the said zemindari with all our properties, moveable and immoveable. You shall therefore act according to this will.

"Tuesday, the 9th of Margasira Bahula, Yuva year."

This was said to have been executed by the deceased in the presence of many witnesses by stamping it with the "matsya santakam" or family device of a fish for his signature a few days before his death.

The Subordinate Judge, A. L. V. Ramana, found it not proved that the authority was given orally or by will; no such will, as had been alleged, having been executed. He was of opinion that the adoption of an only son, whether the first born or an after-born son, was invalid among the regenerate classes, to one of which the parties, being kshatryas, belonged.

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[489] On appeal, this judgment was reversed by the High Court (Sir C. Turner, C. J., and Muttusami Ayyar, J.). Their judgment concluded as follows :—

"On the whole we consider the appellant sufficiently established that authority to adopt had been given, and that the will had been executed by the zemindar, and that the respondent failed to prove that at the time the authority was given and the will executed the zemindar was not competent to give the one or execute the other. We shall, therefore, hold that on these issues the respondent's case failed.

"There is the further point, *viz.*, the question whether the adoption is valid in respect of the competency of the person adopted? At the hearing we were inclined to refer to a Full Bench for consideration the question, whether it has been rightly held that an eldest or only son can legally be adopted? The point has been decided in this Presidency in favour of the validity of the adoption, and in a case under the Mitakshara Law, a decision of the High Court of Bengal to the same effect has been approved by the Privy Council. We, therefore, fear that it would be useless to ask the Court to reconsider a question of law on which the highest tribunal has pronounced an opinion, seeing that the reasons on which we still entertain doubt as to the validity of such an adoption have been stated with great ability by Mr. Justice Mitter of the Calcutta High Court. The essence of adoption being gift, the competency of the giver is essential to the effectual creation of sonship, and the Hindu Law, as we understand it, declared the Hindu house-holder incompetent to give his only son. Moreover, in the various treatises which illustrate the later law obtaining in this Presidency, we find that the commentators, when discussing restrictions which some writers imposed on adoptions, and declaring that they could not apply in cases of necessity, are generally careful to add that the adoption is valid if the boy be a younger son. We should be glad if opportunity arose for the re-consideration of this question by the Privy Council ; but until the present precedents are overruled, we feel ourselves constrained to follow them. We do not, therefore, direct an inquiry as to whether the appellant was the eldest or the only son of his father."

After obtaining leave to appeal from this judgment the plaintiff died, leaving an only daughter, the present appellant. **[490]** Krishna Chandra Devu, the natural father of the adopted minor, having also died, the Court of Wards represented the minor on this appeal.

Mr. *J. D. Mayne* and Mr. *G. P. Johnstone* appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *C. C. Macrae*, for the respondent.

Only the question of fact, as to the authority having been given to the widow, was now argued ; the argument of the question of law being postponed till it should be ascertained whether it was raised, the result being that it was not raised (1).

On a subsequent day (21st April) their Lordships' judgment was delivered by :—

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(1) In *Nilmadub Doss* v. *Bishumber Doss*, 13 M.I.A. 85 the fact of adoption severing the relation of the boy with his natural father was negatived by the decision ; and that the father would not be likely to give in adoption an eldest or only son otherwise than as "dwayamashyayana" was referred to among the reasons.

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JUDGMENT.

LORD MACNAGHTEN.—The zemindar of Madgole died on the 25th of December 1875. He left two widows but no male issue. On the 8th of November 1876, the senior widow adopted a son to her deceased husband.

In 1881 the junior widow brought the present suit to have the adoption set aside, on the ground that the senior widow had no authority from her husband to make an adoption; and also on the ground that the adoption was invalid by Hindu law, because the infant who was adopted was the only son of his natural father.

The question of Hindu law was not argued before their Lordships. In the view which they took of the evidence, it became unnecessary to have it discussed. But as this question seems to have been determined by the High Court in deference to a decision, or supposed decision of this Board, it may be as well to state that the learned counsel on both sides informed their Lordships that they had been unable to find the decision by which the High Court conceived themselves bound.

The case presented on behalf of the senior widow and the adopted child was this :—On Monday the 20th December, 1875, the zemindar verbally authorized the senior rani to make an adoption ; on the following day he executed a will expressly conferring upon her authority to adopt, and at the same time he dictated a letter and sent it to the Collector at Vizagapatam [491] intimating the fact of his having executed a will to that effect. Each of these allegations was traversed by the junior widow.

Apart from the matters directly at issue, the circumstances of the case are not in dispute.

The zemindars of Madgole belonged to a family of some antiquity, with pretensions to a mythical descent. In token of their descent they used the badge or emblem of a fish on their banners and on the seal of the zemindari, and they were in the habit of authenticating documents by a drawing intended to represent the same device, and called the matsya santakam or fish signature.

The late zemindar succeeded to the family estate in 1833. The property was then much embarrassed. It became still further involved during his tenure. The principal creditor was the Maharaja of Jeypore, who was in possession as mortgagee. A person of the name of Lakshmaji was the zemindar's muktyar, and he received a similar appointment from the Maharaja. In 1875, Lakshmaji took a lease of the zemindari. The control of affairs was thus in his hands, and all the officials of the estate were under his orders. Lakshmaji is said by the High Court to have been a clever but unscrupulous person. Probably this statement does him no great injustice. At the date of the judgment of the High Court, he appears to have been undergoing a sentence of imprisonment for forgery.

For some 13 years or more before his death, the zemindar was a helpless cripple from rheumatism. He became seriously ill about a month or six weeks before he died. In a letter from the Sub-Magistrate to the Collector of Vizagapatam, dated the 25th December 1875, announcing the zemindar's death, it is stated that he had been bedridden for three days before the 21st, "owing to excessive heat, swelling of the body, and diarrhœa, and the weakness resulting therefrom." On Monday the 20th of December he was seized with a violent attack of vomiting, and it is said that "the burning in his limbs increased largely." Under that attack, from which he never rallied, he sank on Saturday the 25th of December.

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There seems to have been among the zemindar's dependants a faction opposed to Lakshmaji, and nominally, at any rate, in the interest of the senior rani. The head of this faction was one Gopala, an illegitimate brother of the zemindar. As the illness of [492] the zemindar increased and his death was evidently approaching, Gopala's faction grew bolder and there were disturbances between the adherents of Gopala and those of Lakshmaji. The Sub-Magistrate was informed that rioting was apprehended. On the evening of Friday the 24th of December the Sub-Magistrate received a summons from Gopala, requesting him to enter the fort where the zemindar resided and quell a disturbance. He went there accompanied by the Inspector of Police. On entering the fort, Gopala took him to the senior rani, who was in her husband's room. The rani exclaimed: "This is just the time for preserving the matsya race, and told one of the servants to bring that paper." A paper was brought and placed in the hand of the rani, who gave it to the Sub-Magistrate, saying it was the will of the raja. The Sub-Magistrate went up to the zamindar to ask him if it was so. The zemindar's eyes were open. He seems to have made an effort to speak, but failed. He gave no sign with his hands or with his head. The Sub-Magistrate then had the document read aloud. When the will was read out Lakshmaji said, "Raja did not execute it. It is a forgery." The Sub-Magistrate then sealed up the zemindar's property as far as was practicable. He tried to find the seal of the zemindari. The rani said it was with Lakshmaji. Lakshmaji denied that he had it. The Sub-Magistrate then went to the house of the manager Narasimham. He was examined in the absence of Lakshmaji, and he stated that he had sent the seal to Lakshmaji three or four days before. The seal however could not be found, and it has not been discovered since. The Sub-Magistrate took possession of the document which was represented to be the zamindar's will, and sent it on the following day to the Collector. There is no doubt that it was produced at the trial in the same state in which it was on the night of the 24th of December. It is sealed with the seal of the zemindar, and also bears the fish signature. It purports to be attested by 20 witnesses, and to be subscribed by one Lingaya as the writer of the document.

The zemindar did not recover consciousness, and died as already stated on the 25th of December.

In March 1876 the alleged will was presented for registration. In support of the application thirteen witnesses, of whom the senior rani was not one, were examined. The acting Registrar refused registration. Among the reasons which he gave for the [493] refusal, he referred to the discrepancies in the evidence of the witnesses and to their demeanour. On that occasion the witnesses who deposed to the execution stated that the zemindar sat up and signed the document in their presence. They did not, they said, see it sealed or delivered to the senior rani, but they understood that it was sent to the manager to be sealed, and that it was afterwards delivered to her.

An appeal was presented from the decision of the Acting Registrar. In view of this appeal the senior rani was examined herself. Her statement was this:—On Monday the 20th of December her husband was in a critical state. She went into his room about 9 A.M. She asked, "What is to be my fate? I have no children, and what is to become of me?" He told her to make one or two adoptions, to reign over the country, protect the second wife and concubines just as he did, and conduct the administration. On Tuesday about 3 P.M., at the time of meals he gave

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her the will. No one was in the room at the time but herself and the raja. On the very day he gave her the will he had sent either a will or a letter to the Collector. He signed the will in her presence, and also smeared the ink on the seal and affixed the seal himself. No one attested the will while she was there. She took the will and left it in her box for three days, and gave it to the Sub-Magistrate on the Friday.

After this evidence was given the appeal from the Acting Registrar's decision was allowed to drop. The rani's statement to Mr. Goodrich, the Acting Collector, who made inquiries into the matter at the instance of the Board of Revenue in July 1877, was that she was advised that it was unnecessary to establish the genuineness of the will, as the zemindar had given her authority to adopt. Mr. Goodrich's report was put in evidence by the rani. It may be observed, in passing, that Mr. Goodrich remarks :—"Unfortunately, there has been keen contention all through the business ; many have changed sides, some more than once ; and the amount of perjured evidence at the disposal of each faction has been great."

In October 1877 the Governor in Council directed the Board of Revenue to intervene in their capacity of Court of Wards for the protection of the rights of the two widows, who were registered as proprietresses of the Madgole estate.

[494] In December 1879 the junior widow was relieved from the guardianship of the Court of Wards.

This suit was instituted on the 8th of August 1881. The senior widow and ten other persons, four of whom had been witnesses in the registration proceedings, were examined for the defence. The senior widow was the first witness. Her account of the conversation on Monday was much the same as that which she gave on the former occasion, except that she placed the conversation at 2 jhams or 12 o'clock, and said what when she went to her husband's room there were males in the room, who were ordered to leave, and she added that the people outside could have heard her conversation with her husband, and that the interview ended by her husband saying :—"You had better go now. I shall execute a will to-morrow and give you." As regards the interview on Tuesday, she adhered to her statement that she went at 3 jhams or 3 o'clock to see her husband at meal time, and that her husband both signed and sealed the will in her presence. She added that she stayed alone with her husband about an hour talking over their past griefs and joys.

The room in which the sick man was lying was an apartment without windows. The door opened into a verandah 3 cubits wide. The room is said to have been about 7 or 8 cubits wide and 10 or 18 cubits long from north to south. The cot on which the sick man lay was close by the southern wall.

Several witnesses speak to being in the room on Monday when the rani came in. They say they went out, sat down on the verandah, and heard the whole conversation. The persons outside were about twenty in all. After the rani left the sick man repeated the conversation to them, and they congratulated him on having authorized his wife to make an adoption. He told them he was going to execute a will on the following morning, and asked them all to come quickly. Accordingly they came. Lingaya was among the first to arrive. The zemindar handed him a draft and told him to copy it. He was about an hour copying. He did not know in whose handwriting the draft was. It was in the handwriting

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of some Madgole man. When the will was copied it was read out once or twice, and then the zemindar sat up and signed it, and handed it back to be witnessed by those present. While the will was being signed, the zemindar dictated a letter to the Agent of the Government at Vizagapatam. It was [495] written by Venkanna, not by Lingaya, the writer of the will. When the letter was finished, it was handed to the zemindar, and then the rani came in. Those present then left the room. Some went away at once; others waited in the verandah for about an hour. During that time they were not peeping in. Then they peeped through the door, which was ajar about a span, and just at that moment it happened that the zemindar called for his seal. It was taken from his box. He signed the letter. He sealed the letter and the will, and gave the will to the rani.

Such in substance is the account given by the witnesses for the defence on whom the learned Counsel for the respondent relied. On the other hand, there are witnesses for the defence from whose evidence it may be collected that a person standing at the door of the sick man's room could not see him where he was lying; that nobody peeped through the door, and that, in fact, it was not possible to do so; and also that the conversation could not be heard outside, that the sick man's voice was feeble, and that the rani spoke low. And it is to be observed that Narasimham, the manager, ninth witness for the defence, who does not seem to have had any motive for stating that which was untrue, says that he saw the zemindar daily, from the 20th to the 24th of December inclusive, and he adds: "I did not get any papers signed by him. He was too weak to transact business or to sign papers during those days. His hand was swollen. He postponed signing chitta for a fortnight, as he could not sign."

Taking the evidence of the accepted witnesses, there are discrepancies to which the Subordinate Judge has perhaps attached too much importance. There are contradictions of more importance between the statements made by Lingaya, Venkanna, and a third witness, Bhupala Raj, in this suit, and their former depositions which were put in evidence. The account of the transaction adopted by the learned Counsel for the respondent, presents many improbabilities. The story of the assembly in the sick man's room on Monday morning, of the persons present going into the verandah and hearing there the conversation between the zemindar and the rani, and the zemindar's promise to execute a will on the following day, seems improbable. It is not a little remarkable that there appears to be no trace whatever of this story in the evidence given on the registration proceedings. It is also remarkable that the time of the rani's visit to her husband [496] on Monday is now placed much later in the day than it was in her evidence in 1876. In 1876 the visit is stated to have taken place at 9 A.M., a time at which it is not likely that the zemindar would have had visitors, if one may judge from what is said to have occurred on the following day. People were asked, it is said, to come early on the following day to witness the will, and yet no one seems to have come before 10. The account of the scene, when the will is said to have been copied, signed, and attested also seems improbable. It is improbable that a person admittedly in the state in which the zamindar was should have been able to trace the fish signature with his own hand, and to take so active a part in the transaction,—sitting up without assistance, giving directions, and above all, dictating a letter of some length to the Collector, which explained his will as regards adoption, and asked the favourable consideration of the Government. It is most improbable that this scene,

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for which arrangements were openly made the day before, should have gone on for so many hours without attracting the notice of Lakshmaji, who is said never to have left the fort during the zemindar's illness, and to have kept a vigilant watch on the proceedings of the opposite faction.

But these improbabilities are trifling compared with the improbability presented by the document itself, and by the circumstances under which it was first introduced on the stage.

The alleged will is a remarkable document. It is clear and concise and singularly well arranged. It provides for many things besides providing for adoption, which is said to have been the reason for its execution. It provides for an allowance for the second wife, for the testator's daughter, for his concubines, and above all, it provides for placing the administration of the estate in the hands of Gopala. Now Gopala, as we know from the statement of the senior rani herself, was in disgrace at the time. She says in her final examination: "At the time of the raja's death Gopala Bhupati was banished from the fort. It was the raja himself who precluded him from coming into the fort." In the judgment of the High Court it is stated that he had not been allowed access to the palace for some years. Whether this statement be founded on an admission at the hearing or not, Gopala's banishment, as it was the act of the zemindar himself, must in all probability have occurred before the zemindar's last illness. It is **[497]** almost incredible that the zemindar could have meant to commit the management of his estate to a person whom he had himself banished from his presence. Then there is nothing in the evidence to show that the dispositions in the alleged will emanated from the mind of the alleged testator, or that he had any thing whatever to do with the instructions from which the will was prepared. Lingaya says that he wrote the will on the Tuesday morning from a draft handed to him by the zemindar. The draft is not forthcoming, which is perhaps not to be wondered at. But the person who wrote the draft, who is said to have been a Madgole man, is not produced. No one seems to know who he was. As the zemindar could not leave his room, the writer must have come to the zemindar. There could have been no difficulty in finding the writer, and it is to be observed that the will was challenged as a forgery when first it was produced, and that Lingaya was questioned as to the writer of the draft on his first examination in 1876, so there can be no ground for suggesting that this point, which is obviously of the utmost importance, comes as a surprise to the supporters of the will. Again, there is nothing to show that the zemindar had anything to do with procuring the seal from the manager, in whose custody it was until three days before the death. It seems to have been obtained from him by a trick. Two messengers were sent for the seal. They each said the zemindar wanted the seal, and that Lakshmaji was with him at the time. It was given to the second man, because his story corresponded with that of the first. The second messenger is said not to be alive, but there was no suggestion that the first messenger was dead, and he is not produced.

On the whole, therefore, the irresistible inference seems to be that the alleged will, whether it was prepared before or after Monday the 20th, was not prepared by the instructions of the zemindar, and that the seal, by which it purports to be authenticated, was not procured from the manager by the zemindar's directions.

Under these circumstances, their Lordships are of opinion that it would not be safe to rely on the oral evidence as proof that the

document propounded by the respondent does contain the last will and testament of the deceased. The burden of proof rests with the propounder of the will, and, in their Lordships' opinion, the respondent has not discharged that burden. In their [498] opinion, no reliance can be placed on the alleged conversation on Monday, or on the letter which is said to have been signed by the testator on the 21st, but which, from a pencil memorandum upon it, does not appear to have been received until after the zemindar's death. It was for those who produced that letter to give an explanation of the date endorsed, if they meant to contend that that date was not, as it presumably was, the date of receipt.

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In the result, their Lordships agree with the findings of the Subordinate Judge, though much of his reasoning appears to be far-fetched and ill-founded. In particular, there seems to be no ground for his strictures upon the conduct of the Sub-Magistrate.

Their Lordships will humbly advise Her Majesty that the appeal ought to be allowed, and that the respondent ought to pay the costs in the High Court and in the Court of the Subordinate Judge, whose judgment will be restored, except as regards the payment of costs. The respondent must pay the costs of the appeal.

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11 M. 498.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

SINGARACHARLU (*Plaintiff*), *Appellant* v. SIVABAI AND OTHERS (*Defendants*), *Respondents*.* [24th April, 1888.]

Transfer of Property Act, Section 136—Purchase of actionable claim by officer of Court—Jurisdiction, Meaning of term.

Section 136 of the Transfer of Property Act, 1882, provides that no officer connected with a Court of Justice can buy an actionable claim falling under the jurisdiction of the Court in which such officer exercises his functions.

The plaintiff, an officer in a District Court, having purchased the rights of the mortgagee, in a bond sued to recover Rs. 2,225 due upon it in the Court of the District Munsif:

Held, that as the claim did not fall under the immediate jurisdiction of the District Court, Section 136 was not applicable.

[R., 16 A. 315 (F.B.); 18 A. 265.]

APPEAL from the decree of C. S. Crole, District Judge of North Arcot, reversing the decree of P. Virasami Ayyar, District Munsif of Arni, in suit No. 133 of 1886.

[499] The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and SHEPHARD, J.).

Bhashyam Ayyangar and *Narayana Rau*, for appellant.

Ramachandra Rau Saheb and *Ramasami Mudaliar*, for respondents.

JUDGMENT.

The plaintiff being a clerk in the District Court became the transferee of the bond on which the suit was brought in the District Munsif's Court.

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* Second Appeal No. 1058 of 1887.

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On appeal the District Judge held that the case fell within Section 136 of the Transfer of Property Act, and that the transfer was therefore void and inoperative. At the hearing we were referred to the case of *Rathnasami* v. *Subramanya* (1) in which the plaintiff was a vakil of the High Court, who had bought a bond and sued upon it in the Subordinate Court of Kumbakonam. It was argued in that case that as a vakil of the High Court is entitled to practise in every Subordinate Court as in the High Court, he is not at liberty to buy an actionable claim anywhere within Presidency. But the Court declined to accept this view of the section, and held that as there was no evidence that the vakil practised regularly in the Subordinate Court, the assignment to him was not affected by the section.

The effect of this decision really is to limit the operation of the section by confining it to the cases in which the claim is necessarily and immediately litigated in the Court in which the person affected exercises his functions. In the present case the Court, under the jurisdiction of which the claim actually fell, was not the Court in which the plaintiff exercised his functions. It was only by transfer, appeal, or otherwise that the District Court would have gained jurisdiction.

We do not think that this potential jurisdiction is the jurisdiction intended by the section. By way of analogy we may refer to the language of the Indian Majority Act, Section 3, where the words "every minor under the jurisdiction" have been held to mean "minor actually subjected to the jurisdiction of the Court of Wards," and not "minor who may be so subjected."

We must reverse the decree of the District Judge and remand the case for disposal on the merits.

Costs to be provided for in the revised decree.

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11 M. 500.

[500] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

QUEEN-EMPRESS *v.* VYTHILINGA AND OTHERS.*

[9th January, 1888.]

Registration Act, 1877, *Sections* 82, 83—*Criminal Procedure Code*, *Section* 195—*Sanction*.

Certain persons were charged with offences falling under Section 82 of the Indian Registration Act, 1877, and also with forgery of a document presented to, and registered by, a Sub-Registrar; the Sub-Registrar having granted sanction to prosecute the persons concerned without holding any enquiry, the Sessions Judge referred the case to the High Court under Section 215 of the Code of Criminal Procedure, in order that the commitment might be quashed on the ground that there was no legal sanction:

Held, that no sanction was necessary as to the charge of forgery, and that the provisions of Section 195 of the Code of Criminal Procedure were not applicable.

CASE referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure, by J. A. Davies, Acting Sessions Judge of Tanjore.

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* Criminal Revision Case No. 499 of 1887.

(1) 11 M. 56 (61).

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The facts of this case are set out in the judgment of the Court (COLLINS, C.J., and WILKINSON, J.).

Kalianaramayyar, for accused.

Pattabhiramayyar, for the Crown.

JUDGMENT.

The Acting Sessions Judge of Tanjore applies to the High Court to exercise the powers vested in it by Section 215, Criminal Procedure Code, and to quash the commitment of certain persons to take their trial before the Court of Sessions, on the ground that there has been no legal sanction for the prosecution. Four persons have been committed to the Court of Sessions on the following charges: (1) defendants Nos. 1 and 4 on a charge of forgery, (2) defendants Nos. 2 and 3 on a charge of abetment of using a forged document as genuine (Sections 471 and 109, Indian Penal Code), (3) defendants Nos. 2 and 3 on a charge of abetting false personation before a Sub-Registrar (Section 82, Act III of 1877), **[501]** and (4) defendants Nos. 2 and 3 on a charge of making false statements before a Sub-Registrar (Section 82, Act III of 1877).

The document which is alleged to have been forged purports to have been executed on the 7th January 1887. It was presented for registration and registered on the 23rd idem. The document purports to have been executed by the prosecution 1st witness (Amirthathammal) to defendant No. 1 (Vythilinga Chetti) mortgaging her lands to him as security for a loan of Rs. 1,500. Defendant No. 2 is the writer of the document, and defendants Nos. 3 and 4 are the attesting and identifying witnesses. On being applied to by Amirthathammal to grant sanction for the prosecution of the accused, the Sub-Registrar passed the following proceedings: "The document having been registered, I cannot take the initiative in the matter. Sanction is however accorded to the petitioner to prosecute the persons concerned." On the authority of *Queen-Empress* v. *Sheikh Beari* (1) the Sessions Judge is of opinion that, as the Sub-Registrar has taken no evidence and made no enquiry before granting sanction, the commitment is illegal.

The only offences for which a registering officer can grant permission to prosecute, are those referred to in Section 82 of the Act (III of 1877). If the permission of the Sub-Registrar was necessary for the prosecution of defendants Nos. 2 and 3 for making false statements before him and for abetting false personation, such permission was granted. But it has been held by a Full Bench of the Calcutta High Court on *Gopi Nath* v. *Kuldip Singh* (2) that it is not necessary that sanction should be given before instituting a charge under Section 82. The Sub-Registrar's sanction was not necessary for instituting the charge of forgery. The alleged forged document has not been given in evidence in any proceeding before a Court, and the provisions of Section 195 of the Code of Criminal Procedure have therefore no application. For these reasons we refuse to quash the commitment, and direct the Sessions Judge to proceed to hear and determine the case according to law.

(1) 10 M. 232.

(2) 11 C. 566.

12 M. 1.

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12 M. 1.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

SESHAMA (*Defendant*), *Appellant v.* SANKARA (*Plaintiff*), *Respondent.** [6th February and 20th April, 1888.]

Boundary Act, 1860, *Sections* 21, 25, 28—*Limitation Act*, 1877, *Sections* 6, 14—*Appeal from decision of Boundary officer—Limitation—Award by Arbitrators—Irregular procedure.*

The appeal allowed by Section 28 of the Madras Boundary Act, XXVIII of 1860 is one from a decision recorded in the presence of the parties and duly intimated to them as required by Section 25 of the said Act.

In 1883 a plaint by way of appeal from a decision purporting to be passed under Section 25 of the Boundary Act was presented to the Court of a District Munsif and returned on the ground that the subject-matter of the suit was beyond the jurisdiction of the said Court. The plaint was then filed in the District Court more than two months after the date when the decision of the Boundary Settlement officer was communicated to the parties :

Held, that Section 14 of the Limitation Act, 1877, applied, and that the suit was not barred by limitation.

The true construction of Section 6 of the Limitation Act, 1877, is that, save as to the *period* of limitation, the other provisions of the Act are applicable to cases governed by special and local laws of limitation.

The omission by the Collector to pass a decision in accordance with an arbitrator's award and to furnish a copy to the parties as required by Section 21 of the Boundary Act is fatal to the award.

[2] The power given by Section 21 being a judicial power, a Collector must exercise his independent judgment and should not refer the award for acceptance to the Board of Revenue and Government, nor should he adjudicate when, as agent to the Court of Wards, he represents one of the rival claimants.

[Appl., 34 M. 151=8 M.L.T. 310=(1911) 1 M W.N. 28 (29); R., 24 M.L.J. 41 (45)=18 Ind. Cas. 617 ; 4 O.C. 181 (185).]

APPEAL against the decree of D. Buick, Acting District Judge of North Arcot, in Original Suit No. 22 of 1883.

The facts necessary for the purpose of this report sufficiently appear from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.)

Mr. *Powell* and *Parthasaradhi Ayyangar*, for appellant.

Mr. *Subramanyam*, for respondent.

JUDGMENT.

The appellant is the palayagar of Bangari and the respondent is the zemindar of Punganur in the District of North Arcot. Both the Bangari palayam and the zemindari of Punganur are permanently-settled estates and they are in part contiguous to each other, the former lying to the east of the latter. The property in litigation consists of certain hills and

* Appeal No. 7 of 1885.

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jungles which lie between them and the contest is as to the estate in which they are included or as to the true boundary line between the two estates where the hills and jungles in dispute are situated.

The boundary in dispute is that between the villages Sarakal, Gurukuvaripalli and Chiltavaripalli, a hamlet of Sarakal in the Bangari palayam, and the villages of Bonamanda and Midimalla subordinate to the village of Avalapalli in the Punganur zemindari. The latter villages are on the plateau and the former are on the plain below the plateau and the dispute is as regards the slopes of the ghats and the valleys between the spurs projecting from the table land. In the plan attached to the decree of the first Court the boundary claimed by the respondent is represented by the yellow line commencing at the spot, marked Q (Bedisakonda) on the south and extending to Virastralapenta on the north, marked A, and the boundary claimed by the appellant is denoted by a green line commencing at Kannaoparai, marked W, and extending to an old temple, marked C. In July 1882 the Government invested Lieutenant-Colonel Cloete, Deputy Superintendent of Revenue Survey, with the powers of a Settlement officer under Madras Act XXVIII of 1860 for the purpose of adjudicating on the conflicting claims. The boundary line which he determined as the true line is shown on the plan by a broad blue line.

The Settlement officer recorded his decision at Trichinopoly [3] on the 15th November 1882 and forwarded it to Madras where the Superintendent of the Madras Revenue Survey confirmed it on the 10th March 1883. It was then communicated to the parties concerned, the communication from the Collector to the (plaintiff) respondent being dated the 24th March 1883. From that decision, the appellant preferred no appeal by way of regular suit, but the respondent brought this suit on the 8th May 1883, praying for a declaration that he was entitled to have the boundary determined and demarcated in accordance with the yellow line. His case was that the tract between the blue and yellow lines never belonged to the appellant, that it formed part of his zemindari, and that it was declared to belong to him by Mr. Sewell in 1871, who then adjudicated on the claim as arbitrator under the Boundary Act. For the appellant it was contended that the tract between the green and the yellow lines never belonged to the respondent, but belonged to himself, and that the decision of Mr. Sewell was set aside on appeal. For the purposes of this appeal it is necessary to refer only to three questions on which the appellant and the respondent proceeded to trial, viz., (1) Whether the claim was barred by limitation; (2) Whether the claim was *res judicata* by reason of the decision of Mr. Sewell in 1871; (3) Whether the tract in dispute belongs to the respondent.

As to the first question, the District Judge held that the suit was not barred by limitation, and in this opinion we concur. The question has to be determined in accordance with Madras Act XXVIII of 1860, and it is provided by Section 25 that—"The Settlement or other officer shall proceed to investigate the claim, and after examination of the witnesses and documents, shall record his decision and the grounds for arriving at it, and after duly informing the parties of the same, he shall proceed to mark out the requisite boundaries in accordance with the decision, which, subject to the revision of the authority to whom the said officer is immediately subordinate, shall be considered as the determination of all claims and disputes until it is set aside by a formal decree of a Civil Court. An appeal shall lie to

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the Civil Courts from this decision by regular suit, provided it be preferred within two calendar months from the passing of the same." If the decision of the Settlement officer were taken to be passed on the 15th November 1882, when he recorded it at Trichinopoly in the absence of the rival claimants and without previous intimation to them, [4] the claim would be clearly barred as it was preferred after the expiration of two months, *viz.*, on the 8th May 1883. If on the other hand, the decision of the Settlement officer were considered to be passed on the 24th March 1883 when it was communicated to the respondent, the suit would be in time. We entertain no doubt that the decision from which an appeal is allowed by Section 28 is the one recorded in the presence of the parties and duly intimated to them, for the right to prefer an appeal within two months presupposes a knowledge of the adverse decision from which the appeal is allowed. We do not consider that there is a real conflict between the decisions reported in *Thir Sing* v. *Vènkataramier* (1) and *Annamalai* v. *Cloete* (2). It is not necessary to consider whether the decision of the Settlement officer is only a preliminary proceeding and becomes appealable only after it is confirmed by the revising authority. But it is sufficient to state that the question now under consideration did not arise in the first mentioned case; what was really decided by it being that, when an appeal was preferred from the decision of the Settlement officer to the revising authority and the decision was confirmed by such authority, the period began to run from the date of the original decision and not of the decision of the revising authority. In *Annamalai* v. *Cloete*, however, the question now raised for decision was discussed and the Court observed, that if there was any decision at all in the sense of the Act, it could not date earlier than the date of its communication to the parties; otherwise they might be barred of their right of appeal without any knowledge of the decision having been passed.

Another objection taken in appeal as regards limitation is that although the plaint was presented on the 5th May 1883 to the District Munsif of Palmanair, it was presented to the District Court, which was alone competent to entertain it, on the 15th November 1883, that Section 14 of the General Act of limitations is not applicable to cases governed by a special enactment and that on that ground the suit was barred by limitation. It appears that the suit was at first valued at less than Rs. 2,500 and instituted in the District Munsif's Court, but after enquiry the District Munsif came to the conclusion that the real value was over Rs. 2,500 and on the 13th November 1883 returned the [5] plaint to be presented to a Court of competent jurisdiction, and the plaint was accordingly presented to the District Court on the 15th November 1883. It is conceded that if Section 14 of Act XV of 1877, the Act in force at the date of the suit, is applicable to cases falling under the Boundary Act of 1860, the claim is not barred by limitation, but it is contended that Section 14 is not applicable to such cases. Although the decision reported in *Thir Sing* v. *Venkataramier* supports this view, that decision was passed, it must be remembered, with reference to Act IX of 1871. Section 6 of that enactment provided that—"When by any law not mentioned in the schedule hereto annexed and now or hereafter to be in force in any part of British India, a period of limitation, differing from that prescribed by this Act, is specially prescribed for any suits, appeals or application, nothing herein

(1) 3 M. 92.

(2) 6 M. 189.

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contained shall affect such law;" but it was modified by Section 6 of Act XV of 1877, and the words "nothing herein contained shall affect or alter the period so described" were substituted for the words "nothing herein contained shall affect such law."

The true construction of Section 6 then is that, save as to the period of limitation, the other provisions of the General Act of Limitations are applicable to cases falling under special or local law, and this view is in accordance with the decisions reported in *Behari Loll Mookerjee* v. *Mungolanath Mookerjee* (1), *Guracharya* v. *The President of the Belgaum Town Municipalities* (2), and *Reference under Forest Act V of* 1882 (3). We overrule the objection and hold that the suit was properly considered not to be barred by limitation.

As to the second question, the District Judge is of opinion that the decision of Mr. Sewell was final, that it was binding on the appellant, and that it was not competent to the Government to reopen it. It is admitted that on the 24th August 1871, Mr. Sewell, Assistant Collector of North Arcot, professing to act as an arbitrator under Act XXVIII of 1860, investigated the present claim, *inter alia*, and formally adjudicated upon it. At that time the appellant was a minor, and his estate was under the management of the Court of Wards. Certain old boundary disputes revived in villages along the border of the Chittur taluk and the zemindari of Punganur, and it was considered desirable by the Collector **[6]** to settle them under Act XXVIII of 1860 and to include the present dispute in the settlement. He proposed that Mr. Sewell should undertake the adjudication of these disputes and adding that the zemindar of Punganur expressed his acquiesence in the proposal, requested the Government to assign to Mr. Sewell the adjudication of the differences of which he enclosed a list including the boundary that forms the subject of the present litigation. The Board of Revenue submitted the proposal for the orders of Government who by their order, dated the 13th September 1870, authorised Mr. Sewell to act as arbitrator under Act XXVIII of 1860 for the settlement of the boundary disputes referred to in their proceedings, observing that the Collector should be careful to see that all the requirements of the Act in regard to arbitration were strictly adhered to (Exhibit CC). The Collector communicated the Government order to Mr. Sewell by endorsement and he thereupon proceeded to adjudicate on the claim. He recorded his decision (Exhibit V) and forwarded it to the Collector who forwarded it for the approval of the Board (Exhibit R) and the Government. They approved of the decision and the Collector deposited it in the District Court (Exhibit S). The award was afterwards forwarded to Mr. Rundall to be carried out and he advised the Collector of the difficulty which he experienced in so doing and called attention to several omissions in procedure which in his opinion rendered the award altogether void. A correspondence then ensued and after obtaining the opinion of their Law officers, the Government came to the conclusion either that the question in dispute must again be referred to a new arbitrator if the parties concerned will consent or that if they will not consent, a Settlement officer must be deputed to deal with it under Section 25 of the Act. The parties to this suit consented to the appointment of Major Liardet as arbitrator, and though Government appointed him he was unable to proceed with the arbitration. The respondent then declined to consent to the appointment of any one else as

(1) 5 C. 110. (2) 8 B. 529. (3) 10 M. 210.

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arbitrator and the Government appointed Colonel Cloete to proceed under Section 25 of the Boundary Act. The omissions to which Mr. Rundall called attention are (i) that no written statement nor agreement was filed in accordance with Section 22, (ii) that there was no order of reference as required by the Section 23, (iii) that Mr. Sewell disposed of disputes between villages which are not mentioned in the Government order [7] whereby he was appointed arbitrator, (iv) that when the award was forwarded to the Collector he did not confirm it and pass a decision as required by Section 21, (v) that such decision was not intimated to the parties, and that a certified copy was not forwarded to the District Court for deposit as provided by Section 24.

Though, as observed by the District Judge, most of the omissions are mere defects of form and may not be considered to be fatal to the award on the ground that there was a substantial, if not a formal, compliance with the provisions of the Act, the omission on the part of the Collector to pass a decision in accordance with the award and furnish a copy of the same to the parties is, as pointed out to the Government by the late Advocate-General, fatal to the award. That the Collector intended to approve of the award there is no doubt, for in his letter to the Board of Revenue, dated the 9th October, he expressed his approval and recommended its acceptance by Government. But he overlooked Section 21, which requires him to pass a decision according to the award and to furnish a copy thereof to the parties, and provides that the decision given according to the award shall be final. The power given by this section is judicial, and the Collector was in error in seeking the acceptance of the award by the Board and the Government instead of exercising his independent judgment as a Judicial officer. Again, his position was anomalous. As agent to the Court of Wards he represented one of the rival claimants, and as the person entitled to approve of the award and pass a decision according to it, he was judge in one sense in his own cause. Again, he passed no decision in accordance with the award which alone could become final when duly intimated to the parties and sustain a plea of *res judicata*. We are unable to concur in the opinion of the Judge that this error of procedure is not substantial, and that it was not competent to the Government to re-open the question.

On the merits, however, we consider the decision of the Judge is right. The oral evidence upon which the parties rely is sufficiently set out by the Judge, and it is scarcely necessary for us to recapitulate it here. It will be observed that the oral evidence is conflicting; but considering it in the light thrown upon it by certain undisputed facts and by the probabilities of the case, the respondent's claim appears to be well founded. The dispute between these two estates is more than 60 years old, and the question of [8] actual enjoyment is therefore of considerable importance. The Bangari palayam was under attachment from 1804 to 1827 and it was restored to the palayagar in 1828. During this period the palayam was under Amani management and the accounts do not show that the Government derived any revenue from the forest or hill produce of the tract in dispute, whilst the accounts of Bonamanda indicate that such produce was enjoyed by the zamindar of Punganur. Again, in 1828, a dispute arose in regard to the tract in question between the two estates. Messrs. Macdonald and Inglis, Head Assistant Collectors of North Arcot and Cuddapah, were directed to settle the dispute, and they decided in favour of the respondent in 1832. Their judgment shows that the Punganur zamindar was then in possession; that though the dispute existed even prior to 1804, no

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evidence was then forthcoming in support of the appellant's claim ; and that on the other hand there was positive evidence that the Government was not in possession between 1804 and 1827. It was admitted in the Court below that the respondent was in possession since Mr. Sewell's settlement in 1871. As for possession during the intermediate period, it is shown on the one hand by the oral evidence for the respondent that a Punganur Tana existed at Katu Papannagunta, marked P in the plan, and that tamarind and other forest produce were let on contract by the respondent's family, whilst on the other, there is no trace of interference by the Bangari Palayagar with the possession of Punganur.

Furthermore, though the pymaish accounts of the two estates severally support the rival claims, yet the Punganur Survey Account was considered in 1832 and in 1871 to be more carefully prepared than the Bangari pymaish in regard to waste land and a comparison of O, P, II, III and IV supports the observation of the Judge that the former is more satisfactory and reliable than the latter.

Again, the position of the ruins of a fortification across the Saddikudu Pass not very far on the slope from where the ascent to the plateau begins, the situation of the fortress of Analapallidrug sheltered by jungle all around in which the Punganur Zamindar took refuge in 1785 and on previous occasions and the situation of a ruined wall across the valley in Govindulupenta, marked G, and of a gateway of Thalupula Kamma show that the tract in dispute **[9]** in which the abovementioned Punganur works lie belonged probably to Punganur even before the Mysore war.

With the foregoing evidence before us we are unable to adopt Colonel Cloete's opinion which he formed mainly with reference to the natural features and the lie of the country, the distance of the boundary line from the villages of the rival claimants, and the necessity of the villages on the plain for fuel and grazing grounds.

In dealing with questions of property a decision must be arrived at upon the evidence on record, and we cannot approve of the mode in which Colonel Cloete rejected the evidence on both sides and decided the case on considerations such as those mentioned by him. We are of opinion that the District Judge has come to a correct conclusion as to the effect of the evidence on the record, and we dismiss this appeal with costs.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RAMASAMI AND OTHERS (*Plaintiffs*), *Appellants v.* APPAVU AND OTHERS (*Defendants*), *Respondents.** [11th and 31st August, 1887.]

Evidence Act, Sections 13, 42—Relevancy of judgments in suits in which right asserted to collect dues for a temple.

In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple :

Held, that judgments in other suits against other persons in which claims under the same right had been decreed in favour of the trustees of the temple

* Second Appeals Nos. 455 to 457 of 1886.

were relevant under Section 13 of the Evidence Act as being evidence of instances in which the right claimed had been asserted :

Held, also that the said judgments were relevant under Section 42 of the said Act as relating to matters of a public nature.

[Appr., 12 A. 1 (13) (F.B.); R., 24 B. 591; 15 M. 19 (24); 16 M. 194 (196).]

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APPEALS from the decrees of D. Irvine, District Judge of Trichinopoly, reversing the decrees of A. Kuppusami Ayyangar, District Munsif of Trichinopoly, in suits Nos. 208, 209, and 395 of 1884.

[10] The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

The Acting Advocate-General (Mr. *Spring Branson*), for appellants in all cases.

Mr. *Brown* for respondents in second appeals Nos. 455 and 456 of 1886.

Parthasaradhi Ayyangar and *Bhashyam Ayyangar*, for respondents in second appeal No. 457 of 1886.

JUDGMENT.

These were suits brought on behalf of the Saptharishi pagoda at Lalgudi, in the Trichinopoly District, and the nature of the claim is thus set forth in the plaints.

An annual income called *saiykkurini* has been fixed and collected in the time of the present as well as of previous Governments for the benefit of the said devastanam for (in respect of, or upon,) the lands in the undermentioned Mangamalpuram, Konnakudi, Valuthiyur hamlets of the said village and others villages.

The obligation binding the proprietors of the lands in the said villages, &c., whoever they may be, without any reference to religion, to pay the said income to the said devastanam, has existed from time immemorial.

Out of the saiykkurini of Rs. 69-9-2 per fasli [due] to the said devastanam and fixed for the said Mangamalpuram and its hamlets, the saiykkurini per fasli is fixed at Rs. 49-1-2 for the said Mangamalpuram village, Rs. 7-8-0 for the said hamlet, Konnakudi village, and Rs. 36-8-0 for Valuthiyur village. Each raiyat of the said villages is bound to pay every fasli to the said devastanam at (the rate of) Annas 13-1 per pangu in Mangamalpuram village, Annas 12 per pangu in Konnakudi village, and Annas 9-9 per pangu in Valuthiyur village.

The defendants have owned $4\frac{9}{16}$ pungus of land in the said Mangamalpuram village from fasli 1284 last, $\frac{4\frac{1}{4}}{6}$ pungus in the said hamlet Konnakudi from [a period] prior to the said fasli, and $\frac{1}{16}$ pungu of land in Valuthiyur village from a period prior to the said fasli. The saiykkurini tirva therefor at the aforesaid rate amounts to Rs. 3-12-10 per fasli for $4\frac{9}{16}$ pungus in Mangamalpuram village, Annas 7-6 per fasli for $\frac{4\frac{1}{4}}{6}$ pungus in Konnakudi village, and Pies 8 per fasli in Valuthiyur village. The defendants are bound to pay [it] within the close of each fasli.

The defendants, who have been paying the said saiykkurini [11] tirva all along prior to fasli 1284, have allowed their payments to fall into arrears to the extent of the amount due from fasli 1284 up to date. Besides this, they deny the right (of the devasthanam) to the said income from that date.

The issues framed in original suit No. 395 of 1884, from which appeal No. 56 of 1885 was preferred to the District Court and second appeal No. 457 of 1886 is preferred to this Court, were as follows :—

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(1) Whether the pagoda has right to collect the saiykkurini tax?
(2) Whether the defendants are bound to pay and have paid such tax till fasli 1284?
(3) Whether the claim is in any way barred by time?
(4) What amount the plaintiffs are entitled to recover from the defendants?

In original suit No. 208 of 1884 [appeal No. 53 of 1885, second appeal No. 456 of 1886] the issues were—

(1) Whether the plaintiffs have no cause of action against the defendants by reason of their being Christians?
(2) Whether the claim is *res judicata*?
(3) Whether the defendants are bound to pay the saiykkurini tirva mentioned in the plaint?

In original suit No. 209 of 1884 [appeal No. 48 of 1885, second appeal No. 455 of 1886] in addition to the issues just above recorded, additional issues were framed as to whether the right to collect what is styled the tirva is barred by time or not.

The defendants disputed the plaintiffs' right to the payments claimed, denied that such payments had been made up to fasli 1284, and in the case of the defendants, who are Christians, pleaded that, by reason of their religion, the obligation, if any, is not binding on them.

The Court of First Instance gave decrees for the plaintiffs in each case, but the District Judge in appeal reversed those decrees and dismissed the suits with costs throughout.

Against the decrees in appeal these second appeals are preferred.

[After dealing with the plea of *res judicata* the judgment proceeded as follows.]

The District Munsif held it proved by the documentary and oral evidence that payments have been made presumably since **[12]** 1811, and that the temple authorities have a right to collect them; the objection that the origin of the right to claim payment had not been explained, and that, in the absence of such explanation, the payment must be held to be voluntary, he disposed of by saying that it was "too late in the day" for the defendants to question the right.

The District Judge says that the plaintiffs "base their right to collect" what he calls "*the tax*," "upon custom;" he also remarks that they are unable to describe the origin of the right asserted, and states that they cannot explain the meaning of the word itself or the nature of the thing claimed, and on these grounds, apparently, holds that the custom is not shown to be reasonable; and he decides that the "tax" is not certain, because "the mode of assessment is purely arbitrary." He further held that though the payments now claimed have been made under the name of saiykkurini for a long time, they have not been made without objection, and therefore the alleged custom, if made out, has not been acquiesced in.

It is desirable to clear the case of any misconception which may arise from the use of the word "tax;" no word corresponding thereto is used in the plaint; the words used "Varambadi," *i.e.*, income and "Yerpattu," *i.e.*, "settled" do not necessarily or even primarily import a power created by the sovereign authority to collect a tax. Again the fact that there have been at times disputes as to the payments claimed is no evidence that the right to claim them does not exist; payments made by parties to suits in consequence of such disputes being decided against them in Courts of Law, and by others similarly situated without recourse to

law, might be, on the other hand, evidence, so far as it goes, of the continuance of a demand as matter of right and of submission thereto by reason of a corresponding obligation.

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Objection is taken on the respondents' part that the judgments filed showing that certain persons holding lands in villages in which it is in evidence that these payments are claimable as of right have been compelled by decrees of Court to pay are not admissible against the appellants.

It is contended that such judgments not being "transactions" or "facts," they are not admissible under Section 13 of the Evidence Act, and that they do not relate to a matter of a public nature within the meaning of Section 42 of the same Act.

[13] We concur with the majority of the learned Judges who decided in *Gujju Lall* v. *Fatteh Lall* (1) that a judgment of the character thereunder consideration, *viz.*, as to whether a certain person was or was not the heir to another, is neither a transaction nor a fact in the sense in which the words are used in Section 13 of the Evidence Act, and that the judgment referred to in that case could not be given in evidence, but the judgments filed in this case are not of the character under consideration in that case; the question for determination in the previous suits was whether the payments then claimed, and which are in contest in the present suits, were claimable as of right, and in one case whether they were so claimable from a particular class of persons, *viz.*, Christians; and it appears to us that, when a right of the character now in question is at issue, such judgments are admissible in evidence as evidence of "particular instances in which the right or custom was claimed," and "in which its exercise was disputed, asserted or departed from," and was further adjudicated upon; and that the right was a right of the character dealt with under Section 13 of the Evidence Act. The case for the appellants is—and there is evidence in support of it in the case before us as to at least six of such villages—that from those who hold lands in a large number of villages in the vicinity of the temple (see Exhibit F) the payment claimed is demanded as of right, and that such payments have been made after suits from time to time brought and determined in reference to the liability of persons occupying lands in these villages; and this being so, we are further of opinion that the decisions in the former suits are decisions which relate to "matters of a public nature" within the meaning of Section 42 of the same Act.

The question for determination before us is not dissimilar in principle from that reported in *Naranji Bhikabhai* v. *Dipa Umed* (2). The right now claimed appears to us to be as much a right of the character indicated in Section 13 of the Evidence Act as the right to a fishery, and the judgments go far to support the finding of the District Judge as to the payments claimed having been customarily made. The assumption that the appellants based their claim upon an alleged custom only appears to us to be unwarranted. The allegations in the plaint appear perfectly **[14]** compatible with the case that the appellants base their claim upon a right; the origin of that right is not clearly defined, but from evidence of custom, in the sense of payments extending over a long series of years, the existence of a right may, in connection with other circumstances, possibly be inferred; and the dismissal of the appellants' suits for the reasons stated affords good grounds for second appeal. The word "custom" is not used in the plaints.

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(1) 6 C. 171.

(2) 3 B. 3.

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On the facts then as found by the Courts below, such payments have been ordinarily made, and, as would appear from Exhibit C, not only from the year 1830 and subsequently, but, as certified in that report, there was evidence of such payments from 1801.

No doubt it is also stated that no *collections* were made from 1801 to 1822; there were, however, as recited in C, agreements to pay taken from the mahajanams in 1813 in a lease for 10 years, and the fact of nothing having been collected is explained, *viz.*, that the people had been suffering much and unable even to pay the Government dues; it further appears that in 1828 "the mahajanams of the Lalgudi country" voluntarily gave an agreement to the Tahsildar in which "they admitted the right of the said temple to 7½ mercals for sayikkurini which was allowed *from the beginning*" (or as we should say from time out of mind), excused themselves for not having paid it, and agreed to pay it in future in money at a commutation rate to be fixed by Government.

There is moreover a reference to an excuse said to have been made by the raiyats from which it would appear that these payments were made in the time of the Mussalman rule also.

As to the objection that the claim is bad by reason of the nature and amount of the payments being indefinite, the word itself indicates (payment of) a "Kuruni" or mercal for every cheyyi of land, a well-known measure; and from Exhibit C it seems that the raiyats' share of produce from such area was estimated at 40 kalams of grain, and indeed there appears to have been no contest whatever as to the rate claimed, *viz.*, 7½ mercals for every 40 kalams or the equivalent after the charge was commuted into a money payment.

As to antiquity in the case of a right no less than of a custom, usage for a number of years, such as is proved in this case, certainly raises a presumption that such right or custom has existed beyond the time of legal memory.

[15] The question is whether a legal origin is to be assigned to the plaintiffs' claim. The evidence to which we have above referred is hardly consistent with the payments having been of voluntary character; it is also to be observed that when the temple was under the management of Government, the sums now claimed were collected in addition to the revenue and credited to the temple, while the suit in 1861, in which the defendants were Christians, is of importance not only as bearing on the question whether the obligation to pay exists, but also whether, if it exists, it constitutes a charge on the land; that suit was carried up to the High Court in appeal, and among the contentions raised throughout was one that, whatever the case might be as regarded other persons, there could be no obligation to pay binding upon persons professing the Christian religion; but the second appeal was dismissed, from which it would appear that the obligation must have been held to be something more than a mere personal obligation, and that the payment was not a mere voluntary payment.

A grant from the sovereign power need not necessarily be presumed; the customary payment may be accounted for as a payment charged upon the cultivator's interest in the land (subject to payment of the landlord's share) and created in favour of the temple by the then owners of that interest, in which case the charge would be binding on them and on their successors and on purchasers for value from them.

We have not, however, been referred to any evidence showing that, notwithstanding devolution of these lands from generation to generation

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and transfers to strangers for value, the demand has been ordinarily made and submitted to by heirs and by purchasers and by persons of different religious persuasions not being worshippers in the temple. Evidence as to this would be of great value in assisting us to determine whether the obligation is one which has run with the land, or, in other words, whether the sums claimed constitute a charge on the lands; and as the matter is obviously one of considerable importance, seeing that in the list F there are some 65 villages in the neighbourhood described as villages "from which in 1861 saiykkurini was collected," and the effect of our decision in this case may affect holders of land in all such villages, we shall desire the District Judge to take such evidence on this point also as the parties may adduce, and to [16] return a finding within two months from the date of receipt of this order, when ten days will be allowed for filing objections.

On receipt of the findings of the District Court, these appeals came on for hearing on the 28th February 1888, and judgment was reserved. On the 25th April judgment was delivered as follows:—

These second appeals came on for disposal with reference to the findings on the questions referred for retrial on the 31st August last. Two questions were referred, *viz.*, whether the claim is *res judicata*, and whether the payment claimed to be recovered is voluntary. The finding is that the claim is not *res judicata*, because the present defendants are not shown to be connected with or claim under defendants in the previous suits. As regards the defendant Appavu, however, the District Judge observes that the decision in Original Suit No. 51 would bind him in respect of the land at Seshamangalam.

On the merits the Judge is of opinion that the payment is voluntary and cannot be treated as a charge on the land. It is objected that the finding should not be accepted.

The Judge's opinion that a revised finding was required from him on the general issue of liability is correct. The special question which he was required to consider by the last paragraph of this Court's order of August last was referred to him as a subsidiary question in order that a correct decision might be arrived at as to the character of the payment. The effect of the evidence is summarized by the Judge in paragraph 24 of his return in the following terms:—

"What appears to me to be the inference to be drawn from the whole evidence is that the Government collected this rate for the benefit of the temple not as a rate or charge on land belonging to the temple, but as an additional charge imposed of its own authority to enable it to make an allowance to the temple, to be continued or discontinued at its own will or pleasure, and to which the temple had no independent title; that when the Government ceased to collect it, the people continued to make the payments generally either because they were willing to do so or because they were bound to do so; that for many years past many persons have refused to make any payments, denying their liability to do so; that the temple authorities have got decrees in many cases without dispute, and in two cases against Christians who [17] denied their liability; that in spite of such enforcement in individual cases large numbers of persons have been left unmolested in their refusal to pay. In short, I think that ever since the Government have ceased to collect the rate, the people have held that it was a voluntary payment, and the temple, it was compulsory, and that the temple has never been sure of its ground to try to enforce the claim generally against those who resisted,

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but has rather been trying to build up a case for itself by degrees, and practically no one was likely to be made to pay if he was determined that he would not pay unless he was compelled to do so."

The Judge refers to exhibits C, E, F, and, adverting to the facts that the collection was made because the mahajans were willing to pay, that the fees were classed with devadayam, brahmadayam, and others which are charitable fees, that arrears were remitted without reference to the gurukkals of the temple who are considered to be entitled to them, he comes to the conclusion that there was no grant from Government of a charge on land, and that the fee was collected as a payment voluntarily made to a religious institution. It was in evidence that from 1801 to 1822 no collections were made on the ground that the people were suffering much. It was also in evidence that in 1813 agreements to pay were taken from the mahajans when a lease for ten years was taken in connection with the Government demand; that in 1828 the mahajans voluntarily gave agreements admitting the right of the temple; and that there was an allusion that such payments were made in the time of the Mussulman rule also. Having regard to the foregoing evidence, we cannot say that it is not consistent with the view taken of it by the Judge that the payments were made along with other charitable fees; that they were not made when the raiyats could not afford to do so; that promises were obtained from time to time from the mahajans to continue the payments; that the Government enforced their collection on the basis of those promises; and that they were remitted without reference to the gurukkals who were said to be entitled to the collections when the raiyats could not afford to pay.

We may note here that the raiyats accustomed to worship in the temple would ordinarily continue a payment, such as the one in dispute, as an act of piety, and that there is no evidence of grant of a charge on land or of its confirmation by the British [18] Government. In this connection we may draw attention to the evidence which shows that the owners of 24 out of 28 pangus in the village of Sattamangalam, who are Vishnuvites, pay the fee to the Vishnu temple though, as observed by the Judge, saiykkurini was originally claimed on all the 80 pangus on behalf of the temple in suit which is a Siva temple. It is also worthy of remark that though decrees were obtained, many were not enforced, and that though a pretty large number of raiyats refused payment, legal proceedings were not instituted to enforce payment. We are unable to say upon the whole evidence that the Judge has not come to a correct finding.

As to those cases in which decrees have been obtained and a plea of *res judicata* can be founded upon them, it may be that a fresh inquiry into the merits is precluded. But the decision in each of those cases must depend on the special circumstances of that case in relation to the question of *res judicata*. Among the defendants before us, the Judge has come to the conclusion that the decree in Original Suit No. 51 is binding upon the defendant Appavu in respect of his land in Seshasamudram. We accept the finding of the District Judge and dismiss the second appeals except in respect of the land in Seshasamudram held by the defendant Appavu. We set aside the decree of the District Judge and restore that of the District Munsif as regards defendant Appavu in respect of the land belonging to him in the village of Seshasamudram in second appeal No. 455 of 1886.

We direct each party to bear their own costs throughout in the special circumstances of these cases.

12 M. 19 (P.C.) = 15 I.A. 171 = 5 Sar. P.C.J. 265 = 12 Ind. Jur. 371.

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PRIVY COUNCIL.

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[19] PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Sir Barnes Peacock, and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

ARUNACHELLAM (*Objector*) v. ARUNACHELLAM AND ANOTHER (*by their Guardians*), *Petitioners*.* [27th June, 1888.]

Civil Procedure, 1882, *Section* 311—*Alleged irregularity attending sale in execution—Failure to prove substantial injury resulting.*

A judgment-debtor having allowed the execution-sale of immoveables to be completed without objecting on the ground afterwards alleged by him, *viz.*, insufficiency of description within the requirements of Section 287, he having been throughout aware of what the description was, the sale is not invalid on this ground alone without more.

No evidence having been given in the Court executing the decree of substantial injury having resulted by reason of such irregularity, *i.e.*, the alleged mis-description:

Held, that, although the Appellate Court below had assumed that the property had been sold for less than it ought to have fetched, such substantial injury as inadequacy of price should have been proved to have occurred in order to bring the case within Section 311. *Olpherts and Macnaghten* v. *Mahabir Pershad Singh* (1) referred to and followed.

[**F.**, 18 A. 141 (143); 21 C. 66 (**P.C.**) = 20 I.A. 176 = 6 Sar. P.C.J. 324; **Appr.**, 13 A. 564 (568); **R.**, 28 A. 273 = 3 A.L.J. 140 = (1906) A.W.N. 3; 24 C. 291 (294); 31 C. 815 = 8 C.W.N. 686 (688); 32 C. 509 = 1 C.L.J. 91 = 9 C.W.N. 348; 32 C. 542 = 9 C.W.N. 487; 6 C.L.J. 62 = 11 C.W.N. 848; 6 C.L.J. 163 (174); 14 C.L.J. 346 (351) = 16 C.W.N. 704 (708) = 11 Ind. Cas. 438; 14 C.L.J. 541 (549); 16 C.L.J. 557 (559) = 16 Ind. Cas. 235 (236); 8 C.W.N. 257 (262); 5 M.L.J. 70 (74); 1 O.C. 186; 4 O.C. 331; 4 O.C. 379 (382); 6 O.C. 61 (63); P.L.R. (1900) 161; U.B. R. (1907) 2nd Qr. C.P.C., 311; **Expl.**, 6 C.W.N. 42; **D.**, 6 C.W.N. 48 (52).]

APPEAL from two orders (16th October 1883) of the High Court reversing two orders (9th August 1882, and 26th September 1882) of the Subordinate Court of the Madura district.

The question now raised was whether there had been such an irregularity in a sale in execution of a money-decree involving substantial injury to the judgment-debtor that it had been rightly set aside under Section 311 of the Code of Civil Procedure. The appellant was the purchaser at the sale, and the respondents were the judgment-debtors, whose property had been sold in execution, the sale having been afterwards cancelled in pursuance of the orders of the High Court.

The property sold was an estate lying within the Sivaganga zamindari, consisting of fifteen villages, of which the first, Kattanur, gave its name to the whole estate.

[20] The family to which the respondents belonged owned one-half of Kattanur in possession, and in 1879 obtained the remaining half in mortgage to secure the sums of Rs. 2,582 and Rs. 14,000.

The decree as to which the question of its due execution had arisen was obtained on 6th January 1880, by Tolaja Rama Rao, in a suit of 1879 against the present respondents besides others, and on the 30th January 1882, an application was made by Tolaja for execution of his decree by

(1) 10 I.A. 25, reported as *Macnaghten and another* v. *Mahabir Pershad Singh*, in 9 C. 656.

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sale of the village Kattanur, in satisfaction of a sum of Rs. 5,083 then due upon that decree. An order for attachment of the property was made on the 7th March, the usual proclamation of approaching sale was made on the 11th March, and on the 25th May, an order for sale was made with the customary notification, the sale to take place on the 22nd July. The notification stated that "the right hereinbelow mentioned of the defendants in the said property will be sold." Then followed the boundaries and other description of the village of Kattanur and its hamlets about to be sold. No complaint was then made to the Court that this description was insufficient. On the 27th July, several days after the village had been put up for sale, and the day before it was actually sold, these respondents presented an application praying for a postponement of the sale on the grounds that steps were being taken to set aside the decree and that the Court already held funds sufficient to satisfy the judgment-creditor. The Court refused to postpone the sale unless the debtors paid into Court the balance of the judgment-creditor's claim, and on the next day these respondents filed another petition suggesting another mode of meeting the creditor's demand. In neither of these petitions was any complaint made against the mode in which the property was described or put up for sale.

Having been put up on the 22nd July, and four following days, the property was sold on the 28th, to the present appellant for Rs. 20,500. And on the 29th, the judgment-debtor petitioned the Court to set aside the decree on account of irregularities causing loss. It was complained that the decree might have been satisfied by selling one hamlet only, named Pottapicheri, which it was said would have fetched about Rs. 10,000. The petition proceeded: "It is the object of law that the balance of the decree-debt should be collected by selling Kattanur and its hamlets one after another. In direct contravention to it, the village of [21] Kattanur, &c., and its hamlets were all sold together in one lot, inclusive of the said mortgage right and the proprietary right, and this fact is brought to the notice of the Court as irregular. The minors, who are the owners of the said village, have thereby sustained a heavy loss to the extent of Rs. 40,000." This petition was presented on behalf of these respondents as plaintiffs in Original Suit No. 28 of 1882.

On the 7th August an identical petition was put in on behalf of the respondents as defendants in suit No. 44 of 1879. Both petitions were disposed of on the 9th August by an order which was one of the two orders appealed to the High Court. The order was as follows: "The village of Kattanur with its hamlets was attached as one lot and sold as such. It is now alleged that such a sale was irregular, and that it has caused substantial injury to the defendants, and that hamlet after hamlet ought to have been sold. If anybody had suggested it at the time of the sale, it could have been done; and Sabapathi Chettti, who by so many petitions protested against the sale, did nothing of the kind. There is no irregularity, I think, in selling a property in the manner it was attached. Here the property was attached in one lot and was sold as such." The petition was accordingly rejected.

On the 25th September two more petitions were presented to the Subordinate Court that the sale should be set aside. On the 29th the order was made, which was the second of the two orders appealed to the High Court, that the sale would be confirmed unless an order to the contrary should be made by the High Court within an interval allowed. That time having elapsed, and no order to the contrary having been

received from the High Court, the sale was confirmed on 30th September. The specification of the property in the sale certificate was in the same terms as in the notification. Meantime, on the 9th September, an appeal had been preferred by the judgment-debtors to the High Court against the order of the 9th August on the ground of irregularity on the part of the Lower Court in selling the whole estate when the sale of a part would have been sufficient, "and in not appropriating the moneys already in Court to the credit of the decree."

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By the order of the Chief Justice, dated 19th September, the appeal was admitted on the ground of the "grievous and irreparable loss alleged to have accrued to the appellant," the Chief Justice observing that "he saw no irregularity."

[22] On the 27th September 1882, an application to the High Court to direct the Lower Court to postpone confirmation of the sale till the then pending appeal from the order of the 9th August should have been disposed of was rejected. Consequently the sale was confirmed by the Lower Court on the 30th September, and a certificate followed as above stated.

On the 7th November 1882, the present appellant was on his own application made respondent in the two appeals then pending in the High Court. In these, the order of remand, of which the effect is stated in their Lordships' judgment, was made on 30th April 1883, and was followed by the judgment of the High Court, dated 16th October 1883. This order directed that the orders of the Subordinate Court confirming the sale and refusing to cancel it should be set aside, adding that, as the appellants to the High Court, who were the judgment-debtors, had not asked, as they might have done at the right time for the amendment of the proclamation of sale, they should pay the costs in both Courts.

On this appeal, Mr. *J. D. Mayne* for the appellant argued that the orders of the Subordinate Court were correct and should not have been cancelled. The High Court had set aside the sale upon a ground of objection which was for the first time suggested in the Appellate Court. There had been no insufficiency in the description nor any misdescription of the property which could have prejudiced the purchaser. Nor had any proof been given that the judgment-debtors had sustained substantial injury by reason of any irregularity in the publising or conducting the sale. So that the misdescription, if any, had taken place was not a material irregularity within the meaning of Section 311 of the Code of Civil Procedure. He referred to *Olpherts and Macnaghten* v. *Mahabir Pershad Singh* (1).

For the respondents, Mr. *R. V. Doyne* and Mr. *H. Cowell* argued that there had been on the part of the executing Court such a failure to comply with the provisions of the Code of Civil Procedure and of Section 287 in particular as to vitiate the sale in execution and that it had been rightly set aside.

Mr. *J. D. Mayne* was not called on to reply.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR RICHARD COUCH.—This is an appeal against two orders [23] and one judgment of the High Court of Madras, which reversed the proceedings of the Subordinate Court of Madura in execution of a decree in a suit which had been brought in that Court. The respondents were defendants in the suit, and in execution of the decree which had been

(1) 10 I. A. 25 = 9 C. 656, *nom. Macnaghten and another* v. *Mahabir Pershad.*

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obtained against them, a village called Kattanur was sold by the order of the Court and was purchased by the appellant. The High Court, by their judgment, which is now appealed against, set aside the sale, and the grounds upon which they did so are stated by them to be that: "It is clear that the description of the properties advertised for sale was most imperfect. The judgment-debtors enjoyed not only proprietary rights in some portion of the property, but rights as mortgagees of very considerable value in other portions of the property, and there was nothing to indicate the possession by the judgment-debtors of any rights as mortgagees in the villages. The purpose of the law would be entirely defeated if a more complete description were not enforced than was given in this case. . . . .

"It cannot be doubted that the inadequate description led to sale of property valued at upwards of Rs. 40.000 together with mortgage claim for Rs. 40,000 for Rs. 20,000." Then they say they must set aside the order confirming the sale and also another order made upon another petition by which an application to set aside the sale was refused.

It is true, as stated by the High Court, that the judgment-debtors had proprietary rights in a part of the property and were only mortgagees of the other part. The decree was obtained in January 1880, and an application was made to the Court for the execution of it, and attachment was made of the village, which contained 15 hamlets; there was the usual proclamation of the sale and notification that it was to be on the 22nd of July 1882 and the usual warrant, and apparently the judgment-debtors knew perfectly well that the whole of the village was going to be sold. They state in an application which they made that "the Kattanur village of these plaintiffs has been attached on account of the said debt, and the sale is fixed by this Court for the 22nd instant." Notwithstanding this, the first complaint which was made by them was on the 29th July 1882, and in their petition they complained that the village had several hamlets attached to it; and if one of them alone had been sold, it would have been sufficient. They also complained that one moiety of the villages [24] belonged to them by right of mortgage, and the other they had their property in, raising for the first time the objection upon which the High Court has founded its judgment. The sale was completed, and they then petitioned the High Court on the 9th September 1882. In this petition they state that the villages ought to have been sold each by itself and not all in one lot, and that the villages being separately numbered for the attachment there was no necessity for a representation that they should be separately sold.

Upon that petition an order appears to have been made by the Chief Justice in which he says: "I see no irregularity. The judgment-debtor might have applied that the sale should be made in lots." There is a distinct opinion of the Chief Justice that the judgment-debtors might, if they had considered the sale of the villages in one lot would have been unfair, have made an application to have them sold in lots, which they did not do. However, notwithstanding the Chief Justice's opinion that there was not any irregularity, he admitted the appeal, and the High Court, when the appeal came before them, made this order: "We require the Court below to ascertain and report what is the interest enjoyed by the family in the villages; whether it intended to sell the mortgage and other rights; whether the appellants in that Court made any complaint of the insufficiency of description in the proclamation of sale; and whether any injury has occurred to the appellants from any such insufficiency." It

would appear from what the High Court then directed to be ascertained and reported that they were satisfied with the opinion which had been expressed by the Chief Justice that there was no ground for saying that the sale ought to be set aside because it had not been sold in lots.

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A report was made by the Subordinate Judge, and it is this: "There are four points sent down for report: (i) The interest enjoyed by the family in the villages is as stated in the judgment of their Lordships; (ii) the sale proclamation says that the right, title, and interest will be sold, and this must include the mortgage and other rights, but they were not specified; (iii) no complaint was made of the insufficiency of description in the proclamation of sale. Two petitions are relied on by the petitioners, one dated the 29th July 1882 and the other dated the 7th August 1882. The first petition is said to be before the High [25] Court. The second petition makes no such complaint; (iv) as I find that no such complaint was made, I thought that any evidence as to any injury resulting from such insufficiency was unnecessary."

Therefore, as far as regards the objection that the description was insufficient, which is relied upon, as their Lordships understand, as vitiating this sale—for that appeared to be the contention of the counsel for the respondents—the objection was not taken until the sale had been completed. The judgment-debtors knowing, as they must have known, what the description was in the proclamation, allow the whole matter to proceed until the sale is completed, and then ask to have it set aside on account of this, as they say, misdescription. It appears to come within what was laid down by this Board in the case in the 10th Indian Appeals, page 25 (1), that if there was really a ground of complaint, and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection.

There is another objection to this decree of the High Court. The law provides, by Section 311 of Act XIV of 1882, that an objection may be taken by the judgment-debtor to an irregularity in the sale, but then it says that no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity. The Subordinate Judge finding, as he says, that no complaint had been made of this irregularity, did not receive evidence that there was any injury occasioned by it. If he was wrong in the opinion of the High Court in [26] doing that, they ought to have sent back the case to him to take that evidence. Instead of doing this when the case comes before them and they give judgment, they assume that there was a substantial injury and that the property, in consequence of this mis-description, had sold for less value than it would otherwise have fetched. There seems to be no

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ground for an assumption of that kind by the High Court, and, therefore, both as to the objection to the non-description, or not mentioning the mortgage in the attachment proceedings, and that there was no proof that any special injury was occasioned, their Lordships think that the judgment of the High Court was wrong, and that it must be reversed.

Their Lordships will, therefore, humbly advise Her Majesty that the orders of the High Court should be reversed, the appeals to the High Court dismissed with costs, the orders of the Subordinate Court, which were appealed against, affirmed, and the costs in the Subordinate Court ordered to be paid by the respondents. The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant—*Lawford, Waterhouse, and Lawford.*
Solicitors for the respondents— *Rowcliffes, Rawle & Co.*

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PRESENT :

Lord Macnaghten, Lord Hobhouse, and Sir R. Couch.

[*On appeal from the High Court at Madras.*]

APPASAMI ODAYAR AND OTHERS (*Plaintiffs*) *v.* SUBRAMANYA ODAYAR AND OTHERS (*Defendants*).
[3rd and 4th May, and 23rd June, 1888.]

Limitation Act 1859, *Section* 1, *Clause* 13—*Partition suit for share of joint family estate—Failure to prove participation in the family coparcenary within the period.*

In a suit brought in 1881 for a share of joint family estate, the question whether the plaintiffs' right to sue was barred by limitation under Act XIV of 1859, Section 1, Clause 13, depended on whether there had been any participation of profits between the plaintiffs' father and the defendants, who with him were co-descendants from a common ancestor, after 1837 down to which year the family was certainly joint. If in 1871 the period of limitation had expired, the Act IX of that year and the later Acts need not be referred to; for, if they altered the law, they would not revive the right of suit.

[27] Upon the evidence it was found that whatever might have been the father's intention when he settled in another village in 1837, the effect of what had been since done, or omitted, on both sides, was that in due time the right of suit had become barred under the first Limitation Act.

[R., 19 A. 357 (370); 19 B. 809 (814); 37 B. 393 (397)=14 Bom. L.R. 908 (914)=17 Ind. Cas. 629 (632); 20 C. 487 (492) (P.C)=20 I.A. 30=6 Sar. P.C.J. 261; 26 M. 291 (304); 8 Ind. Cas. 512=21 M.L.J. 21 (28)=9 M.L.T. 3 (7); 53 P.L.R. 1901]

APPEAL from a decree (1st April 1884) of the High Court reversing a decree (13th April, 1882) of the Subordinate Judge of Kumbakonam.

The appellants, plaintiffs in the suit, and the respondents, who were defendants, belonged to branches of a family whose gentile name was Odayar and who were mirasidars, the former being residents of Karuppattimulai, in Mannargudi taluk, and the latter living on the family land at Aravur in Kumbakonam. The question on this appeal was whether the plaintiffs had a still subsisting right to sue, notwithstanding the law of limitation, as members of an undivided family, to have partition made of estate alleged to be ancestral and joint, and to hold their share in severalty

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from the defendants, their alleged coparceners, who were in possession, or the coparcenary had ceased for so long a time as that the claim had become barred by limitation.

The plaint (25th July 1881) claimed one-fourth of the family property at Aravur, land, houses, and appurtenances, setting forth the descent of the parties in the manner stated in their Lordship's judgment. The plaintiffs alleged that down to 1877, they had not been excluded from joint enjoyment of the profits of the lands at Aravur to which they were entitled, but that since that year their share had been denied to them. As to their own lands at Karuppattimulai, these had been partly obtained by their mother as stridhanam and inherited by them from her, and partly had been purchased out of income, so that they were not joint property of the family in general.

The defendants alleged that the branch of the family to which they belonged had been separate as to food, residence, and property since the time of the defendants' grandfather, Thoppai, who died in 1838 or 1839; and that he and Chidambara, who died in 1868, the father of the first defendant, had themselves acquired the properties in suit after the cessation of joint living on the part of the plaintiffs' father. They also relied on the law of limitation.

The issues were: 1st, whether the parties were members of an undivided or divided family, and if the latter, when and how [28] divided, and down to what period did the coparcenary last? 2ndly, whether the claim was barred by limitation? 3rdly, whether the property claimed was acquired as alleged for the defence?

The Subordinate Judge found that there had been no partition, and that the property claimed was not the self-acquisition of the defendants or of any of them. He found that the coparcenary had continued down to 1877. He, therefore, made a decree for partition in favour of the plaintiffs.

On appealthe High Court (Turner, C.J., and Muttusami Ayyar, J.) reversed the decree of the Subordinate Judge. Their judgment was as follows :—

"It is scarcely possible, upon the evidence before us, to resist the conclusion that for upwards of 45 years there has been no participation on the part of the plaintiffs' branch in the beneficial enjoyment of the property in question. There is a great deal of documentary evidence to show that from 1835 the plaintiffs and their father have lived at Karuppattimulai, whilst the first defendant and his father and the second defendant and his branch of the family have always lived in their ancestral village Aravur. The plaintiffs' fourth witness, Kuppu Odayar, to whose evidence the Subordinate Judge attaches weight, and who is certainly not biased in favour of the defendants, has deposed that the joint family at Aravur was reduced in circumstances at the time of the father Palaniappa Odayar's marriage; that upon his marriage a moiety of the village of Karuppattimulai was granted to his wife as stridhanam, and that he then removed to that village and lived and died there. Documentary evidence shows that this was about 1837, and that the property which Palaniappa Odayar or his wife then acquired consisted of 14 velis 12 mas $44\frac{1}{16}$ kulis of land. It is also in evidence that subsequently to 1837 the members of the family at Aravur bought lands, from time to time, extending to nearly 85 velis, while the total extent now belonging to the defendants' branch is nearly 120 velis. This affords a reasonable ground

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for the inference that when the father left Aravur to take up his residence at Karuppattimulai, the joint family probably owned about 35 velis of land, of which his quarter share would have amounted to 8¾ velis if a division had then been effected. This fact and the evidence of witness Kuppu Odayar to the effect that the family [29] at Aravur was then in reduced circumstances convey the impression that Palaniappa Odayar, who acquired by marriage considerable separate property, did not probably intend or care to claim a share from his coparceners, who were considered to be worse off than himself, either from the unproductiveness of the family property or from the number of members in the family who had to be supported.

"It was suggested for the defendants at the trial in the Court below, and also mentioned at the hearing of this appeal, that, at or before this time, there was a partition or some arrangement which determined the coparcenary between the two branches of the family. On referring to the evidence, however, it appears that this suggestion is made more in reference to the subsequent conduct of the parties than to any express agreement between the plaintiffs' father and his coparceners. Although the second defendant spoke of his having heard of a formal division from the deceased members of his family between the plaintiffs' grandfather Karuttasami Odayar and the defendants' father Chidambara Odayar, we cannot rely on his evidence, as it is inconsistent with the rest of the evidence, which discloses that Palaniappa Odayar had lived in coparcenary with the defendants' branch until his marriage. It is also inconsistent with the defendants' statement that he knew of no formal partition in the family at any time. The other evidence bearing on the question of division is only an opinion founded on separate residence and separate enjoyment for a considerable length of time. We are therefore not prepared to hold that the Subordinate Judge was in error in declining to accept the plea of formal division or any other express agreement equivalent to it. Neither do we see reason to doubt the propriety of the finding that were the plaintiffs entitled to claim partition, the plea of self-acquisition set up by the defendants could not be upheld. The effect of the evidence on this point is that there were about 35 velis of land in the family when Palaniappa Odayar separated from it, while there was no other ostensible source of income to which subsequent acquisitions might be reasonably traced. There may have been good husbandry, thrift and care on the part of those who managed the affairs of the family at Aravur subsequently to 1837, or the property itself may have become more productive. In the absence of clear evidence disclosing an independent source of income and an inde-[30]pendent means of acquisition, we cannot hold that the later acquisitions have been made otherwise than with the aid of family property. The material question, therefore, is whether the relation of coparcenary was continued after Palaniappa Odayar's separation, and if it was not, what is its legal effect upon the plaintiffs' claim.

"It does not appear that the plaintiffs or their father ever received part of the income derived from the family property. The first plaintiff no doubt deposed that at one time he took some money from the family house at Aravur. But his statement is not corroborated, and as he is an interested party, it cannot be accepted without corroboration. It was next alleged by the plaintiffs that the first plaintiff had lived at Aravur until four years ago and that his joint residence was a continuation of the coparcenary."

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In regard to this subject, the Court found that in some of the written transactions of the family between 1864 and 1881, the defendants were described without exception as residing at Karuppattimulai. The Court considered it unlikely that Palaniappa would have lived at Aravur without taking part in the family affairs. In regard to money said to have been received by the defendants for marriage expenses, the Court said that the evidence of its having been paid was doubtful, and added "were we to accept it, these payments would not show that the plaintiffs' father had not already virtually relinquished his interests in the joint property. It occasionally happens, when even divided cousins are married at one time in the same house and there is an elderly member in either branch, that that member bears the whole cost more from family affection and pride than in acknowledgment of a subsisting coparcenary. If the coparcenary had continued, the managing coparceners would have ordinarily interfered in the case of every marriage in the plaintiffs' branch and paid its expenses from family funds. The only other matters mentioned as evidence of coparcenary are that Chidambara Odayar, the defendants' father, lighted the funeral pyre when Ponnammal, the plaintiffs' paternal grandmother, died, and that the daughters of Ayyadorai Odayar, the second defendant's cousin, are still living at Karuppattimulai with the plaintiffs. As to the first, it proves nothing more than that Chidambara Odayar acted as proxy for the first plaintiff, on whom the duty of setting fire to the [31] funeral pyre devolved in consequence of his father having predeceased his grandmother. If the evidence is intended, as seems to be the case, to convey the impression that Chidambara Odayar lighted the funeral pyre, because there was coparcenary, such an effect cannot be attached to it under the ceremonial law. Whether the family is joint or divided, it is the duty of the son, and, in his absence, of the grandson to perform the funeral obsequies ; and when he is too ill or too young to undertake the duty, some elderly member, either an undivided or divided uncle or granduncle, acts as his substitute. As to the residence of Ayyadorai's daughters in the plaintiffs' house at Karuppattimulai, it may be owing to their junior paternal aunt living there, and it cannot be accepted as evidence of coparcenary."

The judgment concluded thus :—

"The conclusion we come to upon the whole evidence is that from 1837, when the plaintiffs' father went to Karuppattimulai, the two branches have acted as if they had no community of interest, and that the plaintiffs' branch has neither directly nor indirectly participated in the beneficial enjoyment of the property in dispute. In this view of the facts of the case the suit was clearly barred when Act XIV of 1859 was in force. By Section 1, Clause 13, there must be a participation in the family income, or some act equivalent to it within twelve years, from which a joint interest may reasonably be inferred, and the evidence on record disclose neither the one nor the other.

"It has been held that what is necessary to bar the claim is proof of possession and enjoyment of the property as the possessor's separate property to the absolute exclusion of the person suing to enforce the right to a share for more than twelve years. We are of opinion that the appeal must be decreed ; that the decree of the Subordinate Judge must be set aside, and the suit dismissed with all costs."

On this appeal Mr. *T. H. Cowie* and Mr. *R. V. Doyne*, for the appellants, argued that the judgment of the High Court was not completely consistent with the case set up for the defence. A case of abandonment

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by Palaniappa of his joint interest, after 1837, should have been proved by definite acts, or omissions on his part, of which there had been no sufficient evidence. Moreover, as regards the immoveable property of the family upon the construction of Clause 13, Section 1 of Act XIV of 1859, the claimant, in [32] order that a bar might be constituted, must have been entirely out of possession, from which he must have been excluded altogether by those former co-parceners against whom he claimed. *Govindan Pillai* v. *Chidambara Pillai* (1). But here the evidence showed no such entire exclusion. Again, although Act XIV of 1859, Section 1, Clause 13, required a plaintiff to prove possession on his part within twelve years, the corresponding enactment in Act IX of 1871 required adverse possession on the part of the defendant. Reference was made to *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (2) and *Rao Karan Singh* v. *Raja Bakar Alikhan* (3).

Mr. *J. D. Mayne* and Mr. *G. P. Johnstone*, for the respondents, were not called upon.

On a subsequent day (June 23rd) their Lordships' judgment was delivered by SIR R. COUCH.

JUDGMENT.

This is a suit between the members of a Hindu family, of which the common ancestor was one Ramalinga Odayar. He had two sons, Kutti Odayar and Subramanya Odayar. Kutti had an only son, Thoppai, who had three sons, one of whom died without issue, another, Subba, had three sons who have died without leaving issue, and the third, Sabhapati, left an only son, the second defendant Sami Odayar. Subramanya had two sons, Karuttasami and Chidambara. Karuttasami had an only son, Palaniappa, the father of the three plaintiffs, and Chidambara left an only son, the first defendant Subramanya. At the time the suit was instituted the plaintiffs and defendants were the only remaining members of the family. The share of the plaintiffs would be one-fourth if they are entitled to any part of the property claimed in the suit. They sued for possession of that share. The first defendant Subramanya, in his written statement, said that the plaintiffs and defendants were not members of an undivided family; that no portion of the property sued for was ancestral property of Chidambara and Thoppai; that they lived jointly and acquired some property through their own exertions, and the properties in litigation consisted of such self-acquisitions and of property subsequently acquired by their descendants, including the defendants.

Palaniappa, the father of the plaintiffs, was married in 1837, and there is no doubt that up to that time the descendants of [33] Ramalinga were a joint family. The material questions are whether Palaniappa then separated himself from the family in respect of the family property, or if he did not, whether he afterwards participated in the profits of it. It appeared from the evidence of Kuppu Odayar, who was connected by marriages of his own and his younger brother's daughter with both the plaintiffs and defendants, that Palaniappa married the daughter of Kuppu's paternal uncle, and on his marriage went to live at Karuppattimulai, the village of that family, which is about ten miles distant from Aravur, the residence of the Ramalinga family. At that time the family at Aravur, was reduced in circumstances, and a moiety of the village of Karuppattimulai was given to his wife by her family. Palaniappa continued to live

(1) 3 M.H.C.R. 99. (2) 7 I.A. 181 = 5 B. 48. (3) 9 I.A. 99 = 5 A. 1.

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at Karuppattimulai and died there. The property thus acquired by him consisted of rather more than 14 velis of land, and it is said by the High Court that the family at Aravur probably owned about 35 velis, of which Palaniappa's share would have amounted to 8¾ velis. The High Court say that this fact and the evidence of Kuppu Odayar as to the circumstances of the family at Aravur convey the impression that Palaniappa did not probably intend or care to claim a share from his coparceners. It may be that he did not, but in order to see whether he lost his right to a share, what was done afterwards must be considered.

By Section 1, Clause 13 of Act XIV of 1859 a suit for a share of the family property not brought within twelve years from the date of the last participation in the profits of it would be barred. This Act continued in force until the 1st July 1871 when Act IX of 1871 came into force. Consequently if there was no participation of profits between 1837 and 1871, the suit would be barred, and the later Acts for limitation of suits need not be referred to. If they altered the law, they would not revive the right of suit.

The plaintiffs sought to avoid the law of limitation by evidence of the actual receipt of money, by payments of marriage expenses by Chidambara and Sabhapati, and by residence in the family-house at Aravur. Appasami, the first plaintiff, in his evidence said that about fifteen years ago he took from Aravur Rs. 2,000 or Rs. 3,000. This, if true (and he was not corroborated), would not avail to prevent the operation of Act XIV of 1859.

[34] There was evidence of the payment by Chidambara of the expenses of the marriages of members of the plaintiffs' family, when there was at the same time a marriage in his own family. The High Court justly say that this evidence is vague and unsatisfactory. Even if true it cannot be said to prove a participation in the profits of the estate received by Chidambara as manager for the family. As to the residence, their Lordships have been carefully referred by Mr. Doyne to all the evidence on this subject. It is conflicting, and the evidence of Ramu Odayar, one of the defendants' witnesses, is that the plaintiffs would come to Aravur on marriages and deaths and take their meals either in the old or new house, and would either come alone or with their family. This would explain what residence there was, and is more probable than the plaintiffs' case that the eldest member of their branch of the family resided at Aravur as a member of the joint family. Looking at the whole of the evidence it appears to their Lordships that whatever may have been Palaniappa's intention when he left Aravur, a suit for his share of the family property became barred by the law of limitation. This was the decision of the High Court, which reversed the decree of the Subordinate Judge and dismissed the suit. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The appellants will pay the costs of it.

Appeal dismissed.

Solicitors for the appellants : *Burton, Yeates, Hart, & Burton.*
Solicitors for the respondents : *Gregory, Rowcliffes & Co.*

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AUG. 1.

APPELLATE CRIMINAL.

12 M. 35 = 2 Weir 457 = 2 Weir 654.

12 M. 35 = 2 Weir 457 = 2 Weir 654.

[35] APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

QUEEN-EMPRESS *v.* SIVARAMA.* [1st August, 1888.]

Criminal Procedure Code, Section 494—Irregular Procedure—Discharge of prisoner committed to Sessions—New trial—Conviction quashed.

A prisoner committed to Sessions on a charge cannot be discharged by the Sessions Court under Section 494 of the Code of Criminal Procedure, but must be convicted or acquitted.

Where a prisoner was erroneously discharged by a Sessions Court under Section 494 (*a*):

Held, that as the prisoner was entitled to be acquitted, a conviction obtained in a second trial for the same offence was bad in law.

APPEAL from the decree of G. T. Mackenzie, Sessions Judge of Kistna, in Calendar Case No. 10 of 1888.

The prisioner was convicted of giving false evidence under Section 193 of the Penal Code.

In a suit before the District Munsif, prisoner was defendant, and sanction was granted to prosecute him for giving false evidence in the suit. Prisoner was committed for trial. The Sessions Judge, W. G. Underwood, being of opinion that the sanction granted by the District Munsif was too vague and did not apply to the prisoner, the Public Prosecutor withdrew from the prosecution, and the Sessions Judge directed the prisoner *to be discharged*. Thereupon a fresh sanction was obtained from the District Munsif, and the prisoner was again committed to Sessions and convicted. It was stated in the judgment that the Public Prosecutor withdrew from the case "before a charge was framed."

Anandacharlu, for accused.

Mr. *Wedderburn*, for the Crown.

(KERNAN, J., called attention to the fact of the former trial and order of discharge.)

Mr. *Wedderburn*.—The conviction is bad. The mistake has arisen apparently from the practice of Sessions Courts not trying [36] prisoners on the charges framed by the committing Magistrates, but on charges framed at the Sessions trial. The Sessions Judge evidently thought that the words "before a charge has been framed" in Section 494 of the Code of Criminal Procedure mean before the Sessions Court has framed a charge. But the charge referred to in Section 494 is evidently the charge mentioned in Section 210 and in Section 271 (see also Section 226). A prisoner once committed to Sessions on a charge cannot be discharged, but must be acquitted or convicted. The only way to remedy the defect now is to set aside all proceedings, including the erroneous order of discharge, and direct a new trial from that point.

The Court (KERNAN and WILKINSON, JJ.) delivered the following

JUDGMENT.

The prisoner was charged for the same offence that he is now charged with in case No. 19 of 1887 before the Sessions Judge on the 22nd day of July 1887. The charge was withdrawn by the Public Prosecutor by permission of the Sessions Judge. The result was that under Section 494 (*b*)

* Criminal Appeal No. 183 of 1888.

the prisoner should have been acquitted. But he was merely discharged by the Sessions Judge. This procedure was wrong. The Sessions Judge should have referred the matter to the High Court to quash the committal as he thought the sanction insufficient.

As the prisoner was entitled to be acquitted on the charge, the second charge for the same offence, though on a new sanction, is bad. We must, therefore, reverse the conviction in the present case.

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12 M. 36=2 Weir 32.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

QUEEN-EMPRESS v. NIRICHAN AND ANOTHER.*
[17th April, 1888.]

Criminal Procedure Code, Section 35—Penal Code, Sections 71, 72—Separate convictions for different offences in the same transaction.

An accused person was convicted under Section 457 of the Penal Code of house breaking by night in order to commit an offence (mischief and assault) and also [37] under Sections 426 and 352 for the offences of mischief and assault and punished separately for each offence. These offences formed parts of one transaction: *Held*, that the sentences were legal.

[R., 16 C. 442 (446) (F.B).; Rat. Un. Cr. Cas. 597 (598); U.B.R. (1892—1896) 241 (242); 1 Weir 34.]

CASES referred by H. M. Winterbotham, Acting District Magistrate of Malabar.

The facts were stated as follows:—

Regarding the first case, the Joint-Magistrate, remarks—

"In this case the Sub-Magistrate has convicted and punished the accused under Section 457 of house-breaking by night with intent to commit mischief and assault, and has also convicted and punished the accused for the offences of mischief and assault separately.

"These latter sentences are illegal under the High Court ruling in criminal appeal No. 352 of 1873 (Weir's Digest, p. 381), where it was held that the law forbids two punishments for an offence so compounded that one substantive offence is the aim of the other and evidentiary matter of the intent necessary to constitute that other.

"This ruling of the Madras High Court was, however, passed under the late Code of Criminal Procedure. The Bombay High Court have lately discussed the legal question and have decided that the double punishment is legal under the present Code, X of 1882—*Queen-Empress v. Sakharambhai* (1).

"The point is one of almost daily occurrence, and it seems to me to be of great importance that it should be ascertained whether the law on the point is the same now under Act X of 1882 as it was declared to be by the Madras High Court under the Code before in force.

"In my humble opinion the ruling of the Bombay High Court is the one that should be followed. An offence under Section 457, Indian Penal Code, is complete when a man commits house breaking by night in order to the committing of assault or mischief, and if he proceeds further and

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* Criminal Revision Cases Nos. 87 and 88 of 1888.

(1) 10 B. 493.

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actually commits assult or mischief, he then commits distinct offences punishable under Sections 352 and 426 of the Indian Penal Code, and these subsequent offences do not cease to be distinct offences because they also furnish evidence of the intention necessary to constitute the first offence."

The Public Prosecutor (Mr. *Powell*), for the Crown.

[38] The Court (KERNAN and MUTTUSAMI AYYAR, JJ.) delivered the following

JUDGMENTS.

KERNAN, J.—The decision in *The Queen* v. *Noujan* (1) was made on the Criminal Procedure Code of Act X of 1872. Illustrations (*n*) and (*p*) to paragraph 3 of Section 454 were relied on by the Court as evidencing the rule that, although there might be separate convictions for different offences committed in a series of acts in the same transaction, yet there could only be punishment inflicted to the measure of the largest amount awardable for any one of the offences. In the Act X of 1882, although the first portion of the illustrations (*n*) and (*p*) in the former Act are to be found in illustrations (*b*) and (*c*) to paragraph 1 of Section 235, yet the part of the illustrations (*n*) and (*p*) in the former Act, which limits the punishment to that for one offence only, is not re-enacted. Section 71 of the Penal Code is not interfered with by Section 235 of Criminal Procedure Code. But in neither of the two cases before us did the different offences, when combined, constitute an offence. Therefore Section 71 does not apply. I think the sentences imposed in each case were legal.

MUTTUSAMI AYYAR, J.—In criminal revision case No. 88, the accused was convicted at one trial of three offences punishable under Sections 354, 380, and 451 of the Indian Penal Code. In criminal revision case No. 87 the accused was found guilty of offences punishable under Sections 352, 426 and 457 of the Penal Code. The several offences formed parts of one criminal transaction, and the Second-class Magistrate passed separate sentences for each of the offences. The question referred to us is whether separate sentences can be lawfully passed. I would also answer the question in the affirmative. Section 235 of the present Code of Criminal Procedure contains only rules of criminal pleading in regard to joinder of charges, and reading cl. I, together with illustrations (*b*) and (*c*), it is clear that separate convictions for the several offences were perfectly legal.

As to the punishments to be awarded, the rule is now to be found in Section 35 of the Code of Criminal Procedure and in Sections 71 and 72 of the Indian Penal Code. According to Section 35, separate sentences awarded in the cases before us were legal. And Section 71 has no application, for the several offences are not parts of one [39] and the same offence as shown by the illustration (*a*) of that section. Nor do the cases before us fall either under Clause III of Section 235 of the Code of Criminal Procedure or Section 72 of the Indian Penal Code.

On comparing Section 235 with the corresponding section of the former Code of Criminal Procedure, it will be observed that the rules for assessing punishment, which Clauses II and III of Section 454 contained, are omitted in the present Code, and illustrations (*b*) and (*c*) of Section 235, Clause I of the present Code appeared in the former Code as illustrations of Section 454, Clause III. This modification clearly indicates an intention on the part of the Legislature to provide, by Section 235, rules of

(1) 7 M.H.C.R. 375.

criminal pleading only and to leave the rules for assessing punishment to be found in Section 71 or Section 72 of the Indian Penal Code and section 35 of the Code of Criminal Procedure. The ruling in *The Queen* v. *Noujan* had reference to the provisions of the former Code of Criminal Procedure, and it is no longer applicable. I do not, however, desire to be understood as saying that it may not usefully be kept in view for the purpose of seeing that the aggregate sentence is not excessive or unnecessarily severe.

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12 M. 39 = 1 Weir 10.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

HAYES *in re.** [27th July and 1st August, 1888.]

Jurisdiction of High Court—Foreign Jurisdiction Act, 1879, *Chapter II—European British subjects in Bangalore—Justice of the Peace for Mysore.*

The civil and military station of Bangalore is not British territory, but a part of the Mysore State, and the Code of Criminal Procedure is in force therein by reason of declarations made by the Governor-General in Council in exercise of powers conferred by the Foreign Jurisdiction and Extradition Act, 1879.

Justices of the Peace for the State of Mysore are also Justices of the Peace for Bangalore, and both the Civil and Sessions Judge and the District Magistrate of Bangalore being such Justices of the Peace, are, by virtue of Section 6 of the said Act, subordinate to the High Court at Madras.

APPLICATION to the High Court under Section 526 of the Code of Criminal Procedure for the transfer of a criminal case from the Court of the District Magistrate of the civil and military station **[40]** of Bangalore to the Court of one of the Presidency Magistrates at Madras.

The facts necessary for the purpose of this report appear sufficiently from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ).

Mr. *Hayes*, for petitioner.

Laing, for defendants.

JUDGMENT.

This is an application under Section 526 of the Criminal Procedure Code for the transfer of a criminal case pending in the Court of the District Magistrate of the Civil and Military Station of Bangalore. One Mr. Hayes filed a complaint in the said Court under Section 500 of the Indian Penal Code against (i) the editor and managing proprietor and publisher of the *Bangalore Spectator*, and (ii) against the joint-proprietor and publisher of the *Bangalore Spectator*. Both the accused are European British subjects. It appears the complaint has reference to matters connected with the Municipality of Bangalore, and that the District Magistrate is also the President of the Municipality. It is further alleged for the complainant and admitted for the accused that the Magistrate may probably be cited as a witness in the case. Affidavits are also filed to show that the Magistrate himself expressed a wish that the case might be removed from his Court. We consider, therefore, that it is expedient to transfer the case to some other magistrate competent to try European British subjects and having jurisdiction as a first-class Magistrate in the Civil and Military Station

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* Criminal Miscellaneous Petition No. 41 of 1888.

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of Bangalore. The next question we have to consider is whether we may transfer the case either to the Civil and Sessions Judge for the station of Bangalore or to the Assistant Resident of Mysore. In this connection three points are urged for the accused, *viz.*, (i) that the Civil and Military Station of Bangalore is not British territory; (ii) that the Code of Criminal Procedure is in force there in common with other Acts by virtue of declarations made by the Governor-General in Council in exercise of the powers conferred upon him by Act XXI of 1879, and (iii) that those who are appointed Justices of the Peace for the State of Mysore under the said enactment are also Justices of the Peace for the station of Bangalore. We are of opinion that the contention is well founded. We see no reason to doubt that the station of Bangalore is foreign territory. That it was so prior to 1881 was already [41] decided by this Court in *Regina* v. *Shallard* (1). In 1881, when the State of Mysore was transferred by the Governor-General in Council to His Highness the Maharaja of Mysore, the whole province of Mysore was transferred, and the civil and military station of Bangalore was not specially excluded. The instruments of transfer, however, provided for the establishment of British cantonments in the State of Mysore, for the Maharaja granting free of all charge such lands as may be required for such cantonments, and for renouncing of all jurisdiction within the lands so granted. (*Mysore Blue Book*, page 193). On the 19th May 1881, the Maharaja of Mysore assigned the civil and military station of Bangalore to the British Government, and renounced the exercise of all jurisdiction within the said station with effect from the 25th March 1881. (See Notification, *Mysore Gazette*, Part I, No. 8, page 25, of 21st May, 1881). It is clear then that the station of Bangalore is part of the State of Mysore, assigned by the Maharaja to the exclusive management of the British Government, and in which the Maharaja renounced the exercise of all jurisdiction. Nor is there any reason to doubt that the Code of Criminal Procedure and other Acts of the Legislative Council are in force in the station of Bangalore by virtue of declarations made from time to time by the Governor-General in Council under Act XXI of 1879. Thus on 3rd March 1883, Act X of 1882 was introduced into Bangalore, with the exception of so much of it as applies (1) to the Courts of Presidency Magistrates, (ii) to Justices of the Peace, (iii) to European British subjects, and (iv) to the High Courts of Judicature established under 24 and 25 Vict., ch. 104. (*Gazette of India*, Part I, page 137, of 3rd March 1883). Again on the 7th August 1883, the Governor-General in Council published a list of Acts declared applicable to Bangalore civil and military station, and the notification published in the *Gazette of India*, Part I, page 332, of the 11th August 1883, announced that the declaration was made under Sections 4 and 5 of Act XXI of 1879 (The Foreign Jurisdiction and Extradition Act, 1879). Further it is clear that the jurisdiction which Justices of the Peace exercise over European British subjects in the civil and military station at Bangalore depends upon their appointment for that station and upon Act XXI of 1879 and [42] upon the enactments extended by the Governor-General in Council under the authority conferred upon him by the Foreign Jurisdiction Act.

Accordingly on the 21st July 1881, ten persons were appointed to be Justices of the Peace in the State of Mysore under Section 6 of Act XXI of

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(1) 2 M.H.C.R. 444.

1879. (*Gazette of India*, Part I, page 296, of the 23rd July, 1881.) On the 3rd January 1884, the Assistant Resident was similarly appointed a Justice of the Peace. The District Magistrate before whom the complaint of Mr. Hayes is now pending, and the Civil and Sessions Judge to whose file its transfer is suggested, were appointed to be Justices of the Peace in the State of Mysore on the 22nd March 1884 and on the 14th October 1884, respectively. (*Gazette of India*, Part I pages 124 and 360). Though they are all appointed Justices of the Peace in the state of Mysore, they are Justices of the Peace also for the Civil and Military Station of Bangalore, which is included in and part of that State as already stated. It is conceded by the counsel for the complainant that no other construction is possible, for there would be no Justice of the Peace at all for the station of Bangalore if it were not taken to be included in the words "In the State of Mysore."

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APPELLATE CRIMINAL.

12 M. 39 = 1 Weir 10.

The conclusion we come to is that the Civil and Sessions Judge, as well as the District Magistrate, of the Civil and Military Station of Bangalore are appointed Justices of the Peace, by virtue of their offices, in the said station for the State of Mysore, which includes the Civil and Military Station of Bangalore; that by virtue of Section 6 of Act XXI of 1879, they are also magistrates of the first class, and that both their Courts are subordinate to this Court under the same enactment.

We order, therefore, that the complaint of the petitioner now pending in the Court of the District Magistrate of Bangalore Civil and Military Station be transferred from his file to that of the Civil and Sessions Judge of that station.

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12 M. 43.

[43] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

NARASAYYA (*Defendant No.* 1), *Appellant v.* SAMI AND OTHERS (*Plaintiffs*), *Respondents.** [2nd and 16th August, 1888.]

Fishery—Tidal river—Customary right.

Plaintiffs claimed a right to catch fish in a tidal river at a certain place by putting up stake nets across the river. This right was alleged to be based on custom, which was not denied by defendants, and user for thirty years was proved. The claim was decreed.

Held, that plaintiffs were not bound to prove sixty years' exclusive user to support their claim.

[Rel., 39 C. 53 (58) = 15 C.W.N. 972 (973) = 11 Ind. Cas. 180 (182).]

APPEAL from the decree of V. Srinivasacharlu, Subordinate Judge at Cocanada, confirming the decree of C. Rangayyar, District Munsif of Narasapurm, in suit No. 457 of 1885.

The facts necessary for the purpose of this report appear from the judgment.

Anandacharlu, for appellant referred to *Viresa* v. *Tataya* (1).

Mr. *Michell*, for respondents. The respondents have acquired a right by prescription long before the Easements Act, 1882, was passed. *Ponnusawmi Tevar* v. *The Collector of Madura*(2), *Mullick Kurim Baksh* v. *Harihar*

* Second Appeal No. 1309 of 1887.

(1) 8 M. 467.

(2) 5 M. H. C. R. 6.

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APPELLATE CIVIL.

12 M. 43.

Mandar (1). In the absence of a specific rule for easements in the Limitation Acts of 1859 and 1871, the twelve years' rule applies.

JUDGMENT.

WILKINSON, J.—The plaintiffs are fishermen residing in the village Kalipatam on the banks of the Upputeru, a river which issues forth from a fresh water lake called Kolleru and empties itself into the sea. The river appears to be throughout its entire course tidal. The plaintiffs claim the exclusive right of fixing stakes and nets for the purpose of catching fish: in other words, of putting a *valakattu* at a certain point of the said river and sue for **[44]** a perpetual injunction to restrain the defendants from interfering with their rights. They also claim damages.

The defendants denied the plaintiffs' exclusive right and asserted that they and their ancestors had long used the said spot.

The Munsif found that the *valakattu* sued for had been used by the plaintiffs for more than thirty years in their own right, and that there existed a custom for the owners of each *valakattu* to make use of a particular spot for putting up their nets. He did not consider the case a proper one for a perpetual injunction, and therefore gave the plaintiffs a decree declaratory of their right to the fifth *valakattu*.

On appeal, the Subordinate Judge upheld the decree of the Munsif.

In this Court it is urged that plaintiffs can have no legal title unless they establish an enjoyment for sixty years. Reliance is placed on the decision reported in *Viresa* v. *Tataya* (2)

The plaintiffs in that case claimed a right by immemorial prescription to place stake nets across the Upputeru and to prevent any other person placing similar nets between their village and the place at which the river issued from the Kolleru lake.

It was held that as an infringement on the general rights of the public, it is clear that the right claimed by the plaintiffs could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown. This is the portion of the judgment which the appellant's pleader relied on in support of this appeal. But it was also added that assuming that the plaintiffs have not established such a common of fishery as they claimed, they may have established a right to a fishery of such a nature that they are entitled by custom to prevent the exercise of a similar right by others within a distance which would necessarily injure the exercise of the right by the plaintiffs.

Now it cannot be denied that the plaintiffs have, as members of the public, a right to fish in the Upputeru which, as a tidal river, is open to the public. The defendants undoubtedly have a similar right and that right is conceded by the plaintiffs. What the plaintiffs contended is that, according to a custom which has been in existence from time immemorial, they have been in the habit of putting up stake nets at the spot marked 5, and that **[45]** in April 1885 the defendants obstructed them. Both the lower Courts have found that the custom has been made out. It appears that there are 28 *valakattus*, the property of different fishermen of Patapadu, and that these *valakattus* are put up every year for certain months in certain recognised places according to an immemorial custom. In breach of that custom the defendants have trespassed upon and interfered with the plaintiffs' *valakattus* and caused damage to them. There being a right, there must be a remedy, and I think this suit lies although the plaintiffs

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(1) 5 B. L. R. 174. (2) 8 M. 467.

may not have proved enjoyment for sixty years. The defendants were bound to exercise their right of fishing in the Upputeru in a fair and reasonable manner in accordance with the established custom of the village, and not so as to impede the plaintiffs from doing the same. Both plaintiffs and defendants are entitled to put up stake nets and catch fish in the Upputeru. But an immemorial custom having been established, according to which the rights of the parties are to be exercised in a particular way, defendants are not at liberty to set that custom at defiance to interfere with plaintiffs' customary exercise of the right. But independently of custom if the conduct of the defendants towards the plaintiffs prevented the latter from a fair exercise of their equal right and special injury thereby accrued to the plaintiffs, the conduct of the defendants is actionable.

There being no grounds for interference, this appeal is dismissed with costs.

MUTTUSAMI AYYAR, J.—The right recognised by the Courts below is a right to catch fish in a tidal stream by fixing stake nets across it at a spot indicated by what is called the fifth *valakat*, and the contention for the appellant is that the user in evidence extends to no more than thirty years, and that unless it is shown to have extended to sixty years, it is not sufficient to support a claim of exclusive right to the fifth *valakat*. On the other hand it is urged for the respondents that thirty years' user is evidence of immemorial enjoyment, and consequently of a grant from the Crown unless the evidence discloses a specific period short of sixty years as the origin of the user. Our attention is also drawn to a special custom found by the District Munsif to exist in the village to which the parties to this appeal belong. The facts found by the District Munsif are that the fifth *valakat* was used by the respondents for more than thirty years, and that there was **[46]** a custom in the village as alleged by them, according to which the owners of each *valakat* had a right by usage to use a particular spot in the creek for fixing his stake nets. He also observed that the appellant did not deny the custom. The Subordinate Judge concurred in the opinion of the District Munsif as to the period for which the respondents and their predecessors had used the *valakat* in question, but did not treat the special custom as one of the questions arising for determination; nor did he record a distinct finding in regard to it. It appears, however, from the judgment of the District Munsif that the existence of the custom as a fact was not denied by the appellant. This Court observed in *Viresa* v. *Tataya* that "though the plaintiffs had not established a right to such a common of fishery as they claimed, they may have established a right to a fishery of such a nature that they are entitled by custom to prevent the exercise of a similar right by any other persons within a distance which would necessarily injure the exercise of the right by the plaintiffs." Allusion was also made to the judgment in *Baban Mayacha* v. *Nagu Shravucha* (1) in which the learned Chief Justice of Bombay stated that a fishery common to the public might be used subject to such regulations as are essential for its enjoyment by members of the public. If such a regulation is evidenced by a custom obtaining in the village for upwards of thirty years, I see no reason why it should not be enforced as creating an obligation as between the residents of the same village not to interfere with each other's privilege founded upon such custom. As the District Munsif states that the existence of the custom was not denied, I do not consider it

(1) 2 B. 19.

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necessary to refer an issue. Concurring with my learned colleague, I would also dismiss the second appeal with costs. I do not consider it necessary to express an opinion on the other questions raised by respondents' counsel.

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12 M. 47=2 Weir 164.

[47] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

THATHAYYA, *in re.** [5th September, 1888.]

Criminal Procedure Code, Section 195—Sanction does not lapse with the death of grantee.

A civil court granted sanction under Section 195 of the Code of Criminal Procedure to the defendant in a suit to prosecute certain witnesses for perjury. The defendant died without having preferred a complaint. His brother thereupon, preferred a complaint, and the Magistrate dismissed it under Section 253 of the Code of Criminal Procedure, on the ground that the sanction died with the defendant. The Sessions Judge held that the sanction was alive, and directed the District Magistrate to make further inquiry under Section 437.

Held, that the Sessions Judge was right.

[F., 13 Cr.L.J. 206 (207) = 14 Ind. Cas. 206 (207); 27 P.R. 1902 = 5 P.L.R. 1903; R., 32 C. 469 (471) = 8 C.W.N. 883.]

APPLICATION under Sections 435 and 439 of the Code of Criminal Procedure to set aside the order of G. T. Mackenzie, Sessions Judge of Kistna, directing further inquiry into charges of perjury brought against petitioners.

The facts appear from the order of the Sessions Judge, which was as follows: –

"The District Munsif of Bapatla, in deciding suit No. 64 of 1886, expressed an opinion that two witnesses had given false evidence. Afterwards the defendant in that suit, Rudrarazu Somarazu, presented a petition to the Munsif praying that these witnesses might be prosecuted for perjury. The Munsif heard the vakils on both sides, and on 27th June 1887, issued an order permitting the prosecution of these witnesses under Section 193 of the Penal Code.

"Rudrarazu Somarazu died before he lodged any complaint in pursuance of the Munsif's sanction, and on 22nd October his brother, Rudrarazu Sivaramarazu, preferred a complaint before the Joint-Magistrate.

"The Joint-Magistrate has discharged the two men accused of false evidence under Section 253 of the Code of Criminal Procedure. **[48]** The Joint Magistrate considers that, as the person who obtained the sanction died, the sanction has lapsed.

"I am unable to concur in this view. I find nothing in Section 195 of the Code of Criminal Procedure which warrants this view. The sanction given by a Court under Section 195 is not a personal privilege granted to a petitioner, but a decision that the case is one suitable for magisterial investigation.

"The Joint Magistrate had power to receive a complaint from his brother, Rudrarazu Sivaramarazu. There is nothing in Section 4 (*a*),

* Criminal Revision Case No. 347 of 1888.

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Section 191, or Section 200 that prevents it. The only bar is Section 195, which requires the previous sanction of the District Munsif, and that sanction had been given.

"In the inquiry held by the Joint Magistrate, the accused put in a memorandum in which they call attention to the case of *Giridhari Mondul, in re*(1).

"The Joint Magistrate quotes the head-note of the report to the effect that permission is granted to a private person to exercise his own unfettered discretion as to whether he will take proceedings or not. It is not safe to follow the head-notes of reports, and I think that this head-note has misled the Joint Magistrate. In this Calcutta case a District Magistrate, on perusing the police reports of a complaint of dacoity against one Numboo, issued an order 'Numboo directed to bring a case under Section 211.' The High Court pointed out to the District Magistrate that his order was expressed in an improper manner, but declined to stop the prosecution institued by Numboo in accordance with that order. I can see nothing in that remark of the Calcutta High Court which supports the view taken by the Joint Magistrate that the sanction granted by the District Munsif of Bapatla was personal to Rudrarazu Somarazu. I consider that, on the death of Somarazu, his brother could, within six months of the date of the Munsif's order, file the necessary complaint before the Magistrate.

"The Joint Magistrate has discharged the accused upon this preliminary point and has not entered into the merits of the case against them. I consider that these two cases ought to be heard on their merits, and, under Section 437 of the Code of Criminal Procedure, I direct the District Magistrate to make further inquiry into these cases either himself or by any Subordinate Magistrate."

[49] *Anandacharlu* and *Sundaram Sastri*, for petitoners.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

A sanction granted under Section 195 of the Code of Criminal Procedure is a condition precedent to the entertainment of a complaint by the Magistrate. There is nothing in the section to restrict the right of complaint to any particular individual when a sanction has been granted under that section.

The order of the Sessions Judge is right.

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12 M. 49=1 Weir 457.

APPELLATE CRIMINAL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

QUEEN-EMPRESS *v.* RAMAKRISHNA.* [11th September, 1888.]

Penal Code, Section 403—*Criminal misappropriation—Intention, Proof.*

R was a Government servant, whose duty it was to receive certain monies and to pay them into the treasury on receipt. He admitted that he had retained two sums of money in his possession for several months, when fearing detection he paid them into the treasury, making a false entry at the time in his books with a view to avert suspicion. His explanation as to his reason for retaining

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* Criminal Revision Case No. 405 of 1888.

(1) 8 C. 435.

1888 SEP. 11.

APPELLATE CRIMINAL.

12 M. 49 = 1 Weir 457.

the money was not credited by the Magistrate, who convicted him of criminal misappropriation under Section 403 of the Indian Penal Code.

Held, that the conviction was right.

[D., Rat. Un. Cr. Cas. 484 (486).]

APPLICATION under Sections 435 and 439 of the Code of Criminal Procedure to quash the conviction of petitioner by W. E. Clarke, First-class Magistrate, Nilgris, confirmed on appeal by D. Irvine, Sessions Judge of Coimbatore, in appeal No. 11 of 1888.

The facts of this case are set out in the judgment of the Court (WILKINSON and SHEPHARD, JJ.)

Mr. *Wedderburn*, for, petitioner.

Mr. *Subramanyam*, for the Crown.

For the prisoner it was argued that there was no proof of criminal intention, and that the prosecution was bound to prove something more than retention of the money and non-payment. **[50]** There must be proof of denial of receipt or a false account or the like. *Rex* v. *Owen Jones* (1), *Rex* v. *Hodgson* (2). The false entry of payment was not evidence of any such intent (2, Russell on Crimes, p. 455, note), for if the crime had been committed it was complete long before the false entry was made. However suspicious the circumstances might be, the reasons given by the prisoner for non-payment were not proved to be false.

For the Crown it was urged that the circumstances of the case precluded any reasonable hypothesis of innocence, and that if further proof was necessary, it would be almost impossible to convict Government servants who misappropriated the public monies.

JUDGMENT.

WILKINSON, J.—The petitioner was, in 1887, Income-tax clerk in the office of the Collector of the Nilgiris. As such, it was his duty to receive monies paid by persons assessed to income-tax, to enter such receipt in the remittance book, to pay such monies into the treasury, and to prepare and obtain the signature of the Deputy Collector to receipts to be given to the payees. The facts found are (1) that petitioner received Rs. 17-5-1 in July 1887, and failed to pay in the same to the treasury until January 23rd 1888; (2) that he received Rs. 44-10-0 on September 9th, 1887, but did not pay in the same to the treasury till January 23rd 1888; (3) that he made false entries in the remittance book as to date of receipt; and (4) that he had these monies in his own possession from the dates of receipt until January 1888. The petitioner admitted these facts and stated that he had put the monies into his pocket and taken them home awaiting an opportunity of replacing them without detection. Under these circumstances, the petitioner has been found guilty of criminal misappropriation under Section 403, Indian Penal Code, and sentenced to six months' rigorous imprisonment. The finding and sentence have been confirmed on appeal by the Acting Sessions Judge of Coimbatore. We are asked to set aside the conviction on the ground that there is no evidence of dishonest misappropriation or conversion. I am of opinion that the petitioner has been rightly convicted of the offence of criminal misappropriation. The offence consists in the dishonest misappropriation or conversion either permanently or for a time of property which is already without wrong in the **[51]** possession of the offender. There must be the intention to cause wrongful gain or wrongful loss, and it is argued that such intention must

(1) 7 C. & P. 833. (2) 3 C. & P. 422.

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be affirmatively made out by the prosecution, as the original taking in this case was innocent. In my judgment the lower Court rightly held that in a case like the present dishonest intention can only be inferred from the circumstances of the case. Looking at all the facts of the case, it seems to me that the only conclusion to be drawn is that the intention of the prisoner was dishonest. if not when he put the monies in his pocket and carried them home with him, at all events the next day when he omitted to take back the monies with him to the office and credit them to Government. The learned counsel for the petitioner has referred us to the case of *Rex* v. *Owen Jones*, decided by Baron Bolland in 1837. That was a charge of embezzlement, and the learned Judge ruled that it was not enough to prove that the accused had received a sum of money and failed to enter it in his accounts unless there was evidence that he had denied the receipt or rendered some false account. The facts of that case are entirely different from this. There the prosecutor and the prisoner had mutual dealings and accounts which had not been adjusted for two years. All that was proved was an omission to enter certain sums received on behalf of the prosecutor in the books kept by the prisoner. The case of the *Queen* v. *Proud* (1) is more in point. The prisoner was a member of a friendly society, and his duty as paid Secretary was to receive monies from members to pay what was due from the society, and to place the balance in a box in the society's room. Suspicions having arisen, prisoner was called upon to deliver up his books, and it was discovered that he had omitted to enter in the book a large number of subscriptions. When called upon for an explanation, prisoner at once admitted he had received the money and offered to repay it. The prisoner was found guilty, and the conviction was affirmed by the Court of crown cases reserved. I may notice here the remarks of the Judges in Criminal Revision Case No. 913 of 1883 (Weir, 3rd Edition, p. 265), a case very similar to the present.

It was the duty of the prisoner to remit the monies he received to the treasury immediately. Instead of doing so, he retained two sums for several months without entering them in his accounts, [52] and it was not until he knew that detection was inevitable that he paid up the money; and even then he attempted to impose upon his superior by putting before him for signature false receipts. There were circumstances from which a fraudulent intention might have been inferred, and I see no reason for interference on revision. The sentence is not too severe.

The petition is therefore dismissed.

SHEPHARD, J.—The petitioner has been convicted on two charges framed under Section 403 of the Indian Penal Code, the Magistrate who tried the case and the Sessions Judge on appeal appearing to take much the same view of the facts. There is no question as to the fact of the petitioner having received the sums on account of income-tax in the months of July and September 1887 and retained them in his hands till the 23rd January 1888. But it is objected that there is no proof of any dishonest conversion of the monies to his own use. The petitioner has endeavoured to account for an act which *prima facie* does not seem consistent with honesty, by saying that he received the two sums late in the day and was therefore unable to enter them in his book or pay them into the treasury in the usual course; apprehensive of official displeasure on account of the breach of duty, he says he kept the monies with him waiting for an opportunity of replacing them without detection. It is to be

(1) 31 L.J. (M.C.) 71.

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observed that he admits having taken these two sums to his own house and does not say he kept them there intact, whereas, with regard to a third sum, in respect of which he was also charged, he says, he kept it in his office desk, and on the strength of this circumstance, as it appears, he was acquitted by the magistrate. As I read the magistrate's judgment touching the sums in respect of which he convicts the petitioner, the magistrate did not accept his explanation as true. Having regard to the circumstances, he did not believe that the petitioner really had intended to pay the monies into the treasury, but thought that he had intended to appropriate them to his own use. And the Sessions Judge agrees in thinking that the explanation cannot be accepted. If the petitioner's account of the reasons for not crediting the money in the usual way is put aside, I think there is no doubt the conviction is right. If he did not intend to pay the money into the treasury, he must have intended to appropriate it to himself and it cannot make any difference that one of his reasons for adopting this course, [53] which was clearly a dishonest one, was that he desired to avert the displeasure of his superior. It was argued that proof of the offence was not complete, because the petitioner was not shown to have ever denied receipt of the money; and we were referred to the case of *Rex* v. *Jones* (1) as authority for the position that evidence of denial is essential. But the facts of that case were very different. The prisoner then, though called a clerk, was really an agent carrying on the prosecutor's business at another place. There were accounts between them unsettled for two years, and all that was shown was that certain small sums received by the prisoner had not been entered in his accounts. It is clear that in such a case the prisoner's conduct was quite consistent with honesty—the omission to make the entries might be attributed to carelessness. It might well, therefore, be said that without evidence that he had denied receipt of the money or made some false account, no case of embezzlement was made out.

The position of the present defendant was very different. He had no business to retain in his own hands money received by him in his official capacity; strictly he was bound to pay it as and when he received into the treasury without waiting for any request; and if it were proved against him that instead of paying the money into the treasury he had put the money in his pocket and taken it home, that without any more would, I think, be sufficient to convict him of dishonest misappropriation. Unless he convinced the Magistrate that he had made a mistake or had kept the money intact fully intending to pay it in, he must have been convicted. Lapse of time makes it less likely such an explanation would be credited, but otherwise is I think immaterial.

There are doubtless cases in which a denial of receipt of the money is necessary in order to prove the dishonest intention, but this case in my opinion is not one of them. I think the case again t the petitioner was complete, when once it was found that having taken the money he resolved to keep it and not pay it into the treasury.

I agree in holding that the petition must be dismissed.

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(1) 7 C. & P. 833.

12 M. 54=2 Weir 22.

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[54] APPELLATE CRIMINAL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

MADURAI *in re.** [11th September, 1888.]

Penal Code, Sections 426, 477—Destruction of promissory note—Offence not triable by Magistrate, but by Sessions Court only.

P.M. was convicted by a Magistrate under Section 426 of the Indian Penal Code on a charge of mischief by tearing up a promissory note for Rs. 20:

Held, that the offence charged fell under Section 477 of the Penal Code and was therefore triable by a Sessions Court only.

[R., 4 N.L.R. 18 (19).]

APPLICATION under Sections 435 and 439 of the Code of Criminal Procedure to quash the sentence of Colonel McDonald Smith, Chief Presidency Magistrate, in calendar case No. 12102 of 1888.

The facts and arguments necessary for the purpose of this report appear from the judgment of the Court (WILKINSON and SHEPHARD, JJ.)

Mr. *Wedderburn*, for petitioner.

The Public Prosecutor (Mr. *Shaw*), for the Crown.

Alagasingarachari, for the complainant Chinnasami.

JUDGMENT.

The complaint against the accused is that he tore in pieces a promissory note which the complainant, having come to demand payment, had put into the hands of the accused. The Chief Presidency Magistrate has found the accused guilty and convicted him of an offence punishable under Section 426 of the Indian Penal Code. It is objected on behalf of the accused that, having regard to the complaint and the evidence in support of it, the Magistrate ought to have treated the case as one in which an offence punishable under Section 477 was charged and ought, in his view of the evidence, to have committed the case for trial, having himself no jurisdiction to try a charge under that Section.

We are of opinion that the objection is well founded. The destruction or attempted destruction of such an instrument as a promissory note is, by Section 477 specifically made an offence which is triable by the Sessions Court only. With evidence of such an offence before him, the Magistrate ought, we think, to have [55] committed the case. *Empress v. Paramananda* (1). The Magistrate refers us to a case reported in Weir's Criminal Rulings, page 259, where it is held that because the evidence may be sufficient to support a charge of robbery with violence or other circumstances of aggravation so as to bring the case within Section 394 or 397 of the Indian Penal Code, the jurisdiction which the Magistrate has under the general Section 392 is not necessarily ousted. The present case, however, is different. The distinction between Section 426 and Section 477 is of a different character. Mischief done by a particular means or to particular things is in several cases treated as a specific offence, and in some cases, *e.g.*, those of michief by fire and mischief by destroying a light-house, the offence is triable only by the Court of Session. When there is evidence of such an offence having been committed the Magistrate cannot,

* Criminal Revision Case No. 433 of 1888.

(1) 10 C. 85.

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we think, disregard the fact that the mischief was committed in a particular way or to particular property, as he might disregard the circumstances of aggravation which convert a case which would otherwise be simple robbery into robbery with violence. We may also refer to the later ruling reported in page 701 of Weir's Criminal Rulings as showing that the Magistrate is not justified in assuming jurisdiction, when the evidence plainly points to a more serious offence of the same genus without his jurisdiction. Exception was also taken to the judgment of the Magistrate, on the ground that he had misunderstood the evidence of the defence witnesses in supposing that they had been called to prove an *alibi*. However, it is unnecessary to make any observation on this point, because for the reason already stated we think the case is one in which the Magistrate ought, if he thought a *prima facie* case made, to commit accused for trial at the sessions. We must set aside the conviction and sentence and direct the Chief Presidency Magistrate to rehear the case, examining such witnesses as the parties may produce, and dispose of the case according to law.

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12 M. 56 = 1 Weir 326.

[56] APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS *v.* DAMODARAN.* [18th July, 1888.]

Penal Code, Section 304a—Causing death by a criminal act.

Where death is caused by an act being in its nature criminal, Section 304*a* of Indian Penal Code has no application.

[R., Rat. Un. Cr. Cas. 458 (459).]

APPLICATION under Sections 435 and 439 of the Code of Criminal Procedure by the Public Prosecutor to set aside a conviction by W. M. Scharlieb, Presidency Magistrate (Black Town), and to direct a committal to sessions.

The facts of the case are set out in the judgment of the Magistrate, which was as follows:—

"The facts of this case, as proved by the prosecution and not denied by the prisoner, are very simple, and there is no doubt that the deceased, Muniappan, met with his death from the injuries sustained by him at the hands of the prisoner. But after all, it was a sudden drunken squabble in which there was no premeditation whatever, and certainly no previous animosity on the part of the prisoner against the deceased. This is clear from the deposition which I took from the deceased himself when he lay on his death-bed in the General Hospital. The deceased solemnly assured me that he and the prisoner had never had any previous misunderstanding, and that all that had led to the prisoner falling upon him and beating him in the manner he did the previous evening was the altercation that had taken place between them at the time at the toddy-shop. It appears that the deceased, who was a cook in the service of Conductor Taylor living in the Ordnance Lines, went with two fellow-cooks between 8 and 9 that night, *viz.*, the 19th March last, to a toddy-shop near the Memorial Hall where they had some toddy to drink; that as they were

* Criminal Revision Case No. 285 of 1888.

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[57] leaving, the man (Manikam, W. 4) who had served them with their liquor asked deceased for the payment of some money which he (deceased) said he had already paid, and that the prisoner, who happend to be lolling about at the time against a post in the verandah, interposed—in the insolence of his youth perhaps—and insisted on the deceased paying for what he had drunk before leaving the shop. The deceased—not unnaturally—bid the prisoner mind his own business and leave the toddy-seller and himself to settle their own differences. As the two got into words, another servant of the toddy-shop named Govindan (W. 5) put them out of the shop. The two, *viz.*, the prisoner and the deceased, passed into the street continuing their altercation; and when they were in front of a betel-bazaar next to the toddy-shop, they passed from words to blows, in the course of which the deceased was knocked down and sat upon by the prisoner, who appears to have dealt the prostrate man some further blows about the neck and body. The evidence of the deceased's wife, Paliam (W. 1), and of his two companions, Chockalingam (W. 2) and Mukundu (W. 3), does not touch the details of the fight. As Mrs. Taylor called for her supper, Paliam ran to the toddy-shop, which was close by, to fetch her husband to serve it, but she only arrived on the spot to see the prisoner seated on her husband in the act of assaulting him, when she seized the prisoner by the hair of his head and dragged him off her husband. Chockalingam and Mukundu had lingered in the verandah of the toddy-shop to light their cheroots and did not come out till attracted by the noise in the street, and then they only came on the scene as Paliam ran up and dragged the prisoner off the prostrate body of her husband. The deceased was lying insensible on the ground; his wife and friends tried to set him on his legs, but he could not stand; and as his head seemed to be helplessly hanging down, they carried him to his godown in the Ordnance Lines, and then his wife, Paliam, ran and fetched the Police, who conveyed the deceased to the General Hospital, where he died at noon on the 21st March from fracture of the spine. Seeing that the facts of the case were not disputed, and that the prisoner, who simply pleaded that he was so drunk that the had no consciousness of what had taken place, had no defence to make, the question I had to debate in my own mind was the nature of the charge established against the prisoner. The prisoner might be committed to the High Court to take his trial under Section 304 of the Penal Cade on the charge of culpable homicide not [58] amounting to murder, or his case was open to be determined by this Court under Section 304 *a* for causing the death of a person by doing a rash act not amounting to culpable homicide. In *Nidamarti Nagabhushanam* v. *The Queen* (1) the prisoner killed his mother by beating and kicking her. The Sessions Judge found that the death resulted from a brutal beating and kicking; but acquitting the prisoner of culpable homicide on the ground that the violence was not such as the prisoner must have known to be likely to cause death, he convicted the prisoner under the new Section 304*a* of causing death by a rash act. The High Court did not think the Judge's reason any ground for acquitting the prisoner of culpable homicide not amounting to murder, because the question was, whether the act was done with the knowledge of causing bodily injury likely to cause death. In the case in question, the brutal beating and kicking and dragging by the hair of an old woman of 60 was by a powerful man who had acted without the smallest provocation. The High Court

(1) 7 M.H.C.R. 119.

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pointed out that culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope they may not, and often with the belief that the actor has taken precautions to prevent them happening, and that the imputability arises from acting despite the consciousness. In the present case the facts are widely different. The deceased, according to Dr. Smith who made the *post-mortem* examination, was a well nourished man, in strong good health, while, to all appearance, the prisoner is a young and rather a small and lightly built man, and, as far as the police knew, he is not a professional bully or a frequenter of gymnasiums. He appears to have officiously interfered on behalf of the toddy-seller, and when told to mind his own business got into words with the deceased. As to what happened in the street after they were turned out of the shop, there is the evidence of a cooly named Arogiam (W. 6) who had come to the betel bazaar to buy betel. This man's evidence was not given in any clear or intelligible manner. When coming to the supreme point in the case, his words could scarcely be grasped, and he really conveyed more by his pantomime than by the actual words he used. This man was the only eye-witness forthcoming of what occurred. According to him, the deceased first struck the prisoner, who immediately retaliated with a blow and, as the [59] deceased turned away, sprang upon him, struck him on the neck, pushing him at the same time, and thus threw him down. All this was done, apparently in a moment, in the suddenness of the provocation and without any premeditation whatever. The only circumstance which bears upon intention or consciousness is that Arogiam says that when laying hands on the deceased the prisoner exclaimed he would twist his neck. On this point I am not disposed to place much reliance on the witness' statement. He dealt more in gesture than in words at this particular point and although he fitted in the words to suit his pantomime, it appeared from his description of what the prisoner did that he gave him a violent blow on the back of the neck, and at the same time pushed him with his fist thus planted on the nape. It may here be noted that the deceased in his deposition before death did not say a word about the prisoner twisting his neck. But even if it be true that the prisoner said 'I will twist your neck,' such words are often used in an angry moment without any meaning, and then there is the doubt that there was any consciousness on the part of the prisoner that such a treatment of a man's neck might cause injury to the spine and thus likely lead to death. To my mind, upon a careful review of the whole of the evidence, it was the hot headed act of a young man in drink angered first by altercation and then provoked by being struck. It was in fact a drunken squabble, when passions are more or less excited on both sides and blows are struck without calculating the cost. The medical officer was of opinion that the injury to the spine was most likely caused by planting the fist or knee against the back of the neck and then violently wrenching the head backwards. The evidence of Arogiam so far consists with this that, as gathered from his description of the scene he witnessed, the prisoner violently struck the deceased on the back of his neck and simultaneously pushed him with his fist thus planted. This had in all probability the effect of jerking the deceased's head backwards, but there was no putting forth of the other hand and wrenching the head backwards with it. The blow on the neck was no doubt repeated perhaps several times; for the medicial officer found that there was a contusion on the nape of the neck and that there was an extravasation of blood beneath the skin, which he said must

have been caused by repeated blows of the fist. Being of opinion that the circumstances of the case, as gathered from the witnesses and as spoken by the deceased himself before his death, are not [60] such as to justify me in framing a charge against the prisoner of culpable homicide not amounting to murder, and that it is not a case of sufficient importance to put before a Judge and Jury, I find that the prisoner did cause the death of the deceased by using violence to him which had the effect of injuring his spine, and I therefore convict him under section 304*a* of the Penal Code of causing death by a rash act not amounting to culpable homicide and sentence him to suffer rigorous imprisonment for the space of one year."

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The Public Prosecutor (Mr. *Shaw*) for the Crown.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

We are clearly of opinion that Section 304*a* of the Penal Code has no application in this case. The magistrate has misapprehended the purport of the remarks made in *Nidamarti Nagabhushanam* v. *The Queen* (1). There is evidence that the accused struck the deceased several blows on the nape of the neck and that the spine was fractured. There is no dispute as to these facts.

The act being in its nature criminal, Section 304*a* has no application. On referring to the evidence, we are unable to say there was not a *prima facie* case of culpable homicide not amounting to murder, which was an offence triable exclusively by the High Court.

We set aside the conviction and sentence and direct the magistrate to commit the accused to the ensuing sessions on a charge of culpable homicide not amounting to murder.

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12 M. 61.

[61] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SELLAMAYYAN (*Plaintiff*), *Appellant* v. MUTHAN AND OTHERS (*Defendants*), *Respondents*.* [7th August and 4th October, 1888.]

Civil Procedure Code, Section 258.

In 1877 *M.* executed a mortgage to *S.* in consideration of a sum paid in cash and a debt due by *M.* to *S.* under a decree. *S.* did not certify satisfaction of the decree to the Court under Section 258 of the Code of Civil Procedure, nor was this stipulated for in the instrument of mortgage:

Held, in a suit to enforce the mortgage, that Section 258 was no bar to the plaintiffs' right to recover.

[F., 13 A. 339 (342); 16 C. 504 (503); 17 M. 392; R., 21 B. 808 (820); 35 C. 870=7 C.L.J. 543=12 C.W.N. 674; 4 C.P.L.R. 148 (152).]

APPEAL from the decree of G.D. Irvine, District Judge of Trichinopoly, modifying the decree of K. Rangamannar Ayyangar, District Munsif of Kulitalai, in suit No. 148 of 1886.

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* Second Appeal No. 1153 of 1887.

(1) 7 M.H.C.R. 119.

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The facts necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

S. Subramanya Ayyar and *Sundara Ayyar*, for appellant.

Pattabhirama Ayyar, for respondents.

JUDGMENT.

In September 1877 respondents mortgaged certain property to appellant for Rs. 450, of which Rs. 60 was paid in cash, Rs. 390 being due to him under the decree in original suit No. 306 of 1874. It is found by the District Judge that appellant failed to certify satisfaction to the Court that passed the decree but its execution was admittedly barred by limitation at the time of the suit. The Judge disallowed appellant's claim to Rs. 390, observing that, when the judgment-creditor failed to certify satisfaction of the decree adjusted out of Court the consideration for the contract of adjustment failed, and he was not entitled to enforce it. Hence this second appeal.

The instrument of mortgage recites that Rs. 60 was advanced in cash, and that the balance was already due under the decree in question and stipulates for repayment of Rs. 450 with interest on the security of the mortgage property. It contains no allusion [62] either to the creditor's obligation to certify satisfaction or the debtor's right to compel him to do so, or to such certificate as the consideration for the contract. The document is susceptible of the construction that certifying satisfaction of the decree was not in the contemplation of the contracting parties, and that an undertaking on the part of the creditor not to execute the decree in his favour was accepted and relied on as the consideration. The question then that arises for decision upon the facts of his case is whether a contract, of which the consideration is in part an undertaking by the creditor not to execute a decree in his favour, is void *pro tanto* by virtue of Section 258. There can be no doubt that apart from that section, the contract would be valid under the rules of substantive law. As to the effect of Section 258 upon the contract, there is a conflict of opinion between the different High Courts, and the words in that section material to our present purpose are, "no such payment or adjustment shall be recognized by *any* Court unless it has been certified as aforesaid" Under the earlier enactment the words were, "by such Court," that is to say, by the Court executing the decree.

That the change must have some significance is not denied; the question is as to its nature and extent. The view adopted by the Full Bench of this Court in *Mallamma* v. *Venkappa* (1) by the Allahabad High Court in *Ramghulam* v. *Janki Rai* (2) and by the Calcutta High Court in *Jhabar Mahomed* v. *Modan Sonahar* (3) was that "any Court" meant any Court dealing with the question of the execution of the decree. The principle on which those decisions proceeded was that Section 258 introduced but a rule of procedure, that the probable intention was that the adjustment of a decree should, like the decree itself, be a matter of record, and that unless it is made a matter of record, no Court having to determine whether the decree has been executed shall recognize it as evidence of a valid adjustment. The construction adopted by the Full Bench of the Bombay High Court is that an uncertified adjustment is valid for no purpose whatever, and even in a separate suit in which the ground of claim is the breach of an otherwise valid

(1) 8 M. 277. (2) 7 A. 124. (3) 11 C. 671.

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contract by which the decree-holder has undertaken not to execute the decree. The Full Bench decision of this Court was founded on the consideration that a rule of procedure should not be taken to [63] repeal a rule of substantive law unless the intention to do so was clearly expressed or must necessarily be implied. The Full Bench of the High Court at Bombay consider that such intention must necessarily be implied from the course of legislation. If the latest modification of the Code of Civil Procedure is any indication of the intention of the Legislature, it lends support to the view taken by the Full Bench of this Court. However this may be, the decision in *Mallamma* v. *Venkappa* is binding upon us as observed in second appeal No. 278 of 1887 until it is set aside by a Full Bench. Though the decision in *Thirumalai* v. *Sundara* (1) seems to follow the Bombay decision, it distinguishes that case from case of *Mallamma* v. *Venkappa*. Again, the creditor may certify the adjustment whenever he likes, and the new contract is not therefore void *ab initio*. We can only refuse to enforce it on the ground that the consideration had failed at the date of this suit, but we are unable to say so in the case before us, as the creditor had allowed the decree to become barred by limitation relying on the mortgage. Following the decision of the Full Bench of this Court, we set aside the decree of District Judge and restore that of the District Munsif, and direct the respondent to pay the appellant's costs both in this Court and in the Lower Appellate Court.

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12 M. 63.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

IBRAHIM (*Plaintiff*), *Appellant v.* SYED BIBI (*Defendant*), *Respondent.**
[13th April and 4th October, 1888.]

Muhammadan law—Divorce.

Under Muhammadan law no special expressions are necessary to constitute a valid divorce, nor, except when the repudiation is final, need the words be repeated thrice. If the divorce pronounced is liable to be, but is not, revoked within the period of iddut, it becomes final.

[R., 30 B. 537 (544) = 8 Bom. L.R. 35.]

APPEAL from the decree of G. D. Irvine, District Judge of [64] Trichinopoly, reversing the decree of A. Kuppusami Ayyar, District Munsif of Trichinopoly, in suit No. 104 of 1886.

The plaintiff sued to recover his wife Syed Bibi, defendant No. 1, from Syed Ali Peran Sahib, defendant No. 2.

In the plaint it was alleged that defendant No. 1 had left plaintiff and was kept concealed by defendant No. 2. Defendant No. 1 pleaded that the marriage tie which existed between her and plaintiff was broken by plaintiff uttering the word "talak" two years ago. She denied that she was with defendant No. 2. Defendant No. 2 was discharged at plaintiff's request, and the only issue was whether defendant No. 1 was divorced as alleged.

The Munsif decreed that defendant No. 1, the subject of the suit, shall be taken possession of by plaintiff.

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* Second Appeal No. 759 of 1887.

(1) 11 M. 469.

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On appeal the District Judge accepted the evidence as to divorce and dismissed the suit without deciding an objection taken on appeal that the words used did not amount to a divorce.

Plaintiff appealed.

Sadagopacharyar and S. *Subramanya Ayyar*, for appellant.

Narayana Rau, for respondent.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

The appellant and the respondent are Muhammadans, the former being the husband of the latter, and it is found by the Court below that the appellant divorced the respondent by uttering the word "talak." Our attention is called to the evidence showing that the words used by the appellant were "as you give the income to another, I do not wish that you should continue to be my wife." It is urged in appeal that there is no distinct finding that the expression used was sufficient in law to constitute a divorce, that it was repeated three times after the intervention of one month between each time, and that the divorce was not reversed within the period of probation allowed. On the other hand, it is contended for the respondent that no special words are necessary, that they need not be repeated thrice, and that if there is an intention to divorce and it is manifested by apt words and if the divorce pronounced is not reversed within the period of iddut, it becomes irreversible. Reliance is also placed on *Hamid Ali* v. *Imtiazan* (1). Before disposing of this second appeal, we con-[65]sider it necessary to ask the Judge to try the following issues and to remit findings thereon :—

(1) Whether any and what special expressions are necessary under Muhammadan law to constitute a valid divorce?

(2) Whether it is necessary to repeat them thrice; and if so, subject to what conditions?

(3) Whether the divorce pronounced in this case was reversed by the husband within the period of iddut?

In compliance with the above order the District Judge submitted the following

FINDING—*First issue.*—"Whether any and what special expressions are necessary under Muhammadan law to constitute a valid divorce."

No such special expressions are required.

Reasons therefor.—No such special expressions are declared necessary in Baillie's Muhammadan Law or Macnaghten's Principles and Precedents, to both of which I have referred; the former (Book III, Chapter II, Section 5) gives an immense number of ambiguous expressions, the effect of which generally depends on intention as stated by the husband or shown by his action in contentedly living separate or otherwise. I can find no decided cases which speak of special expressions, as necessary. *Hamid Ali* v. *Imtiazan* cited by defendant throws no light on the matter. The only other case mentioned in the digest is *Furzand Hossein* v. *Janu Bibee* (2) which seems merely to determine that the words must be utterred to the wife, not to other persons. Anger makes no difference, except as giving more weight to the husband's subsequent denial of intention.

Second issue.—'Whether it is necessary to repeat them thrice; and, if so, subject to what conditions.'

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(1) 2 A. 71. (2) 4 C. 588.

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FINDING.—The words of repudiation must be repeated three times but not necessarily the same words on each occasion, and the three occasions may be continuous. The husband may repudiate three times and therefore irrevocably in one sentence without pause.

Reasons therefor.—I rely on *Abdul Ali Ishmailji, in re* (1). Also on Baillie's Muhammadan Law, Book III, Chapter I and Chapter II, Sections 1, 3 and 5. Macnaghten, Chapter VII, [66] Section 24, says that there must be an interval of a month between each repudiation.

Third issue.—"Whether the divorce pronounced in this case was reversed by the husband within period of iddut."

FINDING.—There is no proof that it was so reversed.

Reasons therefor.—There is no evidence on record as to any formal reversal. It might be inferred from plaintiff's action in sending to call her back from her father's house after she left him, and in subsequently filing a criminal complaint, if he did so within the period of iddut. The only date given in the original record is that of defendant's departure from plaintiff's house at Trichinopoly, 21st May, 1884. The date of the complaint is 27th May 1884 as ascertained from the record of calendar No. 237 of 1884, on the file of the Town Second-class Magistrate of Trichinopoly. Defendant in her written statement gives no place and no date, speaking vaguely of "two years ago." The evidence of her witnesses is equally vague as to date. In a deposition taken by this Court since the remand and herewith enclosed, she says that the talak was pronounced in her own house at Talanji, where she lived always from the date of her marriage. She never lived in her husband's house. He lived in hers. She still avoids giving any exact date, but says that the complaint was filed five or six months after the divorce which was pronounced 4 years and half ago. The parties, as often happens, seem to be each possessed with the one idea of contradicting absolutely everything asserted by the other, without the slightest regard to truth or falsehood or probability. As plaintiff does not assert a revocation, and as the interval between the alleged divorce and the visit for recall, which immediately preceded the criminal complaint of May 27th 1884, is very uncertain, I find that there is no proof that the husband reversed the divorce within the period of iddut.

On the 4th October the Court delivered the following

JUDGMENT.

We agree with the Judge that no special expressions are necessary under Muhammadan Law to constitute a valid divorce. It is sufficient if they clearly indicated an intention to put an end to the relation of husband and wife; nor do we consider that the expressions should be repeated thrice except when the repudiation is final and irrevocable. If the divorce pronounced is liable to be reversed, as in the case before us, and if it is not [67] reversed within the period of iddut, it becomes thereafter irrevocable. The same view was taken by the High Court of Allahabad in *Hamid Ali* v. *Imtiazan.* It is then urged that the District Judge refused to accept fresh evidence tendered by the appellant to prove that the divorce had been reversed, but there is no affidavit to that effect. Nor does the record support the statement. On the other hand, we observe that the Judge took some new evidence after the issues had been remitted to him.

We accept the findings and dismiss the appeal with costs.

(1) 7 B. 180.

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APPELLATE CIVIL.

12 M. 67.

12 M. 67.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

VENKAMMA (*Defendant*), *Appellant* v. SAVITRAMMA (*Plaintiff*), *Respondent.** [6th August and 23rd October, 1888.]

Parent and child—Interference with natural rights for the benefit of the child—Equity and good conscience.

Plaintiff, a Brahman widow, sued to recover her illegitimate infant child from defendant, to whom she had entrusted it since its birth for nurture;

Held, that it being proved that the plaintiff was leading an immoral life, the suit was rightly dismissed.

APPEAL from the decree of A. L. Lister, District Judge of Godavari, reversing the decree of G. Jaganadha Rau, District Munsif of Amalapur, in suit No. 240 of 1886.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (KERNAN and WILKINSON, JJ.)

Subba Rau, for appellant.

Venkatarammyya Chetti, for respondent.

JUDGMENT.

The plaintiff's claim to the possession of the female infant, as stated in the plaint, is that the mother of the child died leaving her with the plaintiff's mother, who, before her death, gave the custody of the child to the plaintiff. The plaintiff gave to the defendant the child, then only one month or so old. The plaintiff alleges that the child was entrusted to the defendant [68] as a temporary convenience, but the defendant says the plaintiff gave over the child to be maintained and provided for permanently by the defendant. What the arrangement was is not important to the question to be decided.

It turned out on the hearing before the Munsif that the child was born of the plaintiff, who is 25 years old and a Brahman widow, more than twelve months after her husband's death. The plaintiff and defendant were examined before the Munsif, and he was of opinion that the child was probably born in the house of the defendant and was kept there to avoid the disgrace that would fall on the plaintiff if it was known she had an illegitimate child. The Munsif found that the child produced before him was well cared for and apparently attached to the defendant. The Munsif also found that the defendant is in good circumstances and that the plaintiff has no visible means of livelihood and is houseless, and, in the interest of the infant, he declined to make a decree in favour of the plaintiff for the custody of the child. The District Judge reversed the Munsif's decree and decreed that the plaintiff should have the custody of the child and directed that the child should be delivered over to the plaintiff.

When the case came before the Court on second appeal we directed the Munsif to inquire how the plaintiff is maintained or with whom she resides and whether she is of respectable character.

After examining the plaintiff and witnesses for the plaintiff and for the defendant, the District Munsif, himself a Brahman, after referring to the evidence, found that, though there are many Brahmans in the village

* Second Appeal No. 1255 of 1887.

where plaintiff lives, some of whom are closely related to her, she has not summoned even one to prove that she still is respected as a caste-woman, and he is satisfied she is not regarded as a Brahman; that though she is visited by Brahman men they do not dine there, and that the object of their presence there is obviously for immoral purposes. On the whole he reports he is disposed to think her character is immoral.

No question has been made as to the jurisdiction of the Munsif to try this suit; and, admitting that ordinarily the mother of an illegitimate infant is entitled, during the period of nurture, to the custody of the infant, the question in this suit is whether the plaintiff is, upon the facts found by the Munsif (as to plaintiff's conduct) in the original hearing and on the inquiry by him, entitled to the custody of the infant as against the defendant who [69] has had the custody of the child committed to her by the plaintiff. There is no reason why the principle applicable to the mufussal of "equity and good conscience" should not be applied to determine whether the infant should be given over to the custody of a natural guardian leading an immoral life, and by whose example the morals of the child are likely to be corrupted. The Minors' Act IX of 1861 recognizes the authority of the principal Civil Courts in India of original jurisdiction to determine on petition questions as to the custody of infants. On the ground of pecuniary benefit alone to the child, the plaintiff could not be deprived of her right to the custody. But the Courts of Law in England and Ireland, in cases where immoral conduct and character is proved against even a mother of a legitimate child, interfere with the ordinary legal right of the mother to the custody of the child. See *Reg.* v. *Clarke* (1) and *Skinner* v. *Orde* (2).

It would be against equity and good conscience to deliver the infant into the custody of the plaintiff whom the Munsif has found to be a person who receives visits from men for immoral purposes and to be of immoral character. Moreover, the plaintiff delivered over the infant almost from her birth to the defendant, a respectable woman in good circumstances, who has since nurtured the child for upwards of two years, and to whom the child is affectionately attached, while she is a stranger to her mother. Under these circumstances we reverse the decree of the Lower Appellate Court and restore that of the Munsif. No costs.

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12 M. 69.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

COOLING AND ANOTHER (*Defendants*), *Appellants v.*
SARAVANA (*Plaintiff*), *Respondent.**
[30th July and 14th August, 1888.]

Lien on land created by agreement—Sale to stranger without notice—Purchaser bound.

D mortgaged certain land to *S* to secure repayment of a loan, and covenanted that in a certain event *S* might realize the money from the house of *D*. *D* sold this house to *C*, who purchased without notice of the covenant.

Held, that *C* could not resist the claim of *S* to have the house sold under the covenant.

[Rel., 11 Ind. Cas. 629 (632)=21 M.L.J. 562 (568); R., 13 A. 28 (52)]

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* Second Appeal No. 1112 of 1887.

(1) 7 E. & B. 186. (2) 14 M.I.A. 309.

1888 AUG. 14. — APPELLATE CIVIL. — 12 M. 69.

[70] APPEAL from the decree of S. T. McCarthy, District Judge of Chingleput, confirming the decree of C. Suri Ayyar, District Munsif of Chingleput, in suit No. 618 of 1885.

The facts necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AIYYAR and WILKINSON, JJ.).

Mr. *Subramanyam*, for appellants.

Srirangacharyar, for respondent.

JUDGMENT.

The house in dispute belonged to one Varada Desikachari, and in August 1879 he mortgaged some land to the respondent with possession. The instrument of mortgage (Exhibit A) contained a covenant in the following terms :—"If any 'halal' (danger or peril) be occasioned by the temple people whilst you are in enjoyment of the land under mortgage, you are at liberty to realize the money from my tiled house." The respondent entered into possession of the land mortgaged by document A, and, in May 1881, Varada Desikachari, the mortgagor, sold the house in suit to the appellants who purchased it *bona fide* for value without notice of the convenant contained in document A. The temple authorities mentioned in that document brought original suit No. 455 of 1885 to eject the respondent, who thereupon instituted the present suit to recover the mortgage debt by the sale of the house in dispute. The debt was found to be neither immoral nor vicious, and the District Munsif considered it to be binding upon defendants 1 to 3, who are the sons of the mortgagor since deceased ; they have preferred no appeal from his decision.

The fourth and fifth defendants, who are the appellants before us, resisted the claim on the ground (1) that the suit was premature ; (2) that document A created no lien on the house ; (3) that they were *bona fide* purchasers for value without notice ; and (4) that the mortgagee forfeited his lien on the house, if any, by laches in original suit No. 455 of 1885.

Both the Courts below considered that the pleas set up by the appellants could not be upheld and decreed the claim, and the contention in second appeal is that they ought to have been upheld.

As regards the first contention, *viz.*, that the suit is premature, our decision must depend on the construction of the stipulation contained in document A. We agree in the opinion of the Courts below that, according to the true construction of the clause in A relating to the house in question, actual dispossession or eviction [71] from the land is not a condition precedent to the accrual of respondent's right to proceed against the house. In their ordinary sense the words "if any halal supervenes from the action of the temple authorities," whilst the respondent is in enjoyment of the land mortgaged, do not import actual eviction by the establishment of adverse title, but they only signify any disquieting or menacing action which places the mortgagee's right of possession in peril. The first contention must be overruled.

Another contention is that as *bona fide* purchaser for value without notice the appellants are not bound by the stipulation in document A. This Court has already held that a subsequent purchaser makes the purchase subject to a pre-existing encumbrance. although he may have had no notice of such encumbrance, *Golla Chinna Guruvuppa Naidu* v. *Kali Appiah Naidu* (1). The substantial question then is whether document A

(1) 4 M.H.C.R. 434.

created no lien on the house in dispute because it was to have arisen on a contingency. When that document was executed, Varada Desikachari was competent to encumber his property either at once or subject to a contingency, and a subsequent purchaser who can only stand in his place takes the property subject to such restrictions as would attach to him as owner if he never parted with the property. In the absence of a special provision of law, we do not see how a *bona fide* purchase can operate to secure a larger interest than the vendor himself had and was competent to transfer. It was suggested by the appellant's pleader that the stipulation ought to be treated as a personal covenant giving a right to claim compensation for its breach from the mortgagor's heirs, and not as a covenant running with the house. We are referred to no authority in support of the suggestion which, if adopted, would defeat the intention of the parties to the contract of mortgage, namely, that of securing the mortgage debt on the house in the event of the mortgagee's right to treat the land as primary security being placed in peril. As to the question of laches, we see no reason to doubt the correctness of the conclusion to which the District Judge has come.

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We are of opinion that the second appeal cannot be supported and we dismiss it with costs.

12 M. 72.

[72] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

BRINDAVANA (*Plaintiff*), *Appellant v.* RADHAMANI AND ANOTHER (*Defendants*), *Respondents.** [5th, 6th, 8th and 9th March and 17th April, 1888.]

Hindu Law—Gandharva marriage without nuptial rites invalid—Mitakshara, Chapter I, Section 12—Illegitimate son—Status of Illegitimate son of Kshatriya by Sudra woman.

In order to constitute a valid marriage in Gandharva form, nuptial rites are essential.

Although the illegitmate children of members of the regenerate classes are excluded from inheritance by the Mitakshara, the absence of legal marriage is no bar to the determination of their caste with reference to the law applied to Anulomajas (children born of mixed marriages).

The illegitmate son of a Kshatriya by a Sudra woman is not a Sudra but of a higher caste called Ugra.

[R., 17 M. 422 (426); 27 M. 13 (14); 32 M. 512=3 Ind. Cas. 541=19 M.L.J. 656 (665) =6 M L.T. 183; 9 Ind. Cas. 71 (73)=13 O.C. 375 (380); 16 Ind. Cas. 787 (788); D., 49 P.R. 1903=118 P.L.R. 1903.]

APPEAL from the decree of J. R. Daniel, District Judge of Ganjam, in suit No. 23 of 1885.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

Bhashyam Ayyangar, *Pattabhiramayyar* and *Desikacharyar*, for appellant.

Ramachandara Rau Saheb, *Ananda Charlu* and *Sundra Rau*; for respondents.

* Appeal No. 148 of 1886.

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JUDGMENT.

The property in litigation is a moiety of the zemindari of Tekkali in the District of Ganjam, and the last made holder was one Krishna Chandra Deo who died in 1854. Upon his death the estate was divided by his two widows, Nilamani and Radhamani and on the death of the former, her share survived to the latter. The appellant is the illegitimate son of Krishna Chandra Deo by a woman named Priyavati, and his right of succession to his father as heir-at-law is, on his own showing, barred by limitation.

In September 1879, Radhamani, respondent No. 1, adopted respondent No. 2, her brother's son, with the consent of certain [73] alleged sapindas of her husband, and the present litigation is the outcome of that adoption.

The plaint stated that, as the illegitimate son of Krishna Chandra Deo, the appellant was not only his lawfull successor, but also his reversioner and entitled to the estate on the death of his widow Radhamani, and that the adoption made by her was not duly authorised, and that it was therefore illegal. The appellant prayed for a decree setting aside the adoption and establishing his right as reversioner. For the respondents it was contended that Krishna Chandra was a Kshatriya by caste, and that, as an illegitimate son, the appellant was neither his heir nor his reversioner. It was alleged further that the appellant's mother Priyavati, was brought up by a dancing girl of Nellore, that she had exercised the profession of that class of women for some time before she became Krishna Chandra's concubine, and that on that ground the appellant was not an illegitimate son of the class referred to in Section 12, Chapter I of the Mitakshara. It was also urged that appellant's claim was barred by limitation, that he was not entitled to maintain the suit, and that adoption of respondent No. 2 was *bona fide* and duly authorised. The District Judge held that Krishna Chandra was not a Sudra by caste, and that the appellant was not his reversionary heir, and the Judge found also that Priyavati, the appellant's mother, was a virgin when she became Krishna Chandra's concubine. In the result, he dismissed the appellant's claim with costs, and it is from this decision the appeal is preferred.

It is conceded that Krishna Chandra Deo's father, Padmanabha Deo, was a pure Kshatriya. It is also admitted that Krishna Chandra's mother was one Padmamala, and that her paternal and maternal grandfathers, Narahari Rao and Giridhara Rao, were Kshatriyas. Nor is it denied that both the wives of Krishna Chandra, Nilamani and Radhamani, were of Kshatriya caste by birth. But the matters in contest are whether Padmamala's paternal and maternal grandmothers and mother were Sudras, whether the two former were married women, and whether Padmamala was Padmanabha's concubine or his lawful wife by Gandharva marriage. The District Judge was of opinion that nothing was known of the caste of the ladies mentioned above, but assuming that Padmamala was a Sudra, he considered that Krishna Chandra was of a higher caste than a Sudra, as his father [74] was a pure Kshatriya. The main question for decision in this appeal is whether Krishna Chandra was a Sudra or one of the regenerate classes within the meaning of Section 12, Chapter I of the Mitakshara. As it is a mixed question of fact and law, we shall first state the effect of the evidence in regard to questions of fact in dispute.

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The first of those questions is whether, as alleged by the respondents, Padmamala was the lawful wife of Padmanabha Deo by Gandharva marriage. The Judge has recorded no finding in regard to it, but treated the matter as one of little moment. We observe, however, there is no satisfactory evidence in support of the contention. None of the respondent's witnesses deposed to the *factum* of a Gandharva marriage between Padmamala and Padmanabha Deo, and there is no direct evidence at all on the point. It was no doubt in evidence that Padmamala was addressed as Maha Devi, that she wore gold jewels on her legs, that she performed a ceremony called Bandapan which married women alone ordinarily perform, and that she was the brother's daughter of Nila Patta Maha Devi, the senior wife of Padmanabha, admittedly a lady of the Kshatriya caste. But these circumstances are not in themselves conclusive on the question of lawful marriage, and although Padmamala was the niece of the senior wife and taken by Padmanabha under his protection on her recommendation, yet it is by no means unlikely that her *status* was not higher than that of a concubine if she was only an illegimate relation. Exhibit O shows that in June 1833 Mr. Ogilvie stated in his official report that Krishna Chandra Deo's legitimacy was a matter of doubt though he referred to Padmanabha having recognized him as his heir, and he further gave what was then believed to be a correct account of the relation between Padmamala and Padmanabha, which is inconsistent with the contention that there was a lawful marriage between them. Again, Exhibit III, which is copy of a letter addressed by Padmanabha's senior wife to the Collector in 1838, is inconsistent with a consciousness in the family that there was a lawful marriage between Padmamala and Padmanabha. She stated in Exhibit C that Gopinatha was the son of a maid servant by Padmanabha, and that Krishna Chandra Deo should be preferred to him, but she did not say that he was her husband's Aurasa or legitimate son, or that he was a child born in wedlock. On the other hand she rested his claim on his adoption by her as a son by her husband's desire. Again **[75]** in document III addressed by her in 1838, she said that Padmamala was of the same caste with her husband, but did not refer to a lawful marriage between them. Moreover, the form of Gandharva marriage such as the one in question is described by the respondents' ninth witness as consisting in an exchange of garlands of flowers between the bride and the bridegroom without a nuptial rite, *homam*, and without the customary token of legal marriage called Pustelu being tied round the neck of the bride. Sir William Macnaughten also says: "The Gandhharva marriage is the only one of the eight modes for the legalizing of which no ceremonies are necessary, and it seems that mutual cohabitation, as it implies what the law declares to be alone necessary, namely, a reciprocal amorous agreement, would be sufficient to establish such a marriage if corroborated by any word or deed on the part of the man." (Macnaughten's Principles of Hindu Law, page 61). But according to Hindu texts the religious element appears to be indispensable to a valid Gandharva marriage. Devala says: "The nuptial rites are ordained in the marriages styled Gandharva and the rest, and to the contract the nuptial fire must be made witness." There is a passage to the same effect in Nirnaya Sindhu, Chapter III, p. 37 (see Shyamachurn's Vyavastha Chandrika, Vol. II, 444). Adverting to the opinion of Sir William Macnaughten, the compiler of the Vyavastha Chandrika, observes: "It is to be remarked in the Gandharva form of marriage the only ceremony that may not be required to be performed is that of the gift, the exchange of garlands of

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flowers being expressive of the gift of the one to the other, but the ceremony of *homam* should be performed as otherwise the marriage is not complete." In Volume III, Colebrooke's Digest of Hindu law, 606, it is said that nuptial rites are necessary even in the marriage named Gandharva and the rest. Devala's Smriti is also cited therein as saying, "Nuptial rites are ordained in the marriage styled Gandharva and the rest. To this contract the nuptial fire must be made witness by men of the three classes." Sir Thomas Strange refers to Gandharva marriage as a form permitted to the Kshatriya or military class, but adds that nuptial rites accompanying them all have the effect of distinguishing even the less approved ones from commerce purely illicit to which otherwise Gandharva and Rakshasa marriages might be assimilated, the former importing an amorous connexion founded on reciprocal desire. I. Strange's Hindu Law, 44. Further, in the Madras Edition of Colebrooke's translation of Jaganatha's Digest, Yajnyavalkya is cited in page **[76]** 613 as saying that Gandharva marriage is permitted to the military class and consists in reciprocal amorous agreement, but the compiler of the Digest, Jaganatha, adds, "Nuptial rites are necessary even in the marriage named Gandharva and the rest." Though as defined by Manu and Yajnyavalkya, Manu, Chapter III, Sloka 32, Gandharva marriage originally consisted in a sexual union founded on a reciprocal agreement made for sensual gratification, yet later texts, such as the Smiriti of Devala, appear to have prescribed *homam* as an essential in order to constitute it into a union in wedlock, and thereby distinguish it from an illicit commerce, permanent and exclusive. Even assuming then that, as suggested by the respondent's pleader, the circumstances already mentioned in regard to the mode in which Padmamala was treated constitute indirect evidence of a Gandharva marriage, we must hold, with reference to the evidence of the ninth witness and the text of Devala, that the marriage, if any, was not contracted in the prescribed form, and that the intention to constitute the relation of husband and wife, which the observance of that form is designed to indicate, was wanting. This is the most favourable view which it is possible to take upon the evidence of the relation between Padmamala and Padmanabha with reference to the consciousness in the family, for Nila Patta Maha Devi spoke of Krishna Chandra as adopted by her husband's desire, an adoption for which there was no legal necessity if he was already born to her husband in lawful wedlock. The conclusion to which we then come is that it is not shown that Padmamala was the married wife of Padmanabha, or that Krishna Chandra was born to him in wedlock, and that he must be taken to have been illegitimate.

Another fact in contest is whether Padmamala's paternal and maternal grandmothers were of the Sudra caste, and the appellant's pleader relies on the evidence of his first witness Kamalalochana Rayi Santo, brother of Padmamala. On this point the evidence is conflicting, and the District Judge observes that nothing is known of the caste of the ladies mentioned above, and that they were the illegitimate relations of Nila Patta Maha Devi, the senior wife of Padmanabha. The only witness who deposed to the caste of one of them is the first witness for the appellant, and his evidence is that his paternal grandmother, Chompa, was a woman of the Vodra or Sudra caste, and that he derived his information from his parents. But his evidence is not otherwise **[77]** corroborated, and though he is Padmamala's brother, his sympathy is with the appellant as the person in whom Nila Patta Maha Devi and Krishna Chandra Deo

took considerable interest. The evidence is also open to the remark that, though the witness calls himself a Sudra, yet he has a *gotra*, he has been invested with the sacrificial thread, and he performs all the purificatory and other ceremonies prescribed for Kshatriyas. On the other hand, the respondents' witnesses say that Krishna Chandra Deo and Padmamala, her father, were all Kshatriyas, and they say so because their fathers were Kshatriyas. We see no reason to doubt that the Judge has come to a correct conclusion.

Another fact in dispute is whether the appellant's mother practised the profession of a dancing girl before she was kept by Krishna Chandra Deo. On this point again there is a conflict of oral testimony, but the probability is in favour of the appellant, regard being had to the mode in which Nila Patta Maha Devi, Krishna Chandra Deo, and his widows treated him. We cannot say that the Judge is in error in holding that Priyavati was a virgin when she began to live with Krishna Chandra Deo. We take it then that Padmamala was not a married wife of Padmanabha, that Krishna Chandra was not born to him in wedlock, that Padmamala's paternal and maternal grandfathers were pure Kshatriyas, that Padmanabha was a Kshatriya, that Padmanabha's mother, Chandramani, was the wife of Ramakrishna Rao, that Ramakrisha Rao was the son of Narahari Rao, a Kshatriya by his concubine, Chompa, and that Chandramani was the daughter of a Kshatriya by his concubine Tulasi, that there is no satisfactory evidence as to the caste of Chompa and Tulasi, and that the appellant's mother was a virgin when she commenced to live with Padmanabha as his concubine. Upon these facts two questions of law arise in the main for decision, *viz.*, whether Krishna Chandra was a Sudra by caste, and whether the appellant was his illegitimate son within the meaning of Chapter 1, Section 12, of the Mitakshara. According to the District Judge, Krishna Chandra was an Ugra and not a Sudra, and the same opinion was expressed by this Court in regard to another illegitimate member of this family *S. G. H. Krishna Devi Garu* v. *S. G. R. P. Maha Devi Garu* (1). In *Chuoturya Run Murdan Syn* v. *Sahub Purhulad Syn* (2), **[78]** the Privy Council observed as follows with reference to the *status* of the son begotten by a Rajaput on a Sudra concubine: "Whatever weight might be due to the authorities cited in support of a speculative opinion entertained perhaps by learned Brahmins and others, their Lordships have nevertheless no doubt that the existence of a Kshatriya class as one of the regenerate tribes is fully recognized throughout India, and also that Rajaputs in Central India and in this district are considered to be of that class." Whilst stating that the question which had then to be decided was, not whether the illegitimate son of a Sudra man by a Sudra woman can inherit, but whether the illegitimate son of a Kshatriya can in any event inherit whether his mother be a Sudra or of any other caste, the Judicial Committee observed: "Although their (Rajaputs') intercourse with females of a lower tribe may have in some instances produced a mixed race, yet even in this class, which Sir John Malcolm termed 'the Bastard Rajaput tribes,' the lowest of them who aspire to Rajaput descent consider themselves far above Sudras." That this is also the case in the Kshatriya family before us, there is no reason to doubt. According to the evidence, the illegitimate relations are called in common parlance Kshatriyas, they have *gotras*, they are invested with the sacred thread, and they perform the

(1) 2 M.H.C.R. 369. (2) 7 M.I.A. 18 (46).

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purificatory ceremonies and the obsequies and the *dharma* prescribed for Kshatriyas. It is also noteworthy that Kshatriya women by birth marry them at times, as the widows of Krishna Chandra and Gopinatha did in the case before us, and that they recognize and treat them as their own sons in the absence of legitimate sons, as was done by Nila Patta Maha Devi in this case. We entertain, therefore, no doubt that, according to the belief of the class, illegitimate descent does not operate to degrade the offspring to the position of Sudra, or deprive them of the social position of Kshatriyas, though it is in evidence, and very probably the case, that pure Kshatriyas do not eat with them and regard them as an inferior class on account of their illegitimate descent.

But to return to their legal *status*: when intermarriages were permitted by ancient Hindu law, children born of mixed marriages were termed *Anulomajas*, and their caste was neither that of their father nor that of their mother. They belonged to an intermediate caste higher than that of their mother and lower than that of their father, and the caste assigned to the son begotten by a Kshatriya on a Sudra wife was called that of Ugra.

[79] So Yajnyavalkya says: "The son begotten by a Brahmana upon his Kshatriya wife is a Murdhavasikta, one upon a Vaisya wife is an Amhashta, one upon a Sudra is Nishada or Parasava. The sons born by Vaisya and Sudra wives to a Kshatriya are called respectively Mahishya and Ugra. The son born of a Vaisya by a Sudra wife is a Karana." This rule refers to married sons begotten by what was called *Anuloma* marriage, or on wives whose caste was inferior to that of their husbands. It must be remembered that this classification had reference to the notion that there was a rise in caste by the fifth or seventh birth. Thus Vijnanesvara says, "that a Brahmin begets upon a Sudra a Nishada; she (the Nishadi) marrying a Brahmin produces a girl, who again marries a Brahmin; in this manner the marriage of the sixth daughter with a Brahmin produces a Brahmin. Again, a Brahmin produces upon a Vaisya an Ambashta, who marrying a Brahmin bears a daughter, and these connections going on for five generations produce a Brahmin." The notion underlying the theory is that the seed has a superior efficacy and renders the field, though inferior as pure as itself when the latter is in union with the former for five or seven generations. It is also said by some commentators that in the *Anulomajas* there is a germ of *Dvijaship*, which if the *Anuloma* union is repeated for five or seven generations is perfected into maturity and becomes equal to that of their father. (Mandalik's Yajnavalkya, page 173.) The same classification is referred to and recognized by the authors of the Mitakshara and of the Madhaviya in the Acharakanda, of which passages relating to the question before us we were referred to during the argument. Translations of those passages, admitted on both sides to be correct, are appended to this judgment for reference. The opinion of the Judge that Krishna Chandra was an Ugra on the assumption that his mother was a Sudra is therefore in accordance with the texts on Hindu law in regard to the caste of *Anulomajas*.

To this view several objections were taken at the hearing by the appellant's pleader.

The first objection has reference to the *Dharma* or duty prescribed for the *Anulomajas*, but it is anticipated and answered by the author of the Madhaviya. The objection referred to by him is that the *Anuloma* offspring are of the caste of their mothers implying thereby that if

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the mother is a Sudra, the offspring [80] would be a Sudra likewise. The Smrities of Vishnu and Sankha are also mentioned as at first sight supporting the objection. Vishnu said, "Children born of parents of equal caste are of like caste. As for the *Anuloma* offspring, they are of their mother's caste." Sankha said, "One begotten on a Kshatriya female by a Brahmin can be a Kshatriya only, one begotten on a Vaisya by a Kshatriya is a Vaisya alone, one begotten by a Vaisya on a Sudra woman is a Sudra alone." The commentators reply to the objection thus: "The objection is of no avail, as these verses only secure or indicate to the offspring the *Dharma* (religious rites) appertaining to the mother's caste. Otherwise, the superior efficacy of the seed will become nugatory. Just as the defect of the field (mother) debars entrance into a superior caste, why should not the superiority of the seed debar a lapse into a lower caste?" It follows that Murdhavasiktas and others unquestionably denote distinct castes. Again, the Mitakshara reconciles the apparently conflicting Smrities in the same way. There is further a passage to the same effect in Vaiyadynatha Dikshitiyam, a modern commentary of authority in the southern district. It follows then that there were originally four castes, Brahmins, Kshatriyas, Vaisyas and Sudras, that *Karma* and *Dharma* (religious rites and duties) were prescribed for each of the four only, and that when mixed marriages came to prevail, intermediate castes were recognized in the case of *Anuloma* offspring in order that they might eventually rise to the superior caste of their fathers on account of the germ of *Dvijaship* in them, but that the *Karma* and *Dharma* prescribed for them until the *Dvijaship* was perfected were those which appertained to their mother's caste. Thus, according to two commentators of paramount authority in this part of India, the *Anulomajas* had an intermediate caste superior to that of their mothers on account of the superior caste of their fathers, though the *Dharma* prescribed for their guidance whilst their *Dvijaship* was in the course of gradual development was that which appertained to the caste of their mothers. We must, therefore, overrule the first objection.

The next objection taken in appeal in view to deny an intermediate caste to *Anulomas* superior to that of their mothers is that those only have intermediate castes who are begotten by twice born men on women of the class next immediately below them. It was urged that a child begotten by a Kshatriya on a Sudra woman was not begotten by a twice-born man on a woman of the [81] class immediately below him. In support of this contention our attention was drawn to Manu,* Ch. X, sloka 14, and to several

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* MANU.

Commentaries on Sloka 14, Chapter X, Manu, *vide* pp. 1287, Vol. II, Manava Dharma Sastra by V. N. Mandlik.

Medhatithi.—The sons that are begotten by a Brahmin on a Kshatriya woman and on a Vaisya woman, and in the same way (the sons) by a Kshatriya on the two, are said to have *Anantara* names. *Anantara* means the *Anuloma* caste equal to that of their mothers. The mention of the word *Anantara* is unnecessary. Therefore he says "by the lowness of their mothers." They cannot be blamed by reason of the superior caste of their fathers. Though they are thus of *Sankeerna Jati* (mixed class) they are considered by this *Vachanam* (text) to have *Matri Jati* (mother-caste). It amounts to saying that *Samskaras* must be performed to them Therefore even without the help of this *Vachanam* they have the said Kshatriya *Samskaras*. As they are like *Asvatara* (donkey or mule) of a class intermediate, there will be no harm even if *Matri Jati* (mother-caste) be stated by this Vachanam.

Sarvajna Narayana —They say that the sons born of women of the *Anantara* classes as of Kshatriya woman by a Brahmin, of a Vaisya woman by a Kshatriya, and

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[82] commentaries on that passage. In Sir William Jones' Translation of Manu, the sloka is rendered as follows: "Those sons of the [83] twice

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of a Sundra woman by a Vaisya, have the *Anantara* names (that is) the names of Kshatriya, &c., on account of the lowness of their mothers. The meaning is that they have the general *Dharmas* belonging to their mother-castes as they have for mothers (women) of) Kshatriyas and other (classes). By that statement that they have *Anantara* names only their names are indicated and not their castes.

Kulluka.—As the reason given is lowness of the mother (the word) *Anantara* should include the classes with one interval and with two intervals just like the one next below. The sons aforesaid begotten of woman of the class next below and of the classes with one and two intervals by the twice-born in the order of descent are said to belong to the caste of their mothers owing to the blemish of the mother who is of a lower caste. Though (they) are *Sankeerna Jati* distinct from that of mother or father, giving them the caste of their mother was for the purpose of receiving the *Samskaras* and the *Dharmas* pertaining to the caste of the mothers.

Nandana.—He states another view by the verse "*Putrayenantarastreejah*," "*Anantara Namnah*" means "*Anantara Varna Namnah*" which means having the name of the caste next below, *i.e.*, in the order having the name (or caste) of a Kshatriya, Vaisya, Sudra, *i e.*, the meaning is "being of the caste of the mother."

Govindaraja.—(1) The *Vachanam* (statement) that the sons mentioned in order begotten by the twice-born classes on women of classes with no interval, one interval and with two, are called by the names of their mother-castes as they have low mothers (that *Vachanam*) is (made) in order that the *Dharmas* of these (sons) belonging to castes different from those of their fathers and mothers may be (the same as) the *Samskaras* and other *Dharmas* belonging to their mother-castes. By the phrase (*matridoshat*) *viz.*, by the lowness of their mothers the word *Anantara* mentioned is for mentioning (also) that with one interval.

Manu, Chap X, Sloka 41, *page* 1301, *of Mr. V.N. Mandlik's Edition.*

Kulluka.—Those (sons) that are born of equal castes of the twice-born and thus in the direct order, those begotten by a Brahmin on a Kshatriya and a Vaisya woman, and that by a Kshatriya on a Vaisya woman, those six sons have the *Dharmas* of the twice-born classes and are fit for having *Upanayana* performed. Some one [82] may mistake that what has been said in the verse "Tavanantara jastviti" is for mentioning their caste (*Jati*) only, and not for mentioning their *Samskaras*. Therefore this *Vachanam* is for (their receiving) the *Samskaras* of the twice-born classes. The others that are the *pratilomas* though they are born of the twice-born classes have (only) the *Dharmas* of of Sudras. These are Sudras, &c., for them there is no Upanayanam.

Medhatithi.—"Those born of own caste," *i.e.*, those born to men of the three castes on women of equal caste, have the *Dharmas* of the twice-born. This simply lays down again what has already been established. Those born of *Anantaras* are *Anulomas.* They are begotten by a Brahmin on a Kshatriya or a Vaisya woman and by a Kshatriya on a Vaisya woman. It means that even they, having Dvija *Dharmas*, are fit for *Upanayana*. Having *Upanayana* performed, they receive all *Dvija Dharmas.* (Here an objection is raised). By stating that they have *Anantara* names, it is the caste (*jati*) of their mothers, that is said of them. Hence follows their capacity for those *Dharmas* equal to their mother's caste (*jati*). True. In stating *anantaranamnah* as name is mentioned it is only a name to them and not mention of caste. Thus a doubt may arise in some. To clear it, therefore, is another *vachanam*, *viz.*, six sons have *Dvija Dharmas* (Shat Sutah Dvija Dharminah). By the word *Dharminah*, *Dharma* is to be understood. As for those born of *Apadhvamsa* they are born in *Sankara*. They have the *Dharmas* of Sudras. They have equal *Acharas*. The meaning is they have those *Dharmas*. *Pratilomas* will be treated later on. Saying "*Anantara*" is only for indicating *Anuloma*. Therefore, though there is an interval, the son begotten by a Brahmin on a Vaisya woman is taken up. *Parasava*, the son born of a Sudra woman is not (taken) as he is outside the six.

Sarvajna Narayana.—He gives this (*sloka*) "*Sajati Iti*" to state something specially with regard to those born of *Anulomas*. The sons begotten by a Brahmin on a Brahmin (woman) and also on a Kshatriya and a Vaisya (woman) who are *Anantara*, three in number, the sons begotten by a Kshatriya on a Kshatriya and a Vaisya (woman), two in number, the son begotten by a Vaisya on a Vaisya woman, one, thus these six sons of the twice-born class have the *Dharmas* of the twice-born. These are similar to the castes of their fathers. Here by saying that they are said to be *Sajati* (own caste) they are qualified for *Upanayana*, &c., along with their distinct occupations.

(1) Vol. III. p. 136.

born who are begotten on women without an interval *antara* between the classes mentioned in order, the wise call [84] *anantaras*, giving them a

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As for the rest born of *Apadhvamsa* (they) are born of *Sankara* (mixed). They have *Dharmas* equal to Sudras. They are not fit for such kind of *Samskaras.*

Nandana.—He says by the sloka "Svajatijanantarajah" how we may know those of *Sankirna* (mixed) *jatis* (castes) and who have *Sudra Dharmas.* Brahmins, Kshatriyas, Vaisyas and Sudras are those born of *Sajati* (own class). *Anantaraja* (means) those that are born of *Anantaras Apadhvamsajas* means *Pratiloma* classes.

Raghavananda.—Here just like Brahmins and others, so (also) for the three ending with *karana* he (author) prescribes "*Asaucham*" (impurity at birth and death) and *Upanayam.* &c. (*Dvijavat*) like to the twice-born: and he prescribes "*Asaucham*" &c., of Sudras for the six sons, *viz. Ayogava, Kshatri, Chandala, Magadha, Vaideha,* and *Suta* "*Sajatija Iti.*" By "*Apadhvamsaja*" are mentioned *Ayogava* and the rest.

Mahabharata Anusasana Parva, Chapter 48, *Sloka* 7.

Three of Kshatriya connection his self is born of two. From the third persons of inferior *Varna* (caste) *Sudras* (called) *Ugras* : this is the Smriti.

[83] SECTION ABOUT DISTINCTION OF CASTES (1).

Having explained "sons born in the castes," the author explains *Anulomas* in verse 90. A son begotten by a Brahmin on a Kshatriya wife is called *Murdhavasikta.* Begotten on a Vaisya wife he is called *Ambashta.* Begotten on a Sudra wife he is called *Nishada.* There is a *pratiloma* caste named *Nishada* who live by fishing. To distinguish this *Nishada* from that caste, the alternative name of *Parasava* is mentioned. The words "by a Brahmin" should be understood all along. As for Sankha's text, *viz.*, "that he who is begotten by a Brahmin on a Kshatriya female becomes only a Kshatriya, that one begotten by Kshatriya on a Vaisya female becomes only Vaisya and that one begotten by Vaisya on a Sudra female is a Sudra," it is for securing the *Dharma* of Kshatriya, &c., but not to negative their being of *Murdhavasikta,* castes &c., nor to secure (the status of) Kshatriya and other castes. Therefore *Murdhavasikta,* &c., are entitled to *Upanayana* with the same *Danda* and *Ajaina* and to behave, speak and eat as they please prior to *Upanayana,* as Kshatriyas, &c.

Now as to verse 91. By a Kshatriya on a Vaisya wife and a Sudra wife are born sons called *Mahishya* and *Ugra,* respectively. By a Vaisya on a Sudra wife is begotten a son called a *Karana.* "This" the giving of the names *Savarana Murdhavasikta,* &c., should be understood to be applicable to women who have been married (*i.e.,* to wives). It should be known that these are the six *Anuloma* sons styled, *Murdhavasikta, Ambabashta, Nishada, Mahishya, Ugra,* and *Karana.*

Now as to verse 92. The author speaks of *Pratiloma* children. Sons begotten on a Brahmin female by a Kshatriya, a Vaisya and a Sudra are respectively designated *Suta Vaidehaka* and *Chandala.* Among these a *Chandala* is excluded from all *Dharmas* or rites.

Now as to verse 93. Further ; a Kshatriya female begets by a Vaisya a son named *Magadha.* She begets by a Sudra a *Kshatri.* A Vaisya female begets by a Sudra a son named *Apogova.* These, namely, *Suta Vaidehaka, Chandala, Magadha, Kshatri,* and *Apogova* are the six *pratilomajas,* as to their duties see Usanas and Manu.

Now as to verse 94. The author here explains the mixed castes springing from further intermixtures. The son born of *Mahishya* (who springs from a union of a Kshatriya with a Vaisya female) on a *Karani* (who springs from the union of a Vaisya with a Sudra female) is said to belong to the caste, name—*Rathakara.* He is entitled to *Upanayana* and all other rites agreeably to texts; for SANKHA says—such as are born of (children) born to Kshatriya and Vaisya on women of the caste next below their [father's] are *Rathakaras.* They are entitled to sacrifice and offer gifts and *Upanayana Samskara* and they should learn about horses, building chariots, and architecture as their profession. Those that fall by *Anuloma* connection under the classes of *Murdhavasikta, Mahishya,* &c., begotten by a Brahmin and Kshatriya are entitled to *Upanayana,* &c. The reason is that those two have *Dvijaship* in them. As for the names they should be known from other *Smrities.* The mention of them here is merely indicative, the reason being that they cannot be enumerated as they are countless.

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(1) Mitakshara.

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distinct name from the lower degree of their mother." Stress is laid on the opinions of several commentators,* and it is argued that there are only six sons fit for the *Dharma* of the twice born, sons begotten by a Brahmin on a Brahmin woman and on women of the next two castes, making three in all, by a Kshatriya on Kshatriya and Vaisya women making two, and by a Vaisya on a Vaisya woman and that sons by Sudra wives are excluded. But it does not follow that the son begotten on Sudra woman in the *Anuloma* form has not a higher [85] caste on, account of the superior efficiency of the seed as explained by Madhava although, for the purposes of *Dharma*, his caste may be that of his mother. The notion of caste rested on the presence of some *Dvijaship* or of the twice born in

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Exposition of the Anuloma and Partiloma Castes (1).

Yajnavalkya.—Children of like caste are begotten by men of a caste, on women of equal caste. By means of marriages which are blameless sons continue the line.

Explanation.—Children of like caste those whose mother and father are of equal caste.

[84] Even MANU says : Chap X, *verse* 5.

Explanation.—Children born of a Brahmin couple become Brahmins by caste.

Similar is the rule for Kshatriya and others (castes).

DEVALA also says :—One begotten on a Brahmin female by a Brahmin male becomes a Brahmin when subjected to *Samskara* (*i.e.*, purificatory ceremonies) ; same should be known to be the case among Kshatriyas, Vaisyas, and Sudras when men of a caste beget children on women of like caste.

MANU speaks of *Anuloma* progeny in different (unlike) cases as follows :—

(Chap. X, *verse* 6).

Explanation.—One begotton by a Brahmin on his wedded Kshatriya wife is similar to a Brahmin—not same. Reason is the inferiority of the mother to a Brahmin because of his relation to his mother whose caste is lower than a Brahmin. Such is the case even in the other castes.

Such children born in the *Anuloma* (direct) order fall under six castes styled Murdhavasikta, &c.

NARADA says :—Kshatriyas beget on Vaisya and Sudra women sons called Mahishya and Ugra according to Smriti.

" A Vaisya begets on a Sudra woman a son called Karana. This holds good if the couple were wedded to each other."

Among these, *three* are begotten by a Brahmin, *two* are begotten by a Kshatriya and *one* by a Vaisya.

This is explained by MANU.

(Chap, X, *verse* 10).

Objection.

Murdhavasiktas and others do not denote distinct castes as *Anuloma* offspring fall under the caste of their mothers.

VISHNU says so,—

Children born of parents of equal caste are of like caste. As for Anuloma offspring, they are of their mother's caste. As for Pratiloma offspring they are despised by Aryas (worthy men).

Also *Sankha*. One begotten on a Khastriya female by a Brahmin can be a Kshatriya alone. One begotten on a Vaisya by Kshatriya is a Vaisya alone. One begotten by a Vaisya on a Sudra woman is a Sudra alone.

Reply.

The objection is of no avail, as these verses only secure or indicate (to the offspring) the Dharmas (religious rites) appertaining to mother's caste. Otherwise the superior efficacy of the seed will become nugatory. Just as the fault of the field (mother) debars entrance into a superior caste, why should not the superiority of the seed debar a lapse into a lower caste.

It thus follows that Murdhavasiktas and others unquestionably denote distinct castes.

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* Medhatithi, Sarvajna Narayana, Kulluka, Nandana, and Govindaraja,

(1) Madhaviyam.

the son on account of the superior efficacy of the seed, whilst the conception of the *Dharma* appropriate to him, when the *Dvijaship* was imperfect and required repetition of the *Anuloma* union for certain number of generations to ripen into that of the father or, in other words, when it was in a state of transition rested on the caste to which his mother belonged. The fallacy in the contention of the appellant's pleader consists in ignoring the distinction between the two conceptions and assuming that the *Dharma* and the caste went together under the ancient law applicable to *Anulomajas*.

The third objection on which the appellant's pleader relies when his attention is called to the finding that nothing was known of the caste of Padmamala's paternal and maternal grandmothers is that the doctrine applied to *Anulomas* who were born in wedlock should not be extended to children born of illicit intercourse.

In verse 92, the author of the Mitakshara speaks of *Pratilomajas* who are the offspring of irregular union the inverse order and mentions their several castes, adding that a child begotten on Brahmim woman by a Sudra is alone a Chandala. and as such excluded from all *Dharmas* and rites. With reference to the other *Pratilomajas*, he refers to the texts of Usanas and Manu in regard to their duties. But it is not necessary to dwell further on this branch of the ancient Hindu law, for Krishna Chandra was *ex hypothesi* the son of a Kshatriya by a woman of inferior caste, and there is no analogy between his *status* and that of *Pratilomajas*. Though the illegitimate children of members of the regenerate classes are excluded from inheritance by the author of the Mitakshara, they are substantially recognized by him as members of their father's families for purposes of maintenance, and the absence of legal marriage is, in our judgment, no bar to the determination of their caste with reference to the law applied to the *Anulomajas*, the point in analogy being the conventional notion in regard to the superior efficacy of the seed. Again, we have already pointed out that this Court judged of the caste of another illegitimate member of the family by analogy to the caste of *Anulomajas*.

Although we have assumed that Padmamala was a Sudra in dealing with the objections, yet it should be borne in mind that nothing is known of the caste of her paternal or maternal grandfathers, while it is shown that her father and mother were the **[86]** children of Kshatriyas, that her father was the illegitimate brother of Padmanabha's wife, and that he as well as her brother have followed the *Dharma* prescribed for Kshatriyas. It is true that when no marriage is proved, there may be no ground for presuming, as a matter of law, that the parents were of the same caste. But when it is shown that her father and brother observed the rules prescribed for Kshatriyas, it would not be unreasonable to presume, in the absence of distinct evidence to the contrary, that their mothers were at least of a caste which did not, according to the notion of the Kshatriyas in this part of the country, incapacitate them for the *Achara* (*Dharma*) they were accustomed to follow. We may here refer also to the statement of Padmanabha's senior wife that Padmanabha was of the same caste with her husband exhibit (III). We are, therefore, of opinion that the District Judge was right in holding that Krishna Chandra was not a Sudra, and that he was at least an Ugra or of a higher caste than a Sudra.

As for the respondent's contention that the appellant's mother practised the profession of a dancing girl, we have already observed that we agree with the Judge that she was a virgin when she became Krishna

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Chandra's concubine. It is in evidence that she was only brought up by a dancing girl for a time and that she did not belong by birth to the caste of dancing girls. It is, therefore, unnecessary, for the purposes of this appeal, to consider whether dancing girls may not give up their profession and become mothers of illegitimate children within the meaning of the Mitakshara law. Nor do we think it necessary to notice the contention that the Mitakshara law regarding illegitimate children is no longer in force, that the illegitimate children contemplated by the commentator are the children of mothers whose legal *status* was that of slaves, and that Act IV of 1843 which repealed slavery virtually repealed this portion of Hindu law. The contention appears to us to be at variance with a long course of decisions in this Presidency, and with the decision of the Privy Council already mentioned in this judgment.

The only question then which remains to be considered is whether the adoption made by the first respondent is valid. As to the *factum* of the adoption, there is no dispute. Nor is it denied that five of the Sapindas of Padmanabha authorized the adoption as asserted by the respondents. As to the suggestion that the consent was given from corrupt motive, we attach no weight to it. We are referred to an entry in exhibit KK, which is to the **[87]** following effect: "Expense for obtaining the consent of five sapindas and Collector's order, Rs. 10,000." It is said by the ninth witness for the plaintiff that respondent No. 1 handed over the account to him in order that, as her gomasta, he might give instructions in a suit brought by her against Krishnama Nayudu and others, and that though that suit was compromised, the paper was allowed to remain with him, and that he now produced it as the plaintiff's witness in the present suit. Kamesam Pantulu was not cited as a witness, though the exhibit is said to be a settlement of account between him and the first respondent and is in his handwriting. Although the defendants, ninth and tenth witnesses, were some of the sapindas who authorized the adoption, they were not at all cross-examined with reference to the entry. The witness did not state that he had the first respondent's permission to produce it in evidence, and his object in producing it was obviously to injure her and favour the appellant. If the account were genuine, it is not likely that it would be allowed to remain with the witness as alleged by him. We are not prepared to say that the account is genuine, and we reject the evidence of plaintiff's ninth witness as untrustworthy. It is next contended by the appellant's pleader that as Krishna Chandra was the illegitimate son of Padmanabha, the sapindas of the latter were not his sapindas competent to authorize his widow to adopt. If Padmanabha were alive, he would be competent to authorize the widow of his son to adopt as her adviser and guardian, though that son was illegitimate. Though his sapindas may not be his illegitimate son's sapindas in the sense that they are heirs to one another in any event, we see no valid objection to holding that they are competent to represent her father-in-law after his death for the purpose of authorizing her to adopt. We consider that the adoption was duly authorized.

For these reasons, we are of opinion that the appeal must fail and we accordingly dismiss it with costs.

As to the memorandum of objections, it is clearly inadmissible under Section 561 of the Code of Civil Procedure. The decree passed by the District Judge was not in part against the respondents and the memorandum cannot be regarded as being in the nature of a cross-appeal. As it is,

however, competent to the respondents to support the decree on a ground which was decided against them, the only effect we can give to it is to treat it as suggesting a ground to be urged at the hearing of the appeal.

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We dismiss it as a memorandum of objections but without costs.

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12 M. 88=2 Weir 100.

[88] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RAMASAMI *v.* DANAKOTI AMMAL.* [6th September, 1888.]

Criminal Procedure Code, Section 145—*Dispute as to right to collect rents.*

A dispute between two persons as to the right to collect rent from the tenants of an estate is cognizable under Section 145 of the Code of Criminal Procedure.

[R., 5 M.L.J. 95 (97).]

APPLICATION under Section 439 of the Code of Criminal Procedure to revise an order passed by V. Subbayyar, Deputy Magistrate of Chingleput, under chapter XII of the Code of Criminal Procedure.

A dispute having arisen as to the right to collect rents between one Danakoti Ammal and Ramasami Mudali, the magistrate declared that the former was 'in possession of the right to collect rents in the village of Ammanur as lessee,' and that she should retain possession of such right until eviction in due course of law, citing *P. B. Deb Roy* v. *D. Churn Bhattacharji* (1) in support of his ruling.

Ramasami Mudali applied to quash this order as being *ultra vires.*

Ramasami Mudaliar, for applicant.

Mr. *Subramanyam* and *Srirangacharyar,* for the lessee.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

We see no reason to hold that the Deputy Magistrate was not justified in holding that there was a reasonable apprehension of a breach of the peace. The ruling in IV, Madras High Court Reports, Appendix XII, was under the Criminal Procedure Code of 1861. We think that a dispute about the right to collect the rents of lands from the tenants in possession is a dispute concerning tangible immoveable property within the meaning of Section 145 of the Criminal Procedure Code.

We refuse to interfere in revision.

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* Criminal Revision Case No. 359 of 1888.

(1) 11 C. 413.

1888
SEP. 7.

FULL
BENCH.

12 M. 89
(F.B.)

12 M. 89 (F.B.).

[89] APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Parker, and Mr. Justice Wilkinson.

REFERENCE FROM THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.* [7th September, 1888.]

Stamp Act, Schedule I, Articles 25, 36—*Declaration of trust—Gift.*

Where a donee was directed in an instrument of gift of certain land to maintain the donor out of the profits of the land:

Held that the instrument was liable to stamp duty as a gift and not as a declaration of trust.

CASE referred by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.

A document whereby a Hindu widow purported to confer all her property on a kinsman and imposed on him the duty of maintaining her from the profits thereof was impounded by the Sub-Collector of Chingleput on the ground that it was not a mere instrument of gift (in which case the document was properly stamped), but was in fact a declaration of trust and was, therefore, liable to a higher duty.

The Board of Revenue being of opinion that this decision was wrong, referred the case for the decision of the High Court.

The Government Pleader (Mr. *Powell*), for the Board.

The Full Bench (KERNAN, MUTTUSAMI AYYAR, PARKER, and WILKINSON, JJ.) delivered the following

JUDGMENT.

We think the instrument is one of gift and is not a trust deed under the Stamp Act, and comes within Article 36, Schedule I of the Stamp Act.

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12 M. 90.

[90] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KUNHAMMAD AND ANOTHER (*Defendants Nos.* 1 *and* 3), *Appellants* v. KUTTI AND OTHERS (*Plaintiffs*), *Respondents.*† [11th September, 1888.]

Civil Procedure Code, Section 231—*Sale in execution of decree against deceased Muhammadan's estate—Representation of deceased by some only of his next-of-kin—Sale held to be valid.*

V., a Muhammadan woman, died leaving her husband and several minor children as her representatives. In execution of a money decree obtained against V., the creditor attached certain land which belonged to V. and made her husband and two of her children parties to the execution proceedings. The land was sold and purchased by the decree-holder:

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* Referred Case No. 6 of 1888.

† Second Appeal No. 35 of 1888.

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Held, in a suit brought by the children of V. to set aside the sale on the ground, *inter alia*, that some of them were no parties to the proceedings in execution, and that the others, being minors at the time, had not been represented by a guardian appointed by the Court, that the sale was valid.

[R., 5 Ind. Cas. 339=7 M.L.T. 270.]

APPEAL from the decree of E. K. Krishnan, Subordinate Judge at Calicut, modifying the decree of P. J. Ittiyerah, District Munsif of Kutnad, in suit No. 203 of 1886.

The plaintiffs were three sons and a daughter of one Viyyathamma, a deceased Muhammadan.

Defendant No. 1 was the assignee of a decree for money against Viyyathamma, in execution of which he attached, brought to sale, and purchased certain land. Defendant No. 2 was the husband of Viyyathamma, and defendant No. 3 was a purchaser from defendant No. 1. This suit was brought to set aside the sale.

On the death of Viyyathamma, defendant No. 2 and two of the plaintiffs only were made parties to the execution proceedings as representatives of the deceased. All the plaintiffs were then minors and no guardian *ad litem* was appointed, but their father, defendantNo.2, objected to the execution proceedings on behalf **[91]** of himself and of plaintiffs Nos. 1 and 2, and also took ineffectual proceedings to set aside the sale as their guardian.

The Munsif dismissed the suit holding, *inter alia*, that the plaintiffs Nos. 1 and 2 were sufficiently represented by their father although no formal appointment had been made by the Court, inasmuch as the Court had subsequently entertained a petition presented by defendant No. 2 as their guardian.

On appeal the Subordinate Judge, while agreeing with the Munsif that plaintiffs Nos. 1 and 2 had been sufficiently represented by defendant No. 2, reversed his decree and set aside the sale on the ground that plaintiffs, Nos. 3 and 4, had not been represented at all in the execution proceedings.

Defendants Nos. 1 and 3 appealed.

Sankaran Nayar and *Govinda Menon*,for appellants, referred to *Khushrobhai Nasarvanji* v. *Hormazsha Phirozsha* (1).

Ramasami Mudaliar,for respondents, referred to *Ramasami* v. *Bagirathi* (2) and *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb* (3).

The Court (COLLINS, A.J., and PARKER, J.) delivered the following

JUDGMENT.

It is admitted that the property sold was the property of the mother, and was therefore liable for her debts. After her death, her husband (defendant No. 2) and plaintiffs Nos. 1 and 2 were brought in as her legal representatives. The decree was executed and the property sold. Plaintiffs Nos. 1 and 2 were treated as majors in the application under Section 234 of the Code of Civil Procedure, and no guardian *ad litem* was formally appointed for them, but defendant No. 2 was in fact allowed to resist the execution proceedings as their guardian. The want of a formal order appointing him guardian is not fatal. *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb* (3) and *Hari* v. *Narayan* (4).

Plaintiffs Nos. 3 and 4 were minors under the protection of their father, defendant No. 2. The property left by the mother was in his possession, and Section 234 only requires a legal representative to be brought

(1) 11 B. 727. (2) 6 M. 180. (3) 14 C. 204. (4) 12 B. 427.

1888 SEP. 11. — APPELLATE CIVIL. — 12 M. 90.

in for the purpose of following property which has come into his hands. This is not a similar case to *Ramasami* v. *Bagirathi* in which no legal representative had been brought in and the sale was therefore set aside.

[92] We must allow the appeal, reverse the decree of the Lower Appellate Court, and restore that of the Court of first instance. The appellants will be entitled to their costs in this and in the Lower Appellate Court.

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12 M. 92=1 Weir 102.

APPELLATE CRIMINAL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

QUEEN-EMPRESS *v.* ACHUTHA.* [22nd October, 1888.]

Criminal Procedure Code, Section 45—Duty to report sudden death—Owner of house distinguished from owner of land.

Under Section 45 of the Code of Criminal Procedure, every owner or occupier of land is bound to report the occurrence therein of any sudden death.

The head of a Nayar family was convicted and fined under Section 176 of the Penal Code for not reporting a sudden death in the family house :

Held, following former decisions of the Court, that the conviction was illegal, because Section 45 of the Code of Criminal Procedure does not apply to the owner of a house.

CASE referred under Section 438 of the Code of Criminal Procedure by J.W.F. Dumergue, Acting District Magistrate of Malabar, as follows :—

"In this case the accused, a karnavan (senior member) of a Nayar tarwad, has been convicted and fined Rs. 3 under Section 176 of the Indian Penal Code for omitting to give information touching the death of his anandravan (junior member) from the effects of a snake-bite.

"The facts are identical with those dealt with in High Court Proceedings, No. 1235, dated 31st July 1880, pages 60 and 61 of the Weir's Code, third edition, and the conviction appears accordingly illegal.

"I do not think that Section 45 of the Code of Criminal Procedure was intended to be applied to such cases as this, but with regard [93] to the distinction drawn between the owner of land and the owner of a house, I submit that the exemption in favour of the latter is dangerous. The owner or occupier of a house must be the owner or occupier of the land on which the house stands, and the circumstances of a sudden or unnatural death in a house are more easily concealed than in the case of open land."

The Acting Government Pleader (*Subramanya Ayyar*), in support of the conviction.

The Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

The accused in this case is the karnavan of a Nayar tarwad, and he omitted to give information touching the death of a member of his family in his house from snake-bite. The Sub-Magistrate considered that he was the owner of land within the meaning of Section 45 of the Code of Criminal Procedure and fined him Rs. 3 under Section 176, Indian Penal Code.

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* Criminal Revision Case No. 469 of 1888.

1888 Oct. 22. — Appellate Criminal. — 12 M. 92 = 1 Weir 102.

It was held in criminal revision cases Nos. 221, 271, 284, and 311 of 1887 that the owner or occupier of a house within a village was not an occupier or owner of land within the meaning of Section 45. Mr. Justice Kernan made a similar order in criminal revision case No. 136 of 1880 under the corresponding section of the former Code of Criminal Procedure. Though another Divisional Bench considered the acquittal of the accused to be illegal in criminal revision case No. 479 of 1887, the decision proceeded on the ground that the accused was the occupier of land as contradistinguished from the owner or occupier of a house. Having regard to the fact that under the old Regulations in this Presidency, an obligation such as is created by Section 45, was imposed upon zemindars and owners of proprietary estates, we are not prepared to hold that the construction hitherto placed on Section 45 is not correct.

We agree with the District Magistrate that the conviction and the sentence referred to us for revision are illegal, and, setting them aside, direct that the fine, if levied, be refunded.

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12 M. 94 (F.B.) = 1 Weir 875.

[94] APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

QUEEN-EMPRESS v. MADASAMI.* [7th and 26th September, 1888.]

Criminal Procedure Code, Section 399—*Reformatory Schools Act*, 1876, *Sections* 2, 7.

The Reformatory Schools Act, 1876, provides only for male juvenile offenders being sent to reformatory schools by Magistrates of the first class, and Section 399 of the Code of Criminal Procedure, 1882, so far as it authorizes a Magistrate not of the first class to direct that a male juvenile offender be sent to a reformatory is repealed :

Held, therefore, when a second-class Magistrate directed a boy to be sent to a reformatory under Section 399 of the Code of Criminal Procedure that the order was illegal.

[R., 25 C. 333 (336).]

CASE referred by C. F. MacCartie, Acting District Magistrate of Tinnevelly, under Section 438 of the Code of Criminal Procedure.

The facts are stated in the judgments of the Full Bench (KERNAN, MUTTUSAMI AYYAR, PARKER, and WILKINSON, JJ.).

The Government Pleader (Mr. *Powell*), for the District Magistrate.

JUDGMENT.

PARKER, J. (KERNAN and WILKINSON, JJ., concurring). The second-class Magistrate has sentenced a juvenile offender (a boy) to rigorous imprisonment for six months and has directed, under Section 399, Criminal Procedure Code, that he be sent to a reformatory instead of being imprisoned in the criminal jail. The question referred to us is whether the direction that the accused be sent to a reformatory is illegal.

The sentence is clearly within the legal powers of the second-class Magistrate under Section 399, Criminal Procedure Code, unless the introduction of the Reformatory Schools Act V of 1876 operates to repeal, or partially to repeal, that section. Act V of 1876 was extended to the Madras Presidency by notification in the official gazette in August 1887.

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* Criminal Revision Case No. 581 of 1887.

1888 SEP. 26. — FULL BENCH. — 12 M. 94 (F.B.) = 1 Weir 875.

[95] The Criminal Procedure Code of 1882 was passed subsequently to Act V of 1876. By Section 2 of the latter Act it was enacted that on and from the dates in which Act V of 1876 came into force in any province, Section 318 of the then Code of Criminal Procedure should be repealed therein. Section 399 of the present Code is the section corresponding to Section 318 of the old Code, and in Section 3 of the present Code it is enacted: "In every enactment passed before this Code (1882) comes into force in which reference is made to any chapter or section of the Code of Criminal Procedure Act XXV of 1861, or Act X of 1872 or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section."

We may, therefore, take it that the introduction of the Reformatory Schools Act repeals the operation of Section 399, Criminal Procedure Code, in this Presidency "so far as may be practicable."

Section 399, Criminal Procedure Code, is a general section, which empowers *any* criminal court to send *any* sentenced person (of either sex) under sixteen years of age to a reformatory instead of sending him or her to a criminal jail. Act V of 1876 on the other hand is a special Act dealing with "Reformatory Schools for male youthful offenders." The legislature apparently contemplated the introduction of "reformatories," and also of "reformatory schools for male youthful offenders only," and provided that when the latter institutions had been established, the provision of Section 399 should be repealed "so far as may be practicable."

The boy sentenced by the second-class Magistrate could only, therefore, be sent to a "reformatory school" by a first-clase Magistrate under the provisions of Section 7 or 8 of the Reformatory Schools Act, and that part of the order of the second-class Magistrate which directs that the accused "shall be sent to a reformatory" must be cancelled.

We may observe that though the legislature apparently contemplated the institution of reformatories as well as "reformatory schools for male youthful offenders," yet, as a matter of fact, the latter institution only has been established and therefore, the order of the second-class Magistrate could not have been carried out in the form in which it was passed.

[96] As the District Magistrate has already taken steps under Section 8, Act V of 1876, to send the accused to a reformatory school, no further orders are necessary.

MUTTUSAMI AYYAR, J.—In this case the second-class Magistrate of Tinnevelly sentenced a juvenile offender to suffer rigorous imprisonment for six months and directed, under Section 399, Criminal Procedure Code, that he be sent to a reformatory instead of being imprisoned in a criminal jail. The District Magistrate refers the sentence for revision, on the ground that the direction that the accused shall be sent to a reformatory is illegal. According to Section 399 of the Code of Criminal Procedure it is competent to any criminal court which sentences a person under sixteen years of age to imprisonment for any offence to make the order, to which exception is taken by the District Magistrate. Act V of 1876 was passed specially with reference to reformatory schools, and under Section 7 of that enactment the power to direct that a prisoner shall be sent to a reformatory school cannot be exercised by any Magistrate inferior to a first-class Magistrate. That Act repealed Section 318 of the Code of Criminal Procedure which was then in force and corresponded to Section 399 of the present Code from such day as the local Government might by notification in the official gazette direct in that behalf. The local Government published a notification as

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mentioned above on the 20th August 1887 after the present Code of Criminal Procedure came into force. It is provided by Section 3 of the present Code that in every enactment passed before it comes into force in which a reference is made to any section of the Code of Criminal Procedure (Act XXV of 1861 or Act X of 1872) or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding section. It is suggested that, under this section, the reference made in Act V of 1876 to Section 318 of the former Code for the purpose of repealing it ought to be treated as a repeal (by reason of Section 3) of S. 399 of the present Code. Act V of 1876 provides only for male juvenile offenders being sent to reformatory schools and Section 399 is repealed by it, so far as it empowers a Magistrate, who is not a First class Magistrate, to direct that the male juvenile offender be sent to a reformatory. In the result there are two enactments, both of which are partly in force, but the one is special and the other general. According to the former no male juvenile offender can be admitted into a reformatory school except under the order of a First class Magistrate or other officer specially mentioned in Section 7 of Act V of 1876. [97] According to the latter, any criminal Court which passes the sentence may do so. The reasonable construction according to which effect may be given to both enactments in force is that the admission of a male juvenile offender into the reformatory school must be made under the order of a First class Magistrate or other officer as provided by Section 7, Act V of 1876, and that any criminal Court acting under Section 399 may direct that a female juvenile offender be sent to a reformatory when one is established. It is urged by the Government Pleader that Act V of 1876 expressly repealed Section 318 of the former Code of Criminal Procedure, and that the question before us is one of express and not of implied repeal. But the words in Section 3 of the present Code, "so far as may be practicable," appear to me to limit the repeal to cases in which Section 399 is necessarily inconsistent with the provisions of Act V of 1876. No grounds are shown for assuming that Government may not hereafter provide a reformatory for the benefit of female juvenile offenders. In the case before us, however, the accused is a boy and the District Magistrate has taken the necessary steps under Section 8 of Act V of 1876. I also think no further orders are necessary, and it is sufficient to declare that the order made by the second-class Magistrate is hereby declared to be illegal.

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12 M. 98 = 13 Ind. Jur. 100.

[98] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RAMA (*Plaintiff*), *Appellant v.* SUBBA AND ANOTHER (*Defendants*), *Respondents.** [26th September and 1st November, 1888.]

Pensions Act 1871, *Section* 4—*Grant of villages enabling grantee to receive the land revenue.*

Suit to recover a moiety of two villages granted as a jaghir:

Held, that as the original grant was not of the freehold or full ownership in the soil, the suit was barred by Section 4 of the Pensions Act, 1871.

* Appeal No. 173 of 1887.

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APPELLATE CIVIL.

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[R., 2 C.L.J. 359=10 C.W.N. 991; 15 Ind. Cas. 871 (873)=23 M.L.J. 687 (691)= 12 M.L.T. 541 (544)=1913 M.W.N. 255 (260); D., 29 B. 480=7 Bom.L.R. 497.]

APPEAL from the decree of J.D. Goldingham, District Judge of Bellary, in Suit No. 2 of 1887.

The facts and arguments sufficiently appear from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

Mr. *Subramanyam* and *Ramachandra Rau Saheb*, for appellant.

Bhashyam Ayyangar and *Sundara Rau*, for respondents.

JUDGMENT.

The appellant brought this suit to recover from respondents a moiety of two villages together with mesne profits from 1882. Those villages were granted in 1809 as a jaghir by the late East India Company to one Ramachandra Rao in consideration of good service rendered by him to the Government.

Until 1884 there was no apparent disagreement among the members of the grantee's family. In August 1885 respondents asserted a claim to the sole and exclusive enjoyment of the jaghir. Thereupon the appellant presented a petition to the Collector, under Section 5 of the Pensions Act, complaining that the first respondent was collecting the entire revenue of the jaghir and appropriating it in contravention of a family custom by which the appellant was entitled to an equal share. He asserted further that as the grandson of the grantee and as nearer to him in degree than respondents, he was entitled to be recognized as the sole jaghirdar. The first respondent contended that the custom [99] introduced into the family by the grantee was one of primogeniture, and that as the senior representative of the senior branch, he was the head of the family and the sole jaghirdar. The case was referred for investigation to the Head Assistant Collector who considered that the evidence before him was altogether in favour of the first respondent and recommended his recognition under the Standing Order of the Board of Revenue, No. 138, as the managing member of the family. The Collector also suggested that the first respondent, Subba Rao, should be recognized as representative of the jaghir and as the managing member of the family; adding, however, that the division of the collections was a separate question, and that the managing member would be liable, if he failed, to provide proper maintenance for the appellant. The Board of Revenue agreed with the Collector, and on the 28th November 1886 the Government approved of the Board's recommendation (Exhibit VI). On 21st January 1887 the appellant applied to the Collector for a certificate under Section 6 of Act XXIII of 1871, declaring his claim to be cognizable by a Civil Court and urged that it was not governed by the Pensions Act. The Collector observed that the jaghir was an unenfranchised inam, and as such came under the Pensions Act, and that the Inam Register stated that as the grant was not enfranchised parties could only sue with the permission of the Government. He further remarked that he would be prepared to recommend the issue of a certificate to enable the appellant to file a suit with respect to his allegation that the collections were not fairly divided, on receiving *prima facie* proof that he had sustained any such injustice or even that there was a *bona fide* dispute as to the share or amount to which he was entitled. The Collector passed his order on the 3rd February 1887 (Exhibit V), and on the 21st idem the present suit was brought. The preliminary objection was taken for the

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respondents that the grant being one of land revenue, the suit was not cognizable without a certificate from the Collector under Sections 4 and 6 of Act XXIII of 1871. Thereupon two issues were recorded for decision; *viz*: (1) whether the grant was an absolute grant of the two villages mentioned therein or whether it was a mere assignment of the Government revenue on account of services rendered; (2) whether the suit falls within Act XXIII of 1871, and whether a certificate, under Section 6 of that Act, is necessary before plaintiff can proceed with the suit. The Judge was of opinion on the first issue that the grant (Exhibit I) was a grant of land revenue coupled with the power of collecting [100] it, and that it did not convey to the grantee any right in the soil; and on the second issue that the suit was governed by Sections 4 and 6 of the Pensions Act of 1871. Accordingly he dismissed the suit with costs, and the contention in appeal is that both issues ought to have been decided in appellant's favor.

We are of opinion that the District Judge is right in considering the claim to be barred by the Pensions Act, Section 4. That section enacts that no Civil Court shall entertain any suit relating to any pension or grant of money or *land revenue* conferred or made by the British or any former Government; Section 7 exempts from its operation any inam of the class referred to in the first section of Madras Act IV of 1862. The expressions 'inam,' and 'grant of revenue' are obviously used in the same sense, and the natural inference is that Section 4 is applicable, whether the inam tenure exists in conjunction with or apart from the kudivaram right. This was the view taken by this Court in *Peria Kovil Kalavi Appan* v. *A. Pulliah Chetty* (1), and the Court observed in that case that the release of a burden altogether or the lightening of a burden which the land would otherwise bear in the shape of assessment is a gift or grant of revenue to the extent of the relief and therefore that a suit for such land is prevented by Section 4 of the Pensions Act. Again the expression "hereditary or personal grant of land revenue" was also used in Regulation IV of 1831 which was the first Regulation in this Presidency that barred the jurisdiction of Civil Courts to entertain suits regarding inams, except with the previous permission of Government, and Madras Act IV of 1862 which divides such grants of land revenue into enfranchised and unenfranchised inams refers to them as "inam lands." This again suggests the inference that though the suit may be for a piece of land, in respect of which the grant of revenue was originally made, yet it is a suit relating to such grant. This view receives further corroboration when we consider the course of previous legislation on the subject, the nature of Act XXIII of 1871 and the probable intention of the Legislature. As observed already, the first Regulation in this Presidency which barred the jurisdiction of Civil Courts regarding hereditary or personal grant of land revenue made by the authority of the Governor in Council was Regulation IV of 1831. It was provided by Section 2 of that enactment that no Civil Court should take cognizance of "any [101] claim to such grants, however denominated, unless the complainant was referred to it by an order signed by the Chief or other Secretary to the Government, to seek redress from the established Courts of Adalat." The intention was to give the Government an opportunity to protect the reversionary interest of the Crown. The next step taken to carry out that intention was the framing of rules by Government, under which the title to the inam was

(1) 1 Ind. Jur. 164.

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scrutinized on the occasion of the inamdar's death and orders were passed as to whether it lapsed to the Crown or whether it was to be continued to his successor, and if so, whether subject to any and what terms. The next change was the removal of the uncertainty in which the recurring scrutiny under the lapse rules involved the title to the inam, and in 1859 rules were framed for enfranchising the inam grants by surrendering the reversionary interests of the Crown for an equivalent quit-rent and placing enfranchised inams on the footing of private property. The outcome of the inam Settlement under those rules was Madras Act IV of 1862. The preamble gives the prior history of the inam tenure and says "whereas by Regulation IV of 1831 of the Madras Code, and Acts XXXI of 1836 and XXIII of 1838, all hereditary and personal grants of land revenue in this Presidency are removed from the cognizance and process of the Court of Civil Jurisdiction. and the power of deciding on claims to these tenures is reserved to the Government; and whereas, under the inam rules sanctioned by Government under date, the 9th August, 1859, the reversionary rights of Government are surrendered to the inamdars, in consideration of an equivalent annual quit-rent, and the inam lands are thus enfranchised and placed in the same position as other descriptions of landed property in regard to their future succession and transmission, it is hereby enacted as follows."

Then Section 1 says "All inams of the classes described in Clause 1, Section 2, Regulation IV of 1831 which have been or shall be enfranchised by the Inam Commissioner and converted into freeholds in perpetuity or into absolute freeholds in perpetuity, shall be exempted from the operation of Regulation IV of 1831, and of Acts XXXI of 1836 and XXIII of 1838 of the Madras Code." This enactment shows, first, that though the inam tenure consisted in a grant of land revenue, it might exist in conjuction with the kudivaram right to the land and referred to it as the inam land; 2ndly that the effect of enfranchisement was its exemption from the operation of Regulation IV of 1831, and its conversion into a freehold in [102] perpetuity; 3rdly, that the term freehold was used in the sense of full ownership unrestricted as to future succession and transmission, or of a release of the reversionary right of the Crown under the terms of the grant; 4thly, that unenfranchised inams continued as before subject to Regulation IV of 1831; and 5thly that the land to which the grant of revenue related was contemplated by the Legislature as either enfranchised or not enfranchised. When the Act of 1871 was passed, there were, therefore, two classes of inam tenures in the case of hereditary grants of land revenue, *viz.*, enfranchised inams and unenfranchised inams, whether those tenures were held in conjunction with or apart from the kudivaram right to the land. Act XXIII of 1871 was intended to consolidate the law on the subject of pensions and grants of land revenue and it repealed Regulation IV of 1831 in respect of enfranchised inams and kept alive Madras Act IV of 1862 in respect of unenfranchised inams. There is no indication of an intention to surrender the reversionary rights of the Crown in the first mentioned class of inams except for an equivalent annual quit-rent fixed under the inam rules of 1859, as stated in Madras Act IV of 1862. The evident intention was to re-enact Regulation IV of 1831 which it repealed for purposes of consolidation by Sections 4 to 6 with reference to unenfranchised inams. It is therefore immaterial that the inam tenure and the kudivaram right vest in one and the same person, provided that the estate which he has is not a freehold nor private property in the sense in which the expression is used in Madras Act IV of 1862 and does not negative any

reversionary interest in Government. The construction suggested for the appellant, *viz.*, that Act XXIII of 1871 does not apply when the exemption from the burden of paying assessment in whole or part co-exists with some interest in land which is not a freehold, involves the anomaly of an involuntary surrender of the reversionary rights of the Government in unenfranchised inams and the inconsistency of placing inamdars who did not choose to enfranchise their holdings on the same footing with those who enfranchised the inam lands and converted their qualified estate into full ownership or freehold in the sense of their release from the reversionary interests of the Crown. The course of decisions in Bombay which is referred to by the Judge lends support to this construction. The question considered in them was one of construction of the original grant, and the test adopted in each case was whether the terms in which the grant was made disclosed an intention to grant the freehold of [103] the land or a qualified ownership in unoccupied land in the villages granted in view to the beneficial enjoyment of the land revenue payable to Government from villages forming the subject of the grant. *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai* (1), an instance in which full ownership or freehold in the soil was granted. The cases of *Vaman Janardan Joshi* v. *The Collector of Thanga* (2) and of *Ramchandra* v. *Venkatrao* (3), are instances of a grant of land revenue and of qualified ownership in unoccupied land. The distinction made is sound in principle. When the land revenue is the real subject of the grant and entire villages are granted in order that the grantee may receive the land revenue due thereon to Government and appropriate it to his own use, subject to the terms of the grant, it is clear that no proprietary interest can pass in lands already occupied and in which the kudivaram right is vested in others, for the Government is not competent to grant what does not belong to it and the terms of the grant must be construed with reference to what was intended to be granted. Such being the case, the interest that passes in waste land or land relinquished by the occupant for the time being is such as would enable the grantee to realize the revenue due to Government which was the subject of the grant, unless the terms of the grant show that a larger interest therein was vested in Government and that that interest was intended to be passed. These decisions show that in order that a grant of villages may not fall under the Pensions Act, it must be a grant of the freehold therein or full ownership in the soil, qualified in no way by any reversion suggested by the terms of the grant, in regard to future succession or transmission.

In the case before us the grant is clearly not a grant of the freehold in the soil in the sense already indicated. Exhibit J, which is the grant, mentions in express terms the contingencies in which the villages should revert to Government. Document J, after reciting the grant of the two villages, states: "which said villages, the said Ramachandra Rao and his heirs shall continue to hold, receive and enjoy all the Circar revenues derivable from the lands belonging to the said two villages so long as the said Ramachandra Rao and his heirs shall continue faithful to his and their allegiance to the British Government and obedient to the Regulations which have been or may be established by its [104] authority for the internal government of the country, for the administration of justice, and for preserving to its subjects the enjoyment of their just rights and privileges." The purpose for which the villages were

(1) 1 B. 523. (2) 6 B.H.C.R. A.C.J. (3) 6 B. 598.

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granted was "subject to the performance of the above duties," that of enabling the grantee to "hold, receive and enjoy all the Circar revenues derivable therefrom." Again the document reserves to other inamdars in possession of land allotted to them in the said villages "in inam tenure" their rights in full. This does not signify that occupancy rights vested in others holding assessed lands were intended to be taken away, nor does it mean that the freehold in any part of the villages was intended to be conferred, for a reversionary right is reserved to Government in certain contingencies. It is not necessary to decide, for the purpose of this appeal, whether until the reversionary right reserved to Government accrues, the grantee has a larger interest in waste land which lay waste at the date of the grant or was since relinquished, than that of cultivating it, such as that of cutting timber, &c.; but it is sufficient to say that so long as the reversionary right exists, the grantee and his heirs do not hold the villages as freeholds or in full ownership as they hold other private property. It is not shown that the villages were exempted from the rules framed under Regulation IV of 1831. On the other hand it appears that the villages were the subject of the enquiry held by the Inam Commissioner and they were not enfranchised. Documents A to F do not carry the case further or show that a freehold was granted.

Reliance was placed by the appellant on the decision of this Court in *Panchanadayyan* v. *Nilakandayyan* (1). The decision in that case proceeded on the ground that the property in the soil was the subject of the grant. The history of inam tenures in this Presidency was not then considered, and the Privy Council case on which that decision rested did not decide that land allotted in inam tenure, which was not enfranchised, was not within the scope of the Pensions Act, as the question did not arise for decision in that case.

We consider that the appeal cannot be supported and dismiss it with costs.

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12 M. 105 = 13 Ind. Jur. 50.

[105] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

RAMACHANDRA (*Plaintiff*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*
[30th August and 6th December, 1888.]

Madras Forest Act, 1882, *Section* 10—*Procedure—Remedy by ordinary suit barred.*

Where by an act of legislature powers are given to any person for a public purpose from which an individual may receive injury if the mode of redressing the injury is pointed out by the statute, the ordinary jurisdiction of Civil Courts is ousted and in the case of injury the party cannot proceed by action.

Plaintiff sued in a Munsif's Court to cancel the decision of a Forest Officer confirmed by a District Judge under Section 10 of the Madras Forest Act, 1882, and to recover certain land, a claim to which had been rejected under the said section:

Held that the Munsif had no jurisdiction to entertain the suit.

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* Second Appeal No. 54 of 1888.

(1) 7 M. 191.

[F., 9 Ind. Cas. 1000 (1001)=38 P.R. 1911=118 P.L.R. 1911=97 P.W.R. 1911; 17 M.L.J. 557; R., 29 B. 480 (509)=7 Bom. L.R. 497; 34 M. 353 (364)=9 Ind. Cas. 109=9 M.L.T. 181=21 M.L.J. 132=(1911) 1 M.W.N. 55 (68); 2 C.L.J. 359=10 C.W.N. 991 (997); 2 S.L.R. 68.]

1888
DEC. 6.

APPELLATE
CIVIL.

12 M. 105=
13 Ind. Jur.
50.

APPEAL from the decree of H. J. Stokes, District Judge of Coimbatore, reversing the decree of P. Narayanasmi Ayyar, District Munsif of Coimbatore, in suit No. 387 of 1885.

The facts necessary for the purpose of this report are set out in the judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.).

Bhashyam Ayyangar, for appellant.

The Government Pleader (Mr. *Powell*), for respondent.

JUDGMENT.

The appellant is the plaintiff in suit No. 387 of 1885 in the Court of the District Munsif of Coimbatore.

The facts are that plaintiff alleges that he is the owner of lands having an area of 822 acres in the vill ge of Vellimalaipattanam. The Forest Range Officer of Coimbatore, acting under the Forest Act V of 1882, notified in the gazette the intention of Government to constitute the said lands forest reserve. The plaintiff under Section 10 of that Act filed a claim to the lands, No. 53 of 1883. On the 18th December 1883 the Forest Officer allowed **[106]** the claim to the extent of 233 acres as being the land comprised within Survey No. 363, but rejected the claim to the extent of 589 acres not comprised within Survey No. 363. The Forest Officer on the 2nd of December published in the gazette a notification that the land rejected from plaintiff's claim was forest reserve, and took possession of it. The appellant under Section 10, Clause 2, preferred an appeal, No. 29 of 1884, in respect of such rejection in the District Court, and that Court on the 4th of July 1884 dismissed the appeal. Though a second appeal might have been brought from such decision, the appellant did not bring such second appeal, but he filed this suit in the Munsif's Court, praying to have the decision of the Forest Officer and District Judge cancelled and to recover possession of the lands as to which his claim was rejected. The defendant in defence stated that, under the Boundary Act XXVIII of 1860, the lands claimed by the appellant were decided by the Deputy Superintendent of Survey (Exhibit No. 1, dated 2nd March 1879) not to be within appellant's boundary or within the village of Vellimalaipattanam, but in the Government village of Narasapuram. The appellant was aware of that inquiry and decision, and though a suit No. 6 of 1879 was brought by the plaintiff to dispute other decisions by the officer of survey, no suit was brought to set aside the decision as regards the lands now claimed. The defendant relied on the decision of the Forest Officer and District Judge as a bar to the suit. The Munsif, by decree of the 7th of April 1886, decided that the appellant was not concluded by the boundary decision or by the decision of the Forest Officer or of the District Judge—and made a decree setting aside the two latter decisions and awarding possession of the lands claimed.

The District Judge on appeal by decree, dated the 30th of September 1887, declared that the appellant was concluded by the decision of the Forest Officer and District Judge and dismissed this suit with costs, holding that the Munsif had no jurisdiction to try this suit after the decision made by the District Judge and that the suit was barred as *res judicata* under Section 13 of the Code of Civil Procedure.

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The grounds of appeal now are—

(1) That the Munsif had jurisdiction to hear the suit.

(2) That the suit is not barred by Section 13.

(3) That the decision of the Forest Officer is not a decision [107] by a Court, and that his decision and that of the District Judge on appeal are not final.

(4) That as there is no express provision in the Forest Act excluding the jurisdiction of the Civil Court, the Munsif had jurisdiction.

(5) That the Lower Appellate Court misconstrued Sections 5, 10, 16, 17, and 40 of the Forest Act.

The first and fourth grounds of appeal may be taken together, *viz.*, whether the Munsif had jurisdiction. Now a particular procedure before a Forest Officer with appeal to the District Judge is provided in the Forest Act for determining the rights of claimants to land intended to be constituted forest reserve.

Section 4 (*c*) requires a Settlement Forest Officer to be appointed to inquire into and determine the existence, nature, and extent of any rights claimed, and to deal with the same as provided by that chapter.

Section 6 requires notification to be published, specifying the land proposed to be included in the reserve and fixing a time, not less than three months after, for all parties claiming rights to deliver to the office notice of such claim or to appear before him and state their claims and requiring notice to be served on every known or reputed proprietor of land included in or adjoining the land proposed to be taken as reserve.

Section 8 requires the Forest Settlement Officer to inquire into all such claims and record the evidence in the same manner as in appealable cases under the Code of Civil Procedure.

Section 9 empowers the Settlement Officer to summon parties and compel the production of documents.

Section 10 requires that in case of a claim to a right in land except rights of way, of water, of pasture, and forest produce to pass an order specifying the particulars of such claim and admitting or rejecting the same in whole or in part ; and in case of a claim admitted in whole or in part, the officer may come to agreement with the claimant for surrender of the right, or exclude the land from the limits of the proposed forest or acquire the same under the Land Acquisition Act.

Clause ii of Section 10 provides that if a claim is rejected wholly or in part, the claimant, within thirty days from the date of the order, prefer an appeal to the District Court in respect of such rejection only.

[108] Clause iii gives a similar appeal on behalf of Government against an admission.

Section 16 provides that when, *inter alia* all appeals shall have, been disposed of, the Government may publish notification in the gazette specifying the limits of the forest, and declaring the same to be reserved from a date to be fixed in such notification and that the Forest Settlement Officer shall, before the date so fixed, publish the said notification, and Section 16 provides that from the date so fixed such forest shall be deemed to be reserved forest.

Thus new powers are given to Government by the Forest Act from the exercise of which individuals may receive injury, and a special mode of redressing such injury is given by the Act and special procedure provided. If such special mode of redress and procedure was not intended to exclude the jurisdiction of the ordinary Courts, most probably, a declaration to that effect would be found in the Act. But the mode of redress

given by the Act is as suitable for the redress of the injury as the mode of redress in an ordinary action, and is perhaps more suitable by reason of the nature and extent of the inquiry that may be made in a fixed time, especially where claims may be numerous and speedy ascertainment of claims may be desirable. The remedies and rights of claimants to be decided on appeal by the District Court are questions of fact and of law and from which decision there is a second appeal to the High Court. See *Kamaraju* v. *The Secretary of State for India* (1). It is an established principle that when by an act of the legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the ordinary courts is ousted, and in case of injury, the party cannot proceed by action. See *The Governor and Company of the Cast Plate Manufactures* v. *Meredith* (2), *Stevens* v. *Jeacoke*(3), *West* v. *Downman* (4).

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Raja Nilmoni Singh Deo Bahadur v. *Ram Bandhu Rai* (5) before the Privy Council was the case of a suit against the Bengal Government made by an alleged owner of land which had been acquired by proceedings taken by Government under the Land Acquisition Act X of 1870. It was decided that it would not be **[109]** reasonable to permit a person whose claim had been adjudicated on in the manner pointed out by the Act to have that claim reopened and again heard in another suit. That principle applies to this case.

The second and third grounds of appeal fail for the reason given respecting their subject matter by the District Judge.

The fifth ground of appeal also fails as there has been no misconstruction by the District Judge.

We do not see that the Sections 5, 10, 16, 17 or 40 of the Forest Act were any of them misconstrued.

The District Judge did not decide that the adjudication made by the Forest Settlement Officer was made in a "Forest Court" under Section 37 to Section 41, nor did the Forest Officer purport to adjudicate in "Forest Court" within the meaning of the Forest Act.

We therefore dismiss the appeal with costs.

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12 M. 109.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

CHATHU (*Plaintiff*), *Appellant v.* KUNJAN AND OTHERS (*Defendants*), *Respondents.**

[29th August and 16th November, 1888.]

Transfer of Property Act, Section 67 (*a*)—*Usufructuary mortgage—Remedy of mortgagee.*

A usufructuary mortgagee is not entitled, in the absence of a contract to that effect, to sue for sale of the mortgage property.

Semble:—The construction placed on Section 67 (*a*) of the Transfer of Property Act, 1882, in *Venkatasami* v. *Subramanya* (I. L. R., 11 Mad., 88) that a usufructuary mortgagee can sue either for foreclosure or for sale but not for one or other in the alternative is wrong.

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* Second Appeal No. 1362 of 1887.

(1) 11 M. 309. (2) 4 T. R. 794. (3) 11 Q. B. 731.
(4) L. R. 14 Ch. D. 111. (5) 7 C. 388.

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Nov. 16.

APPELLATE
CIVIL.

12 M. 109.

[F., 24 C. 677; 4 L.B.R. 222; R., 14 M. 232; 14 M. 284 (287); 12 A.W.N. 66; 5 O.C. 286 (292).]

APPEAL from the decree of V. P. deRozario, Subordinate Judge at Palghat, modifying the decree of B. Kamaran Nayar, District Munsif of Betutnad, in suit 415 of 1884.

The facts necessary for the purpose of this report appear from the judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.).

Sankaran Nayar, for appellant.

Sankaran Menon, for respondents.

JUDGMENT.

[110] KERNAN, J. (after disposing of the other grounds of appeal proceeded as follows):—

The fifth ground of appeal is that the plaintiff is entitled as usufructuary mortgagee to have a decree for sale of the land. Whether the plaintiff is so entitled depends on the provision of the usufructuary mortgage. That mortgage in terms mortgaged to the plaintiff's anandravan Achuta Menon five items of property (the subject of the plaint) which yield 125 paras of paddy for rupees 400 and 200 paras of paddy valued at Rs. 100. It was thereby provided, "you shall hold the lands in your possession and take from the rent of 125 paras of paddy 93 paras of paddy made up of 86 paras for interest at 5 paras of paddy per 100 fanams and at 8 paras of paddy per 100 fanams and of 7 paras of paddy on account of allowance for drying, and pay the balance 32 paras of paddy for revenue and michavaram." It was further provided that when the above-mentioned mortgage amount is paid by two instalments and the paddy by one instalment, the same shall be credited in the document, and the lands shall be surrendered. That usufructuary mortgage does not fix any time for payment. It is open to the mortgagor to pay off the mortgage or not as he pleases. The plaintiff cannot compel payment of the mortgage amount, as there is no covenant or agreement expressed or implied for payment by the mortgagor. The contract of the parties is defined by the instrument. The mortgagee has a right to the produce of the land and to pay himself thereout interest, and apply the balance for allowance for drying and for revenue and michavaram. I am not aware that it ever has been held that a mortgagee under such an instrument could sue for payment of the amount of the principal of the mortgage, either by personal action against the mortgagor or by sale of the land. Section 68 of the Transfer of Property Act probably would apply if the facts thereby contemplated occurred in this case, but they do not. There may be various provisions in mortgages partly usufructuary and called usufructuary mortgages though there are not such; and if, according to the terms of such instrument, the mortgagee is permitted to sue for payment or for sale, such terms will form the contract in such cases. The definition given in Section 58, Clause (*d*), is a true definition of a usufructuary mortgage, and it [111] does not fix a time or contain any covenant or agreement for payment. *Venkatasami* v. *Subramanya* (1) was cited, where it was held that the usufructuary mortgagee was held entitled to a sale.

The provisions of that usufructuary mortgage are not given in the report of the case, and they may not have been the same as in this case. Therefore it is not to be considered as an authority to be followed in this case. If the terms of the mortgage appeared to be in that case similar to those of this case, I would be bound to refer this case to a Full Bench for

(1) 11 M. 88.

decision, as I am not able to agree in the construction put in that case on various sections of the Transfer of Property Act, under which construction a mortgagee by usufructuary mortgage would be entitled to a decree for payment or for sale or foreclosure. In the circumstances contemplated by Section 68 of that Act, a decree for payment may be made, and plaintiff contends in his sixth ground of appeal that as the property was sold in Suit No. 518 of 1879, his rights were prejudiced. But such sale was not made or caused by any act of the mortgagor, and therefore is not within Section 68. The sale made is the only act alleged to prejudice the plaintiff, and therefore Section 68 does not apply. It is not necessary to decide whether Section 68 applies to a usufructuary mortgage made, as that in this case was, before the Transfer of Property Act came into operation.

The objection that the plaintiff should, on his seventh ground of appeal, be declared usufructuary mortgagee is good and the decree should be modified to this extent.

We therefore modify the decree of the Lower Appellate Court by declaring that the plaintiff is entitled to a usufructuary mortgage on the properties and kanam mortgaged to him, and subject to the above modifications the decree of the Lower Appellate Court is confirmed. Plaintiff failed and the appeal is dismissed with costs.

MUTTUSAMI AYYAR, J.—I took part in *Venktasami* v. *Subramanya*, and I am convinced on further consideration that the construction placed therein on Section 67 (*a*), so far as it relates to an usufructuary mortgage, is not correct. As stated in that case, the clause does not imply that an usufructuary mortgagee may sue either for sale or for foreclosure; on the other hand the proper **[112]** interpretation is that he cannot sue for either remedy, whilst the mortgagor may either redeem or allow his right of redemption to become barred by limitation. In the last-mentioned case, the mortgagee would acquire ownership by prescription, and the limited interest originally created in the mortgaged property by way of security would then ripen into full ownership by the operation of the present Act of Limitation.

The fact was overlooked that Section 58 of Act IV of 1882 defined the three pure forms of mortgage into which mortgages in use in this country might be resolved, and that the definition of a pure usufructuary mortgage contained in Clause (*d*) is framed with reference to what is known as the *vivum vadium* or the Welsh mortgage in English Law or the Bhoga Bandukom of Hindu Law, for an indefinite period in which there is no contract express or implied on the part of the mortgagor to repay the debt though he is at liberty to redeem the mortgage. The other sections of Act IV of 1882 to which reference is made in *Vankatasami* v. *Subramanya* are not inconsistent with this view.

Though Section 58 defines the three simple and pure forms of mortgage, yet the particular transaction which may happen to be the subject of litigation may be a combination of two or more of the simple forms, *e.g.*, a mortgage with possession containing a covenant for payment or conferring a power of sale on default of payment. The words in section 67 "in the absence of a contract to the contrary" are intended to provide for such mixed forms. The decision in that case may be correct in the view that the transaction then before the Court was not a usufructuary mortgage pure and simple, but one in which there was an obligation to repay the mortgage-debt. With these remarks I concur in the judgment proposed by Mr. Justice Kernan.

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SEP. 25.

APPEL-
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CIVIL.

12 M. 113.

12 M. 113.

[113] APPELLATE CIVIL.

Before Mr. Justice Wilkinson.

THAMMIRAJU AND OTHERS (*Defendants*), *Petitioners v.* BAPIRAJU (*Plaintiff*), *Respondent.** [21st and 25th September, 1888.]

Civil Procedure Code, Section 521—*Arbitration—Misconduct—Award set aside.*

Where a suit was referred to arbitration, and objection was taken to the award on the ground that one of the arbitrators had not attended a meeting when witnesses were examined by the other arbitrators:

Held, that the award was invalid by reason of misconduct on the part of the arbitrators within the meaning of Section 521 (*a*) of the Code of Civil Procedure.

[R., 15 C.L.J. 360 (365); 9 Ind.Cas. 173 (174) = 21 M.L.J. 263 = 9 M.L.T. 251 = (1911) 1 M.W.N. 151 (154); 1 O.C. 181; U.B.R. (1897—1901) 14.]

APPLICATION under Section 622 of the Code of Civil Procedure to set aside a decree of I. L. Narayana Rau, District Munsif of Rajahmundry, confirming an award.

The facts necessary for the purpose of this report appear from the judgment of the Court (WILKINSON, J.).

Subba Rau, for petitioners.

Biligiri Ayyangar, for respondent.

JUDGMENT.

At the request of the parties the suit was referred for decision to three arbitrators. Objection was taken to the award on the ground that one of the arbitrators was absent during the examination of witnesses. The Munsif overruled the objection, being of opinion that the presence of the three arbitrators at a majority of the meetings, and at the final meeting when the award was drawn up, was sufficient to validate the award. The defendants petition this Court to set aside the decree founded on the award as illegal. The question for determination, therefore, is whether the absence of one of the three arbitrators at some of the meetings held amounts to misconduct. It was held in Second Appeal No. 1316 of 1887 that the word misconduct is used in the sense of neglect of such duties and responsibilities as devolve on arbitrators acting judicially under the Code of Civil Procedure. It certainly was the duty of each and every one of the arbitrators to be present at all the meetings, more especially during the exam-[114]ination of the witnesses. In Russell, on the power and duty of arbitrators, the result of the cases now on the point is given thus: "as joint arbitrators must all act, so they must all act together. They must each be present at every meeting, and the witnesses and the parties must be examined in the presence of them all, for the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow judges so that by conference they shall mutually assist each other in arriving together at a just decision." I have been referred to the case of *Nand Ram* v. *Fakir Chand* (1), where it was held that the presence of all the arbitrators at all the meetings is essential to the validity of the award. I think that it may be gathered

* Civil Revision Petition No. 70 of 1888.

(1) 7 A. 523.

from the provisions of Section 510 that such was the intention of the Legislature, for it is provided that if any one of the arbitrators dies or refuses to act, the Court may either appoint a new arbitrator or supersede the arbitration; in other words the remaining arbitrators cannot act alone. One of the arbitrators having been guilty of misconduct in absenting himself from the meetings, and the other two arbitrators having been guilty of misconduct in examining witnesses in the absence of the third arbitrator, the award should, on the application of the defendants, have been set aside.

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I reverse the decree of the District Munsif and direct him to readmit the suit to his file and dispose of it according to law.

The petitioners are entitled to their costs in this Court.

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12 M. 114=1 Weir 539.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

QUEEN-EMPRESS v. KUNJU NAYAR.* [9th and 20th September, 1888.]

Penal Code, Sections 417, 463, 464, 465, 511—*Forgery—False document—Fraudulent entry in a book of account.*

Prisoner was requested to make an entry in a book of account belonging to the complainant to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts; instead of making this **[115]** entry as requested, prisoner entered in a language not known to complainant that this sum had been paid to complainant. He was convicted of forgery under Section 465 of the Penal Code:

Held, that the offence was not forgery but an attempt to cheat.

[F., Rat. Unrep. Cr. Cas. 595 (596).]

APPEAL from the conviction and sentence passed by the Sessions Judge of South Malabar (L. Moore) in case No. 23 of 1888.

The prisoner sent his petition of appeal from jail and was not represented.

The Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.) delivered the following

JUDGMENT.

The prisoner has been convicted of forgery under the following circumstances:—

The complainant, a timber merchant, had been advancing money to the prisoner to supply him with timber, and accounts had to be settled between them.

The parties met, and the complainant handed to the prisoner the account book kept by him to see how the account stood. The prisoner, after looking at the book, said that he owed Rs. 33-5-3 to the complainant, and was thereupon asked by him to make an entry to that effect in the book. Although the book was kept in Tamil, complainant being a Tamil man not knowing Malayalam, prisoner made an entry in Malayalam to the effect that Rs. 33-5-3 had been received on the 5th of April, and all previous accounts settled by timber supplied on the 15th April.† The Sessions Judge, with the assessors, finds that the entry is false in fact,

* Criminal Appeal No. 283 of 1888.
† In some Editions we find 16th April—ED.

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and the Sessions Judge is of opinion that the making such false entry constitutes an offence under Section 465 of the Indian Penal Code. We are unable to agree in this opinion. In order that a document should be a false document within the meaning of Section 464 of the Indian Penal Code, it must appear that it was made with the intention of inducing the belief that such document was made by or by the authority of one who did not make it or give such authority. There is nothing on the face of this entry in the complainant's book to make it appear that the writing was made or authorized by him. The entry was not signed by the complainant and contained no indication that he acknowledged it as his own statement. We cannot, therefore, say that the entry is a document which was made by the prisoner with the intention [116] denoted by the first clause of Section 464 or caused by him to be signed or executed within the meaning of the third clause of that section. Being of opinion that the prisoner was wrongly convicted of forgery, we must set aside the conviction under Section 465. But as the finding is that the prisoner intended to defraud the complainant by means of the false entry, we convict him of an attempt to cheat, Sections 417 and 511 of the Penal Code, and reduce the sentence to one of six months' rigorous imprisonment.

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12 M. 116.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

AITHALA (*Defendant No.* 2) *Appellant v.* SUBBANA (*Petitioner*), *Respondent.** [3rd August, 1888.]

Civil Procedure Code, Section 586 *applies to orders in execution of decrees in Small Cause Suits.*

No second appeal lies from an order passed in execution of a decree in a suit of the nature cognizable by a Small Cause Court where the subject-matter of the suit does not exceed Rs. 500.

[Appr., 18 A. 481 (F.B.) = 16 A.W.N. 160.]

APPEAL from an order of J.W. Best, District Judge of South Canara, reversing an order of K. Krishna Rau, District Munsif of Udipi, in execution of the decree in suit No. 115 of 1876.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and WILKINSON, JJ.).

Ramachandra Rao Saheb, for appellant.

Subba Rau, for respondent.

JUDGMENT.

The preliminary objection is taken that no second appeal is allowed by the Code of Civil Procedure from the order made by the District Judge. It is provided by Section 586 that no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes when the amount or value of the subject matter of the original suit does not exceed Rs. 500. It is conceded that the decree under execution directed the defendant to pay the plaintiff a sum of money less than Rs. 500, and that it contained no direction for the sale of any immoveable property. It is clear, therefore, that it was a decree passed in a suit [117]

* Appeal against Appellate Order No. 4 of 1888.

cognizable by the Court of Small Causes. It was held by the High Court in Bengal that no second appeal would lie from orders made in execution of decrees passed in suits of the nature cognizable by Courts of Small Causes—*Debee Pershad Singh* v. *Syud Delawar Ali* (1). Although the decision was one passed *ex parte*, yet it appears to recognize the princip l that such orders are orders made in proceedings in suits of the nature of small causes and do not stand upon a higher footing than decrees made in those suits. As regards cases in which decrees of Small Cause Courts are executed against immoveable property, Section 228 specially provides that orders passed in executing such decrees shall be subject to the same rules in respect of appeals as if the decrees had been passed by the Courts which execute them. Though our attention was drawn to *The Collector of Bijnor* v. *Jafar Ali Khan* (2), and *Mahadev Narsinh* v. *Ragho Keshav* (3), we do not consider that they are in point. The question decided by them was that an order of remand made by the District Court was appealable to the High Court, and it proceeded on the view that the orders contemplated by Section 586 are specially provided for by Section 588. Though the District Judge appears to have considered that the decree under execution was substantially a decree passed against the estate of the joint family of which the appellant before us is a member, still the construction adopted by him cannot, in our opinion, operate to alter the real nature of the decree, and can no more give us the jurisdiction which we do not possess than an erroneous order made in an appeal preferred to him from a decree passed by a District Munsif in the exercise of his ordinary jurisdiction in a suit of the nature cognizable by a Court of Small Causes.

We are of opinion that this appeal cannot be maintained, and we dismiss it with costs.

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12 M. 118.

[118] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

GURUSAMI (*Plaintiff,*) *Appellant* v. SUBBARAYA AND OTHERS (*Defendants,*) *Respondents.** [7th August, and 26th November, 1888.]

Champerty—Bona fide litigation—Absence of corprut motive-Inadequacy of price.

In consideration of a loan of Rs. 30 made by plaintiff to defendant to enable defendant to recover from strangers certain land, defendant sold to plaintiff a portion of the said land, the value of which was about Rs. 100. The District Court held that the transaction was champertous and dismissed a suit by plaintiff to enforce his rights:

Held, that the inadequacy of the price was not of itself sufficient to invalidate the transaction.

[F., 2 N.L.R. 17 (21).]

APPEAL from the decree of S. T. McCarthy, District Judge of Chingleput, reversing the decree of C. Suri Ayyar, District Munsif of Chingleput, in suit No. 485 of 1885.

The facts appear from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ).

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* Second Appeal No. 1280 of 1887.

(1) 12 W.R. 86. (2) 3 A. 18. (3) 7 B. 292.

1888 Nov. 26. — Appellate Civil. — 12 M. 118.

Desikacharyar, for appellant, referred to *Abdool Hakim* v. *Doorga Prashad Banerjee* (1) *Damodhar Madhavji* v. *Kahandas Narandas* (2) *Ram Koomar Coondoo* v. *Chunder Canto Mookerjee* (3) *Chedambara Chetty* v. *Ranga Krishna Muthu Vira Puchaiya Naicker* (4), and *Fischer* v. *Kamala Naicker* (5).

Ramachandra Ayyar, for respondents.

JUDGMENT.

Two pangus of land belonged to respondent No. 1, but they were in the possession of respondent No. 3 and others. In order to file a suit against the latter for their recovery, the former executed document A in favour of the appellant. By this document respondent No. 1 reserved for himself a quarter kani of land out of two pangus, conveyed a moiety of the remainder to the appellant for Rs. 30, and agreed to place him in possession if the respondent No. 1 obtained a decree for the recovery, of two pangus, and possession under process of Court. The appellant's case was that respondent No. 1 instituted a suit with the aid of [119] Rs. 30 paid by him and obtained a decree for, and possession of, two pangus, that from 1883 appellant and respondent No. 1 shared the produce of the land, and that as it was inconvenient to hold joint possession, he claimed partition and separate possession of the land to which he was entitled under document A. The District Munsif considered that document A was true, that the consideration money was paid, and that, though the land was worth Rs. 200 and Rs. 30 was an inadequate price, it was due to respondent No. 1 being out of possession at the time of the sale in appellant's favour and to the understanding that the sale was to take effect only in the event of respondent No. 1 succeeding in the suit which he desired to institute. On appeal the Judge was of opinion that the transaction was of a champertous character and dismissed the suit on that ground, though he incidentally made some remarks against the genuineness of document A. The contention in second appeal is that the transaction is neither champertous nor opposed to public policy.

What the Courts have to consider in deciding whether a transaction is champertous in this country is, to quote the words of the Judicial Committee in the case of *Chedambara Chetty* v. *R. K. Naickar* (4), "whether the transaction is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair or an illegitimate transaction got up merely for the purpose of spoil or of litigation, disturbing the peace of families and carried on from a corrupt or improper motive." Again, in *Fischer* v. *Kamala Naickar* (5), the Judicial Committee observed : "The Courts seem very properly to have considered that the champerty or more properly the maintenance into which they were inquiring was something which must have the qualities attributed to champerty or maintenance by English Law ; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that is in a legal sense immoral and to the constitution of which a bad motive is, in the same sense, necessary." Applying the test to the case before us, we do not see our way to saying that the transaction is tainted with any of the corrupt motives mentioned above. Judging from the result of the litigation which the transaction was intended to originate or aid, we see no reason to infer

(1) 5 C. 4. (2) 8 B. H. C. R. 1. (3) 4 I.A. 23.
(4) 1 I.A. 241. (5) 8 M. I.A. 170.

1888 Nov. 26. — APPELLATE CIVIL. — 12 M. 118.

[120] any improper motive. The only fact referred to by the Judge is that the consideration for document A was Rs. 30, whilst the price of the land is at present Rs. 200. The present price of a moiety would be Rs. 100, and a deduction must be made from it on account of the land reserved for the vendor. But, in deciding whether the transaction was *bona fide* or otherwise with reference to inadequacy of price, regard should be had to the state of things as might have appeared to the contracting parties at the time when the transaction was entered into; for, even a *bona fide* purchaser who takes upon himself the risk of litigation and consents to lose what he pays in a specified event, would ordinarily hesitate to pay the price which the property would fetch when the litigation proves successful. We are unable to concur in the opinion of the Judge that the transaction is champertous, because the respondent No. 1 accepted an inadequate price on account of his need, and we shall therefore ask him to return a finding on the first issue, and, if it is in the affirmative, also to return findings upon the evidence on record on the other questions raised by the memorandum of appeal filed in his Court within six weeks from the date of the receipt of this order, when ten days will be allowed for filing objections.

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12 M. 120.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

SHANKS *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*
[20th February, 1889.]

Civil Procedure Code, Section 257—Practice—Order for payment of costs of day—Payment into Court or to party.

Where a party to a suit was directed by the High Court to pay the costs of the day, and his solicitor paid the money into Court under Section 257 of the Code of Civil Procedure:

Held, that section was not applicable as the order was not a decree.

APPLICATION made on 20th February 1889 before Mr. Justice Kernan in Chambers for leave to execute an order passed on 18th October 1888 that defendant should pay the plaintiff the [121] costs of the day. The defendant, instead of paying the amount to the plaintiff, paid it into Court under Section 257 of the Code of Civil Procedure.

The plaintiff's attorney (*Champion*) contended that plaintiff was entitled to have the money paid to him direct, and that the money ought not to have been paid into Court, and that plaintiff was not bound to go to the expense of applying for payment out of Court.

The Acting Advocate-General (Mr. *Spring Branson*), for the defendant, contended that the course adopted by the defendant's solicitor was correct, as the order of the Court amounted to a decree within the meaning of Section 257 of the Code of Civil Procedure.

JUDGMENT.

KERNAN, J.—An order was made, under Section 218 of the Civil Procedure Code on the 18th of October last, that the defendant should pay the cost of the day. The taxed costs, including Rs. 45 for costs of execution,

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* Civil Suit No. 174 of 1887.

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amounted to Rs. 189-8. The defendant's attorney lodged the amount in Court, treating the order as a decree under Section 257. Section 257 provides that all moneys payable under a decree should be paid as follows: 1st into the Court whose duty it is to execute the decree, etc. The present is an application to me in Chambers to decide whether payment into Court was the proper course for the defendant's attorney to adopt. A decree is defined by Section 2 of the Code to mean the general expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal. Certain orders are in that section specially referred to as within the definition. But the order made in this case is not one of those included in the definition. Amongst the orders excluded from the definition are orders mentioned in Section 588; several of those excluded orders are marked under sections of the Code mentioned in Section 588, which enable the Court to award costs. The result is that orders for payment of costs under the following sections are clearly not decrees, *viz.*, 47, 53, 103, 108, 116, 294, 366, paras. 2, 370, 371, 454, 455, 458, 473*a*, 475, 476, 558, and 560. The order for payment of costs was awarded, in disposing of an application, under Section 218. It was not an expression of adjudication on any right claimed or defence set up, when such adjudications decided the suit. That **[122]** definition in Section 2 must be applied as the test to the meaning of the word decree whenever it occurs in the Code. Therefore the word decree in Section 257 does not include the order in this case. The distinctions between orders and decrees are preserved throughout the Code. Section 254 provides that every decree or order directing a party to pay money as compensation or costs may be enforced by the imprisonment of the judgment-debtor, or by attachment of his property as after provided. But Section 257 mentions money payable under a decree. It does not refer to an order, which I cannot but think would have been referred to if it was intended that Section 257 should apply to orders. They make mention in Section 254 of an order, and this absence of reference to an order in Section 257 following so immediately seems to me not to be accidental. I think the omission of the usual "order" in Section 257 was introduced, having regard to the intention of the Code to provide evidence of the discharge or adjustment of decrees. It is argued, however, that as the person in whose favour the order for cost is made can, under Section 220, 3rd para, execute it as if it was a decree; and as he is within the meaning of Section 2 a decree-holder, and as Section 257 in clause (*b*) enables the money to be paid to the decree-holders, therefore an order for costs should be treated as a decree so as to come within Section 257 and that the party subject to such order shall have this relief contemplated by Section 257. But, although such orders are executed as decrees, I do not see that Section 257 applies to them. The amount of costs awarded on an application under any of the sections of the Code is generally a small matter, and of small amount, probably contemplated by the Code to be disposed of without the necessity of formal adjustment and certificate of payment into Court. But decrees for payment of money are contemplated as being of more importance, and a record of the adjustment or of the payment of them is therefore provided; for, if the same formality as to adjustment and certificate of payment into Court should be applied to the amount of costs of application awarded under the Code, the result might be that the award of costs of the day or other small sums of costs awarded by the Court on applications, under any section of the

Code (most frequently only a few rupees), would be nugatory or nearly so. The costs, if paid into Court, could not be paid out without an [123] order of the Court—the expense of which might be more in many cases than the small amount of costs awarded. Though the Code provides that the orders for costs of application may be executed as if they were decrees, it does not provide that the amount of such an order should be paid in any of the ways mentioned in Section 257. As an instance, if at Chambers, an order for costs will be Rs. 7, Rule 44, 24th July 1874. Is that sum to be paid into Court, and to be drawn out at the expense of Rs. 5, provided by the Rules on the order to draw it out, or was it intended to burden the party needlessly with that fee on such a small amount? In my judgment the course taken on behalf of the defendant in paying the amount of the costs awarded by the order of the 18th of October was not correct. I think that Section 257 does not apply to the amount of costs awarded in applications, or under orders which are not decrees within the definition of Section 2 of the Code. The Court has of course power to make a special order in a fit case for payment of any moneys into Court. I do not recollect having heard, before this case, in practice of costs under mere orders which are not decrees, having been paid into Court under Section 257. Payment to the party authorized to receive costs on getting a receipt is usual. The plaintiff, therefore, is entitled to enforce payment in the usual way, unless the money is paid to him. The question is a new one, and the plaintiff has got costs of execution, and therefore I will give no costs of this application.

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12 M. 123 = 2 Weir 376.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* BHARMAPPA.* [24th October, 1888.]

Evidence—Confession, retracted—Corroboration, deposition of witnesses before Magistrate read under Criminal Procedure Code, Section 288, insufficient.

Where a prisoner was convicted of murder on a confession, retracted at the trial, corroborated by depositions read under Section 288 of the Code of Criminal Procedure, and also retracted at the trial.

Held, that the prisoner should not have been convicted on such evidence.

[**Diss.**, 19 B. 728 (730); **F.**, L.B.R. (1872—1892) 497 (498); 2 Weir 509; **Appl.**, Rat. Unr. Cr. Cas. 894 (895); **Appr.**, 27 C. 295 (307); **R.**, 21 A. 111 (112) = 18 A.W.N. 196; 35 M. 397 (405) = 13 Cr.L.J. 352 = 14 Ind. Cas. 896 = 12 M.L.T. 1 = (1912) M.W.N. 549; 13 C.P.L.R. 107 (110); 1 L.B.R. 238 (245); Rat. Unr. Cr. Cas. 719 (720); 2 Weir 510 (513).]

[124] APPEAL from the conviction and sentence of the Sessions Judge of Bellary (J. D. Goldingham) in case No. 25 of 1888.

Prisoner was convicted of murder and sentenced to transportation for life.

The facts necessary for the purpose of this report are stated in the judgment of the Court (COLLINS, C.J., and PARKER, J.).

The Acting Public Prosecutor (Subramanya Ayyar), in support of conviction.

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* Criminal Appeal No. 336 of 1888.

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12 M. 123 =
2 Weir 376.

JUDGMENT.

The Sessions Judge has convicted the prisoner upon the depositions given by prosecution witnesses 1—3 before the Committing Magistrate, which depositions were read in evidence under Section 288 of the Criminal Procedure Code. The statements made before the Magistrate were retracted at the Sessions. The only other evidence against the prisoner was his confession before the Magistrate, which was also retracted at the Sessions.

According to the rulings of this Court, a retracted confession must be supported by independent reliable evidence corroborating it in material particulars—*Queen-Empress* v. *Rangji* (1); but we do not think depositions read under Section 288 of the Criminal Procedure Code, and retracted at the trial are by themselves material corroboration. In this case they are the only corroboration, and a conviction cannot be grounded upon such evidence only—Vide. *The Queen* v. *Amanulla* (2). We are constrained, therefore, to hold that the prisoner should not have been convicted, and that the sentence of the Sessions Court should be set aside and the prisoner discharged.

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12 M. 125.

[125] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

PAPAYYA (*Petitioner*), *Appellant v.* CHELAMAYYA (*Defendant*), *Respondent.** [30th August, 1888.]

Civil Procedure Code, Sections 244, 588, 629—*Review of judgment—No second appeal against an order under Section* 629.

When a Munsif set aside on review an order rejecting an objection to the execution of a certain decree, and the District Court on appeal refused to interfere:

Held, that no second appeal lay to the High Court.

[R., 14 Ind. Cas. 39.]

APPEAL from an order of A. L. Lister, District Judge of Godavari, rejecting an appeal from an order of the District Munsif of Tanuku, in execution of the decree in suit No. 39 of 1879 passed under Section 623 of the Code of Civil Procedure.

V. Chelamayya was made party to the proceedings in execution of a decree which was passed against his deceased son, Venkatachalam, and which directed the sale of certain mortgaged property. On July 14 1883, he objected to the decree being executed against the property directed to be sold by the decree on the ground that that property was his own and not the judgment-debtor's. This objection was overruled by the Munsif, who held that the remedy was by separate suit. A suit was accordingly brought, but dismissed on the ground that the remedy was not by separate suit, and this decree was confirmed on appeal. Upon this he applied for a review of the order of the Munsif, dated 14th July 1883, and this application was granted and the order was set aside.

The judgment-creditor appealed, but the appeal was rejected. Against this order the present appeal was brought.

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* Second Appeal No. 1371 of 1887.

(1) 10 M. 295. (2) 12 B.L.R. App. 15.

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APPELLATE CIVIL.

12 M. 125.

Rama Rau, for appellant.
Subba Rau, for respondent.

[126] The Court (KERNAN and MUTTUSAMI AYYAR, JJ.) delivered the following

JUDGMENT.

The Munsif allowed after notice a review of an order under Section 629 and fixed a day to hear the case. There was an appeal to the Judge, and he confirmed the order under Section 629. Section 588 does not allow a second appeal against an order under Section 629. The order is not itself a decree. *Than Singh* v. *Chundun Singh* (1). We dismiss the appeal with costs.

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12 M. 126.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

ALAMI (*Defendant No.* 2), *Appellant v.* KOMU AND ANOTHER (*Plaintiff and Defendant No.* 2), *Respondents.**

THE SECRETARY OF STATE FOR INDIA (*Defendant No.* 1), *Appellant v.* KOMU (*Plaintiff*), *Respondent.** [24th February, 30th August, and 16th November, 1888.]

Malabar law—Will—Testamentary dispositions of tarwad property by last surviving member of tarwad, valid.

The last surviving member of a Malabar tarwad can make a valid testamentary disposition of the tarwad property.

[R., 14 M. 495; 32 M. 351 = 2 Ind.Cas. 183 = 19 M.L.J. 350 (367) = 6 M.L.T. 106; 17 Ind.Cas. 769 (771) = 24 M.L.J. 240 (255) = 13 M.L.T. 166 (177).]

APPEALS from the decree of E.K. Krishnan, Subordinate Judge of South Malabar, in suit No. 21 of 1885.

Plaintiff Palatholathil Komu Menon sued (1) The Secretary of State for India in Council, and (2) Pullayil Mommath, for a decree declaring that a will, dated 24th November, 1878, executed by Chindarama Pisharodi, was genuine and valid, and that under the said will plaintiff was entitled to the lands mentioned in Schedules A and B of the plaint.

It was alleged that some of the lands were in plaintiff's possession, and that defendant No. 2 was in possession of the rest under a lease obtained from the Collector of Malabar, who had [127] taken possession thereof on the death of the testator under a claim of escheat.

The defendants pleaded, *inter alia*, that the testator who was governed by the Marumakkatayam law could not make a valid will.

The Subordinate Judge decreed in plaintiff's favour.

Appeal No. 80 was preferred by Pullayil Alami, the representative of defendant No. 2, and appeal No. 105 by the Secretary of State.

One of the principal questions argued was as to the right of the testator, the last surviving member of his tarwad, who died on the 8th November, 1883, to dispose of the tarwad property by will.

The Acting Government Pleader (*Subramanya Ayyar*), for appellant in No. 105 and *Mahadeva Ayyar*, for appellant in No. 80.

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* Appeals Nos. 80 and 105 of 1886.

(1) 11 C. 296.

1888 Nov. 16. — APPELLATE CIVIL. — 12 M. 126.

Bashyam Ayyangar, *Sankaran Nayar*, and *Sankara Menon*, for respondents.

On this question the judgments of the Courts (KERNAN and MUTTUSAMI AYYAR, JJ.) were as follows:—

JUDGMENTS.

The next question necessary to be considered on the second issue is, had the plaintiff's father a legal right to dispose of the tarwad property by his will? The Hindu Wills Act passed on the 19th July, 1870, does not apply in Madras, except within the town of Madras. It is, therefore, necessary to see what was the legislation on the subject affecting the mufassal. The second sub-section of Section III of the Regulation 16 of 1802 recognised the right of a Hindu to make a will of his property. But by Regulation 5, 1829, the prior regulation was modified as regards wills made by Hindus by declaring (Section 4) that wills left by Hindus should have no legal force whatever, except so far as their contents should be in conformity with the provisions of the Hindu law according to the authorities prevalent in the respective provinces of the Presidency.

Upon these regulations and having regard to the decisions of the Privy Council in *Mulraz Lachmia* v. *C. V. R. Jaganadha Rao* (1) and in *Nagalatchmee Ammal* v. *Gopoo Nadaraja Chetty* (2), it was held in *Vallinayagam Pillai* v. *Pachchee* (3), on appeal from Tinnevelly, that a Hindu without male issue might dispose of his property by will. That was a case of a Hindu governed by the ordinary Hindu Law.

[128] In this case the parties are Hindus, but subject to the special law of Marumakkatayam prevalent in South Malabar, under which the property of the tarwad is in the members jointly with right of survivorship. According to that law the plaintiff's father could not dispose of the tarwad property or any part of it by will, nor could he make a gift of it *inter vivos* while there was any other member of the tarwad in existence, and such gift or will would in such circumstances be invalid.

Even of his own self-acquired property, though he might dispose of it *inter vivos*, he could not dispose of it by will against the tarwad, while any other member existed (*Ryrappan Nambiar* v. *Kelu Kurup* (4).

But upon the death of all the other members of the tarwad, the property of the tarwad vested in plaintiff's father as the only survivor of the tarwad. There was no other tarwad or person who had community with him, and the property became absolutely his. It is not doubted that, if the property was his absolutely, he might have disposed of it, by act *inter vivos*, during his lifetime. It seems to me that the property was his absolutely. The law empowered the plaintiff's father to make a will subject to the limitation that its contents should be in conformity with the provisions of the Hindu Law according to the authorities prevalent in South Malabar. The Subordinate Judge has pointed out that in 1802, within a few years after South Malabar was taken possession of by the British, Major Walker, an eminent authority on the customs of South Malabar, reported to Government "that a Jemmakkaren (proprietor) having no legal heir may by his will leave his jenmam to such of his friends or acquaintances he may think proper; but, if he should die intestate, the property becomes forfeited to the Rajah. In disposing

(1) 2 M. I. A. 54.
(2) 6 M. I. A. 309.
(3) 1 M. H. C. R. 326.
(4) 4 M. 150.

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of his jenmam by will, the testator, whether of high or low caste, may select his heir from any caste he pleases" (page 62, Edition of 1870, Cochin). The Subordinate Judge has referred to many cases which have from time to time been before the Courts in South Malabar and on appeal to this Court, in which the question has been whether a member of a Malabar tarwad could by will dispose of property of Malabar tarwad and also as to the effect to be given to and the [129] construction of such will: (See the document J, a will on which suit No. 268 of 1839 was brought). K is the petition and evidence and judgment in that suit.

L is another will, and M is the record of a suit, No. 519 of 1875, in respect of the property given thereby to a devisee. N is record for an appeal suit No. 308 of 1876 in respect of a will.

O is the judgment of the District Judge in that appeal, 22nd August 1876.

P is a document called a deed of a settlement, dated 12th Kanni 1015 (26th September 1839).

Although the document is called a deed of settlement, it is in effect a will, as it was not to operate until after the death of the executant.

Q is another document similar to R, which is a will dated 23rd April 1871, by a Vakil of the Munsif's Court at Calicut.

F is a will dated 21st Medom 1031 (15th May 1856).

G is a suit involving a question in respect of a will.

I is a judgment in suit G. I do not doubt that wills were well known to and used in South Malabar from the beginning of the century, although, from the nature of the Malabar tarwad, they could not be in such general use as amongst Hindus following the ordinary Hindu Law. I am unable to see that any of the provisions of the will in question in this suit are contrary to any provisions of Hindu Law prevalent according to the authorities in South Malabar, and I agree with the Subordinate Judge that it is a valid will according to the law by which the parties are bound.

MUTTUSAMI AYYAR, J.—The substantial question for decision in this appeal is whether document A is a will, and, if so, whether it is valid. That it is a will there is no room for doubt. It is designated to be a will, and the disposition which it embodies, whether they are all valid or not, are clearly testamentary. The appellant's pleader questions its validity on two grounds, *viz.*, (i) that according to Marumakkatayam usage by which the testator's tarwad was governed, he was not at liberty to make a will, and (ii) that the testamentary dispositions mentioned in document A are legally inoperative. With reference to the Marumakkatayam usage, it was urged further that testamentary power was unknown to it, and, that if it were not regarded as inconsistent with such usage, it could not, at all events, include a power to disinherit [130] attaladakam heirs or divided kinsmen. I now proceed to deal with these questions, and I take that last question first.

Assuming for a moment that a person governed by Marumakkatayam usage can make a will when he can alienate his tarwad property by gift *inter vivos*, I do not think that the existence of attaladakam heirs or divided kinsmen will make any difference. They might be entitled to succeed as divided kinsmen if the last survivor of a tarwad died intestate, and they might also stand between him and the Crown seeking to interfere by right of escheat; but, as they have no community of interest with the testator, they are not entitled to question his alienation *inter vivos*. So early as 1855, Mr. Justice Holloway considered the

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question when he was the Subordinate Judge of Malabar, and said: "If the deceased was the sole remaining direct heir of the common ancestor in the preferable line, the whole joint tenancy merged in her person, and she would be as to the right of alienation in precisely the same position as the absolute acquirer of the property, seeing that she is the final legal representative of such acquirer. (Wigram on Malabar Law and Custom, page 84)."

The real question then is, whether as divided kinsmen, attaladakam heirs take by right of survivorship or of succession, and in *Katuma Natchier's case* (1) it was held by the Privy Council that when the property in dispute was self-acquired and as such separate property, there was no right of survivorship; that such right was the result of joint tenancy or co-parcenary as regards the property in dispute, and that self-acquired property therefore devolved on the widow or daughter in preference to the coparcener under the Mitakshara law. Again, in *Ryrappan Nambiar* v. *Kelu Kurup* (2) the self-acquired property of a person governed by Marumakkatayam usage was held to be liable for the debts of the deceased acquirer in the hands of the members of his tarwad. That decision proceeded on the view that self-acquired property was taken by the tarwad as the acquirer's heirs, because during his life it was at his absolute disposal, and I see no reason why the same principle is not applicable to the separate property of the sole surviving member of a Malabar tarwad. The only ground on which the appellant's pleader can rest his contention is that tarwad property is a perpetual entail, and that there is no [131] disposing power either *inter vivos* or testamentary except for the necessity, or the preservation of the tarwad, or for its benefit. There was an allusion made to such theory in regular appeal No. 10 of 1884. The denial of disposing power as the incident of a perpetual entail and of absolute property either in the collective tarwad, or in the sole surviving representative cannot be recognized, as it introduces a theory of perpetuity in its most objectionable form. Though the appellant contends that the members of the Andale house are members of the testator's tarwad, yet the contention was negatived by the decision in appeal suit No. 49 of 1879, in which it was held that there was no community of interest between them. The conclusion then I come to is that the Subordinate Judge was right in not raising an issue as to whether the Andale people were attaladakam heirs.

* * * * *

The next question is whether a testamentary power can be recognized under the Marumakkatayam usage. That such a power has been recognized in the case of those who follow Hindu Law is clear from the course of legislation and of decisions in this country. I do not see my way to decline to recognize a similar power in Malabar subject to conditions similar to those prescribed with reference to Hindu wills, *viz.*, *first*, that there is power to give *inter vivos* according to Marumakkatayam usage; *secondly*, that there is evidence of usage showing that testamentary power has long been exercised in Malabar; and, *thirdly*, that it does not override the right of survivorship which takes effect at once on the testator's death.

It appears from exhibits J, P, L, F and R that wills have been made in Malabar from 1826. There is an allusion to the practice in Major Walker's report in 1802. There is a similar allusion to wills in the 5th

(1) 9 M.I.A. 539 (543).

(2) 4 M. 150.

report of the Select Committee on the affairs of the East India Company, Volume II. In 1840 Mr. Strange thought the acquirer might alienate his self-acquisitions by will, but the Provincial Court objected to his decision and referred the matter to the Court of Sadr Adalat. The Sadr Court observed that the disposition could not be set aside unless some title was proved to the testator's property during his life, and that the mere circumstance of death could not originate a title which [132] had previously no existence. (See proceedings of the Sadr Court, dated the 25th September 1843.)

In Original Suit No. 467 of 1837 a will bequeathing self-acquired property to near heirs to the exclusion of the more remote was upheld on the strength of the opinion expressed by the Law Officer attached to the Court of Sadr Adalat. (See new document admitted in appeal.)

In 1854 the late Sadr Court admitted a special appeal from the decree in the Civil Court of Tellicherry in Appeal Suit No. 247 of 1852 on the ground that a karnavan had no authority to will away property to other than his heirs. (See proceedings of the Sadr Court, dated 13th February 1854).

In Second Appeal No. 534 of 1878, Mr. Justice Innes and myself held that self-acquired property which was not validly disposed of by the acquirer during his life-time was not validly disposed of by will. In *Kallati Kunja Menon* v. *P. E. Menon* (1) it was contended by eminent Counsel that the self-acquisitions of land by a member of a Malabar tarwad were his separate property, that after his death they lapsed into the tarwad, but if accepted by the members, they carried their obligations along with them. The Court, consisting of Sir Colley Scotland, Chief Justice, and Mr. Justice Holloway, observed that "when it is once established that the property was self-acquired, we are perfectly satisfied that an alienation, charge or other disposition *to take effect at once* will be perfectly valid." Though the validity of a testamentary alienation was not then in question, the decision was considered to contain a dictum that it could not take effect after the acquirer's death (if it was so intended) on the ground that the property was then merged in the tarwad. Though this dictum was followed in Second Appeal No. 534 of 1878, it was held that the self-acquired property remained in the hands of the tarwad liable for the debts of the deceased acquirer, and thereby suggested that the tarwad took as heir and not by surivorship.

In Second Appeal No. 628 of 1884, a will made by the last owner of a tarwad in favour of an attaladakam heir was upheld in 1885.

Passing on to the documentary evidence in this case, five documents are referred to by the Subordinate Judge. The first of [133] them is Exhibit J. It purports to be a will, dated 28th March 1826, and it bequeaths what is said to be self-acquired property to one branch of the acquirer's tarwad in preference to another, and the decision K upheld it against the disinherited branch. I am unable to accede to the suggestion made by the appellant's pleader that the document simply expressed the wish of the founder of a new tarwad as to how it was to be managed after his death. If it is intended to convey the impression that it was not a binding transaction, Exhibit K sufficiently repels such inference.

The second document is Exhibit P, dated the 26th September 1839. It is called a settlement, but it gives directions as to the management of

(1) 2 M. H. C. R. 162.

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acquired property after the testator's death. It states (paragraph 10) that "after my death, my brother Raman will have the same power that I now have in respect of properties mentioned in the fifth paragraph." Though it is called a settlement, it evidences an arrangement made in regard to management after the testator's death. The plaintiff's fifth witness proved that the provisions of the documents were accepted by the family.

The third document is Exhibit L, dated the 26th May 1851. It purports to be a will, gives the t stator's acquired property to the children of his sister's daughters, and contains directions in regard to its future management. It was upheld in 1876 when it was impugned by a person who claimed to be related to the testator.

The fourth document is Exhibit F, dated the 1st May 1856. It purports to be a will and gives the property including his self-acquisition to his sisters and their issue, and contains directions as to future management. It was recognized in Exhibits G, H, I.

The fifth document R is dated the 23rd April 1871. It purports to be a will made by a vakil, and states that "although it is not customary among Hindus to execut wills, as the wills of Hindus are considered valid by the Legislative Council, I make this will in regard to my self-acquired property." It then sets forth the testamentary arrangement made by him.

The foregoing documents show that from 1826 wills were made in Malabar in regard to self-acquired property generally regulating its future management and occasionally giving it to one class of heirs in preference to another. With these documents before me and with the opinions of writers on Malabar and the dicta of Courts of Justice, it is difficult to say that as a form of [134] alienation, the practice of making a will was not in vogue at least from 1826. Although opinions have varied as to its validity, I do not see my way to holding that a will is not operative in Malabar unless some one of the conditions necessary to the validity of Hindu wills does not exist. Having regard to the decision of this court in *Vallinayagam* v. *Pachche* (1), I also think that if the testator is the sole owner of the property in suit, if he is competent to alienate it by gift *inter vivos*, and if no right of survivorship exists in any one else, and if all these requirements are satisfied as they are in the case before us, a testamentary power must be recognized. I come to this conclusion, not in the view that a testamentary disposition is the necessary logical extension of a power to give *inter vivos*, but on the ground that the leading case on Hindu wills is an authority for the application of the principle it embodies to the people of Malabar, a section of Hindus, though they follow a special usage, when there are traces in the evidence of the practice of making wills for more than fifty years.

(1) 1 M.H.C.R. 326.

12 M. 134.

1888 Nov. 2.

APPELLATE CIVIL.

12 M. 134.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

NURDIN (*Plaintiff*), *Appellant v.* ALAVUDIN AND ANOTHER (*Defendants*), *Respondents.** [16th October and 2nd November, 1888.]

Cause of action—Suit to cancel patta.

Plaintiff sued in a Civil Court to cancel a patta which he alleged was incorrect and fraudulently antedated by the defendant with a view to prevent plaintiff from taking steps to cancel it in a Revenue Court: a copy of the patta had been affixed to plaintiff's house.

Held, that the plaintiff had no cause of action cognizable by a Civil Court.

APPEAL from the decree of C. Venkoba Rau, Sudordinate Judge of Madura (West), confirming the decree of P. S. Gurumurthi Ayyar, District Munsif of Madura, in Suit No. 413 of 1886.

Plaintiff sued to cancel a patta which he alleged was not a proper one, and was fraudulently antedated by the defendants with a view to prevent plaintiff from taking summary proceedings before the Revenue Courts under Act VIII of 1865 to compel [135] his landlord to execute a proper patta. A copy of the patta was affixed to the outer wall of plaintiff's house by defendant No. 2, the agent of defendant No. 1, the landlord.

The suit was dismissed on the ground that plaintiff had no cause of action in a Civil Court.

Plaintiff appealed.

Ramachandra Rau Saheb, for appellant.

Subramanya Ayyar, for respondents.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

The plaintiff sued to cancel a patta, a copy of which defendant No. 1 had caused to be stuck on the outer wall of his house. Plaintiff alleged that the patta was antedated and purported to charge an execessive amount of kist.

The question is whether such a suit will lie in the ordinary courts. Plaintiff does not demand that a proper patta should be granted him by defendant No. 1, in which case he would have a cause of action, nor does he allege that the affixing of the copy on his house has caused him any damage; he merely wants to have the patta concelled, lest it should at some future time be used as evidence against him: in short, he wants practically a declaration that defendant has been making evidence against him.

It was urged that the decision of this Court in Second Appeal No. 430 of 1885 (1) was inconsistent with *Karim* v. *Muhammad*

* Second Appeal No. 1271 of 1887.

(1) "There is of course no doubt that a person aggrieved by any proceedings taken under colour of Act VIII is at liberty to file his suit for damages either before the Collector (Section 49) or in ordinary tribunals (Section 78), but the present suit is not one for damages, and the right to resort to the ordinary tribunals is at least limited by the general principle that there must be a cause of action shown, an injurious act producing damage.

"Here there is no cause of action alleged. All that is stated is that the landlord sent a notice under Section 39, that he intended to move the Collector to sell certain land unless certain arrears claimed were paid within a month. Section 40 allows a

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Kadar (1), but we do not think it is. The latter was a suit to [136] enforce a substantial right, the former to cancel a mere notice. Neither the notice nor the affixting of an antedated patta amounts to more than a mere assertion on the part of the defendant, and we do not think either would give rise to a cause of action maintainable in an ordinary court of law. There is no infraction of any right.

On this ground we think the decision of the Courts below was right and dismiss this second appeal with costs.

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12 M. 136.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

GOVINDA (*Plaintiff*), *Appellant v.* PERUMDEVI AND OTHERS (*Defendants*), *Respondents.** [13th August and 3rd October, 1888.]

Specific Relief Act, Section 42—Civil Procedure Code, Section 53—Amendment of plaint—Suit to declare alienation by Hindu widow invalid—Death of widow pending appeal by plaintiff—Right of appellant to proceed with appeal—Plaint not to be amended by claim for possession.

The proviso to Section 42 of the Specific Relief Act that "no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so" refers to the position of plaintiff at the date of suit.

Where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were not binding on plaintiff, her reversionary heir, and pending appeal by the plaintiff, the widow died:

Held, (1) that the plaintiff was entitled to proceed with his appeal: (2) that plaintiff could not be permitted to amend his plaint and claim possession.

[Rel., 11 Ind. Cas. 676 (679) = 14 O. C. 170 (175); R., 21 B. 701; 6 C.L.J. 74 = 11 C.W. N. 732; 5 O.C. 360 (365).]

APPEAL from the decree of Venkata Rangayyar, Acting Subordinate Judge of Godavari, in Suit No. 2 of 1885.

The facts necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AYYAR and WILKINSON, JJ.)

Parthasaradhi Ayyangar and *Biligiri Ayyangar*, for appellant.

Subba Rau, for respondents.

JUDGMENT.

Defendant No. 1 in this suit was a Hindu widow, and the property in litigation devolved on her on the death of her [137] only son. The appellant claimed to be the reversionary heir of that son, and instituted the present suit under Section 42 of the Specific Relief Act to have it declared that

month's grace within which the alleged defaulter may either pay the money or show cause before the Collector why the sale should not be held. In a certain sense, therefore, the notice gives a cause of action before the Collector, for it enables the defaulter to come into the Collector's Court and indeed requires him to do so within a month, if he has any objection to make. But it gives no cause of action before the ordinary courts. The Courts are strictly judicial; but the Collector combines judicial and executive functions, being both bound to sell if no objection is raised and the proceedings appear regular, and bound to adjudicate on such objections as may be raised.

(1) 2 M. 89.

* Appeal No. 125 of 1886.

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certain alienations made by her were made in excess of her power as a childless widow, and were, therefore, not binding on the reversion. The Subordinate Judge considered that the right asserted was a contingent, and not a vested interest, and, holding that no declaratory decree could be made in respect of such right, dismissed the suit and directed the plaintiff to pay the costs of defendant No. 4. The decision of the Subordinate Judge proceeded solely on the ground mentioned above, and no finding was recorded on any of the other issues raised for decision. The plaintiff appealed to this Court, but his appeal came on for disposal together with another appeal (Regular Appeal No. 83 of 1886) perferred by one Komandur Vedanta Desikacharlu, who had also claimed a declaratory decree as the real reversioner, and whose suit had also been dismissed by the Subordinate Judge for the like reason. The present appellant was a party, defendant, in that suit, and this Court set aside the decree of the Subordinate Judge passed therein and remanded it for disposal on the merits. With reference to the appeal now before us, this Court then adjourned it, and directed that if appellant in the other case succeeded in the Court below, it should be reported. Whilst the other case was pending on remand in the Subordinate Judge's Court, the widow died, and the reversionary right asserted, in whomsoever it vested, became an estate vested in possession. The Subordinate Judge referred to Section 361 of the Code of Civil Procedure, and made an order that the suit abated, and no appeal has been preferred from that order. In this state of facts, this appeal is posted again for disposal. It is urged for the appellant that there is a decree in force against the appellant, and that the appeal cannot abate. It is also contended for him that he should be permitted to amend the plaint so as to treat his right as a vested interest and to claim possession as consequential relief.

Our attention is drawn, on the other hand, to Section 42 of the Specific Relief Act and to the decision in *Gosaien Shiva Ram* v. *Rugho Rai* (1). The proviso to Section 42 of Act I of 1877 directs [138] that "no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." But this direction obviously refers to the position of the plaintiff when he commenced the suit and cannot be treated as taking away a right of suit which had already accrued. We do not consider that the proviso is applicable to this case, for "when the Court once acquires jurisdiction it cannot be divested of it except under some provision of law." The Appellate Court has only to see as a Court of error that the decree under appeal was correct or otherwise when it was passed. Nor is Section 361 applicable to this case, for the appellant may insist on proceeding with the appeal in regard to his liability to pay costs to defendant No. 4, though defendant No. 1 is dead. He may also say that the alienees are the substantial defendants, and that they are alive. The decision of the Subordinate Judge on the preliminary ground which is at variance with illustration (*e*) of Section 42 cannot be supported and must be set aside.

The next question for consideration is whether in the event that has arisen, the original plaint may be amended. The right disclosed by the plaint was a right to sue for a mere declaration of title, and it has now ceased and is replaced by a right to sue for possession by reason of the reversion having become an estate vested in possession. The amendment would substantially alter the original cause of action and rest on an event

(1) 2 Agra Rep. 44.

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which did not occur until after the suit had been instituted and been dealt with by the Court of first instance. We are of opinion that the amendment asked for cannot be made at this stage of the suit.

We therefore reverse the decree of the Lower Court and remand the suit for determination on merits. The respondents will pay the appellant's costs in this Court, and the costs in the Lower Court will be provided for in the revised decree.

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12 M. 139 (F.B.).

[139] APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Parker, and Mr. Justice Wilkinson.

NARASINGA AND ANOTHER (*Defendants*), *Nos.* 2 *and* 3, *Appellants* *v.* SUBBA (*Plaintiff*), *Respondent.** [15th December, 1887 and 23rd October, 1888.]

Civil Procedure Code, Section 586—Mofussil Small Cause Court Act (XI of 1865), Section 6—Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu law—Liability of son for debt of living father.

In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt:

Held, by the Full Bench that the suit as against the sons was not a suit of the nature cognizable in Court of Small Causes within the meaning of Section 586 of the Code of Civil Procedure.

Held, further, by the Divisional Bench that the decree against the sons was bad.

[R., 27 M. 243 (247) = 14 M.L.J. 84 (94).]

APPEAL from the decree of H. R. Farmer, Acting District Judge of Kurnul, modifying the decree of M. Madhava Rau, District Munsif of Kurnul, in Suit No. 290 of 1885.

The facts of this case are set out in the following order of reference to a Full Bench made (by Kernan and Wilkinson, JJ.) on the 15th December 1887:—

"The defendants Nos. 2 and 3 are sued on a bond executed by their father, on 26th November 1882. The father is still alive. He and these defendants, his sons, have been sued in the District Munsif's Court of Kurnul on the regular side.

"The bond was proved, and that defendant No. 1 received the amount of it.

"There is no finding by the District Judge on appeal whether the money was borrowed on the bond for purposes binding on the family. Nor is there any finding that it was for illegal or immoral purposes.

"The question is whether, under such circumstances, the suit was in its nature a Small Cause suit within Section 586 of the Civil [140] Procedure Code so as to bar an appeal; or in other words, was it such a suit, as against the 2nd and 3rd defendants, the sons, as the Judge of a Small Cause Court would not have jurisdiction to try.

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* Second Appeal No. 260 of 1887.

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"The decision in *Gopal Krishna Sastri* v. *Ramayyangar* (1) by a Division Bench is an authority that the Small Cause Court has jurisdiction to entertain such a suit, and it refers to the Full Bench decision in *Ponnappa Pillai* v. *Pappuvayyangar* (2) in which the nature of the son's obligation is fully discussed by Mr. Justice Muttusami Ayyar.

"The decree in the Small Cause suit, if such suit is maintainable, is a personal decree against the sons even though they may have no assets, ancestral or otherwise, of their father and family. If the sons are liable as sons only to the extent of assets of the father or family, then the decree of a Small Cause Court should not be *in personam*, but to the extent of the assets, a decree which that Court apparently has not the power to make.

"The questions then are—

i. Is this a suit in which a second appeal lies?

ii. Has a small Cause Court jurisdiction to entertain such a suit against the defendants Nos. 2 and 3, who are only sued as sons of their father who is still alive?

iii. Is the obligation of the sons, one arising on contract or implied contract, or only a moral obligation not enforcible in civil law except against assets of the father and family?

Ramachandra Rau Saheb, for appellants.

The questions are, are the sons of a Hindu father, who is alive, liable to satisfy the debts of the father, it appearing that the debt was not beneficial to the family? Secondly, whether the suit is of a Small Cause nature? Here the suit is not of a small cause nature. By Section 6 of Act XI of 1865 only contract debts could be sued for in a Small Cause Court. There is no contract of any kind here either implied or express, nor has the conduct of the parties led them to believe that there was an implied contract. There is no theory of law to support a contract either implied or express, and hence the Small Cause Court has no jurisdiction. See *Gopal Krishna Sastri* v. *Ramayyangar* which purports to follow the case **[141]** in *Govinda Munyea Tiruyan* v. *Bapu* (3), see also *Harihara* v. *Subramanya* (4), and *Karuppana* v. *Virabadra* (5), In all these case it was held that the Small Cause Courts had no jurisdiction. In analogous cases also it has been held to the same effect as in maintenance cases. *Savitribai* v. *Luximibai* and *Sadasiv Ganoba* (6), *David* v. *Grish Chunder Guha* (7). On the question of the son's liability, see Section 283 of Mayne's Hindu Law, 4th Edition. It is there said that sons are not bound to pay the father's debt when he is alive. The decree in this case is a personal decree, and it does not by the force of the provisions of the Code of Civil Procedure bind the sons.

Rama Rau, for respondent.

The Small Cause Court had jurisdiction. If the father dies, a suit lies in a Small Cause Court on the promissory note executed by the father. The question whether the suit is of a small cause nature is determined by seeing whether this suit could have been brought in a Small Cause Court if there had been such a Court in existence. If it can be so instituted, then there is no second appeal. The case in *Karuppana* v. *Virabadra* is exactly in point. The principle of decision in that case applies exactly to this case. See *Kunhali Beari* v. *Keshava Shanbaga* (8) and *Ponnappa Pillai* v. *Pappuvayyangar*.

(1) 4 M. 236. (2) 4 M. 1. (3) 5 M. H. C. R. 200. (4) 9 M. 250.
(5) 6 M. 277. (6) 2 B. 573 (622). (7) 9 C. 183. (8) 11 M. 67.

1888 Oct. 23. — Full Bench. — 12 M. 139 (F.B.).

The Full Bench, (KERNAN, MUTTUSAMI AYYAR, PARKER and WILKINSON JJ.) delivered the following judgment:—

JUDGMENT OF THE FULL BENCH.

"We are of opinion that this suit was not one of a Small Cause nature so far as it relates to the 2nd and 3rd defendants, and that there is a second appeal from the judgment of the Lower Appellate Court by them. The case is remitted to the Division Bench."

The Divisional Bench (KERNAN and WILKINSON, JJ.) on the 23rd October 1888 delivered the following

JUDGMENT.*

On return of the Full Bench decision we reverse the decree of the Lower Appellate Court against the 2nd and 3rd defendants, and dismiss the suit as against them with costs throughout, including the costs of this appeal.

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12 M. 142 (P.C.) = 16 I.A. 1 = 5 Sar. P.C.J. 271 = 13 Ind. Jur. 9.

[142] PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Lord Hobhouse, and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

MINAKSHI NAYUDU (*Defendant*), v. IMMUDI KANAKA RAMAYA GOUNDAN (*Plaintiff*). [1st November, 1888.]

Execution sale—Hindu Law—Ancestral Zamindari sold in execution of decree for money against the father, including the son's right of succession—Debt not immoral.

A sale in execution of a decree against a zemindar for his debt, purported to comprise the whole estate in his zemindari. In a suit brought by his son against the purchaser, making the father also a party defendant, to obtain a declaration that the sale did not operate as against the son as heir, not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose:

Held, that the impeachment of the debt failing, the suit failed; and that no partial interest but the whole estate had passed by the sale, the debt having been one which the son was bound to pay.

Hardi Narain Sahu v. *Ruder Parkash Misser* (1) (where the sale was only of whatever right, title, and Interest the father had in property) distinguished.

[F., 36 B. 68 (76) = 13 Bom. L.R. 1161 (1168) = 12 Ind. Cas. 949; R., 12 A. 99 (100); 12 A. 209; 27 A. 16 (F B.) = 1 A.L.J. 310; 15 B. 13 (19); 21 B. 616 (619); 20 C. 328 (337); 34 C. 642 (F.B.) = 5 C.L.J. 491 (498) = 11 C.W.N. 593 = 2 M.L.T. 207; 3 Bom. L R. 322 (332); 4 Bom. L.R. 587 (598): 1 O.C. 112; D., 15 B. 87.]

APPEAL from a decree (7th April, 1884) of the High Court varying a decree (14th April, 1883) of the Subordinate Judge of Madura (West).

The question here was whether the whole estate of inheritance in an ancestral zemindari had passed to a purchaser at a sale in execution of a money-decree against the zemindar, or only such right as he held in the estate, as distinguished from his son's right of succession.

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* of the Divsional Bench-ED.

(1) 11 I.A. 26 = 10 C. 626.

1888 Nov. 1.

PRIVY COUNCIL.

12 M 142 (P.C.) = 16 I.A. 1 = 5 Sar. P.C.J. 271 = 13 Ind. Jur. 9.

The suit was brought by the son of the zamindar of Velliyakundam against his father, and the present appellant, for a declaration that a promissory note for Rs. 2,000, made by the zamindar and held by the latter, was given for a debt contracted by the zamindar for an immoral purpose; thus the sale of the zamindari in execution of a decree, obtained upon the promissory note, was invalid as against the plaintiff, who, it was alleged, was [143] entitled to succeed on the death of the present zamindar notwithstanding the sale.

For the defence it was denied that the debt was incurred for any immoral purpose, and an issue was fixed to that effect.

The decree against the father was obtained on 20th August, 1879; the zamindari was sold on 30th August, 1880; the son filed his objection on 4th November, 1880, and brought this suit on 15th November, 1882.

The Acting Subordinate Judge (C. Purusotham) dismissed the suit on the ground that the evidence had failed to show that the debt was incurred for any immoral purpose. He cited *Gopalasami Pillai* v. *Chokalingam Pillai* (1).

On an appeal to the High Court, this decree was varied by a Division Bench (TURNER, C.J., and MUTTUSAMI AYYAR, J). Their judgment, after referring to the circumstances under which the note was made, proceeded thus:

"That consideration was paid for the promissory note was proved by the first defendant who was called as a witness by the second defendant; but although general evidence was given that the first defendant was immoral and kept a concubine, the evidence as to the purpose for which the loan was taken was discrepant, and the Subordinate Judge, while he was not convinced it was taken for a family purpose, was also not satisfied that it had been taken for an immoral purpose. On this finding, in view of rulings to which he alluded, he held that the claim failed.

"We agree with the Subordinate Judge that the suit is not barred by limitation. There was no inquiry whether the plaintiff was entitled to resist the sale. We also agree that the evidence offered by the plaintiff was too unreliable to warrant a finding that the first defendant had contracted the debt on which the decree was obtained for an immoral purpose.

"We see no reason to think that the lease was not created for good consideration, and it is not denied that two sums of Rs. 6,000 and Rs. 3,000, respectively, have, in fact, been applied for the satisfaction of the decree in original suit No. 16 of 1863.

"The income which remained for the support of the family was not large, and although the first defendant may have been extravagant in his expenditure in proportion to his fortune and [144] have indulged immorality, it is not shown that the loan was taken with the intention that it should be expended in immoral purposes, or that it was so expended; the lender, looking to the necessitous circumstances of the family, may well have believed the money was required for family purposes, though there is no evidence that any representation of this kind was made to him or that he lent his money on the faith of such a representation. All that is shown is that the first defendant contracted a debt. We have then to consider whether the plaintiff is entitled to the whole or any portion of the relief sought by him. He is not entitled to a declaration that the debt

(1) 4 M. 320.

1888 Nov. 1. — Privy Council. — 12 M. 142 (P.C.) = 16 I.A. 1 = 5 Sar. P.C.J. 271 = 13 Ind. Jur. 9.

was contracted for immoral purposes, nor is he entitled to a declaration that the judgment debt is not, under any circumstances, binding on him; but, in view of the recent ruling of the Privy Council that a sale in execution of a money-decree of the right, title, and interest, of a Hindu father, will affect only the interests of the father, the plaintiff is entitled to a declaration that the sale in execution of the decree of 1879 has affected the interests of the first defendant only and not those of the plaintiff.

"The Court cannot make any order directing or prohibiting mutation of names in the revenue register. To the extent indicated the decree of the Subordinate Judge is reversed and the claim in part decreed, and, in modification of the order of the Subordinate Judge, it will be ordered that the parties do bear their own costs in both Courts."

This appeal was thereupon preferred by the purchaser.

Mr. *J. D. Mayne*, for the appellant, argued that the decree of the first Court dismissing the suit should be restored. By the concurrent findings of two Courts, the son's suit had failed to show that the father's debt had been contracted for any immoral purpose. The debt having been contracted for no immoral purpose, the Court which executed the decree of 1879 was competent to sell, and had sold, on 30th August, 1880, the whole estate. As to the quantity of interest sold, the procedure in execution sales no longer restricted, since Act X of 1877 came into operation, the thing sold to the right, title, and interest of the judgment-debtor, as did Act VIII of 1859, section 259 (sale certificate). The corresponding sections in the amended procedure of Act X of 1877, in XII of 1879, and in XIV of 1882, were adapted to the sale of all such **[145]** interest in the estate itself as might be legally sold. He referred to Sections 287 and 316 of the latter Acts.

The interest of the son was liable to be sold in satisfaction of his father's debt, and the High Court Judges had apparently meant to refer to the then recent case of *Hardi Narain Sahu* v. *Ruder Perkas Misser* (1), where, however, the sale was only of the father's right, title, and interest, with the result that, for that reason, the son's interest was held not to have been sold. The general rule being that one member of a joint family could not be made liable by another member for debt, not for the family benefit, there were exceptions, of which one was that the son was bound to pay the father's debt, and the grandson, the grandfather's if not incurred for any immoral purpose. He referred to *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree* (2), *Girdharee Lall* v. *Kantoo Lall* (3), *Suraj Bunsi Koer* v. *Sheoproshad Singh* (4).

He referred also to *Deendyal Lal* v. *Jugdeep Narain Singh* (5) as applying the principle of the above exception to the case of executions of decree against the father binding the son's interest, unless restricted to the father's interest, where the debt was of the proper character; this being the development of the principle that the father had power, for lawful and moral purposes, to anticipate against his son by action taken in his own lifetime; in other words to bind his interest by sale or mortgage.

He referred also to *Nanomi Babuasin* v. *Modun Mohun* (6), *Simbhunath Panday* v. *Golab Singh* (7), *Pettachi Chettiar* v. *Sengili Vira Pandia Chinnathambiar* (8), *Bhagbut Pershad* v. *Mussumat Girja Koer* (9), and

(1) 11 I.A. 26 = 10 C. 626. (2) 6 M. I. A. 393. (3) 1 I. A. 321.
(4) 6 I.A. 88 = 5 C. 148. (5) 4 I.A. 247 = 3 C. 198. (6) 13 I A. 1 = 13 C. 21.
(7) 14 I.A. 77 = 14 C. 572. (8) 14 I.A. 84 = 10 M. 241. (9) 15 I.A. 99 = 15 C. 717.

he distinguished the effect of sales of the father's right, title, and interest only from that of the sale in the present case. 1888 Nov. 1.

In regard to the character of the property sold, he referred to *Sartaj Kuari* v. *Deoraj Kuari* (1).

PRIVY COUNCIL.

[146] The respondent did not appear. Their Lordships' judgment was delivered by LORD FITZGERALD.

12 M. 142 (P.C.) = 16 I.A. 1 = 5 Sar. P.C.J. 271 = 13 Ind. Jur. 9.

JUDGMENT.

In this case the appellant was the decree creditor. The note for Rs. 2.000 was not originally passed to him, but he became the *bona fide* holder, and upon that note he obtained a money decree against the zamindar. An attempt has been made to impeach that decree which their Lordships will presently refer to. The decree creditor then took the ordinary proceedings to have the zamindari attached and sold. The son of the zamindar, who was the plaintiff in the suit now before their Lordships, intervened, and he first sought by petition an order that his interest in the zamindari should be excluded from the sale, and that the sale should be made subject to his right. It does not appear from any document before their Lordships what order, if any, was made on that petition; but their Lordships assume that the petitioner failed before the Court below in obtaining that protection which he sought. Notwithstanding that petition, proceedings towards a sale went on, and upon the documents before their Lordships they must come to the conclusion that the thing professed and intended to be sold, and actually sold, was not the father's share, but the whole interest in the zamindari itself. Throughout this case the son does not appear to have ever contended that no more than his father's interest was sold. His case was that the whole zamindari was sold out and out; he impeached the debt which led to the sale, and asserted that the decree founded on it could not bind his interests. That impeachment of the debt has failed. It was said to have been for illegal and immoral purposes, and if it had been in its inception illegal and immoral, the son would not be liable to pay the debt, and the zamindari would not be the subject of sale. But that ground has entirely failed. The Subordinate Judge, who examined the evidence with the greatest care, correctly came to the conclusion that there was no satisfactory evidence that the debt was contracted for illegal or immoral purposes, and there is no doubt in the case that the original creditor advanced the Rs. 2,000 *bona fide*, and that it was a debt contracted by the father and coming within the ordinary rule of Hindu law with reference to an estate such as is now before their Lordships, that the son would be liable for the debt contracted by the father to the extent of the assets coming to him by descent from the father, and that his [147] interest in the zamindari was liable and might be sold for the satisfaction of that debt. The son, having failed to get the protection which he sought by his petition, instituted this suit impeaching the debt and seeking to be absolutely relieved from it. He has failed entirely in that, and their Lordships quite agree with the judgment of the Subordinate Court that, failing in that his whole suit failed. The plaintiff based his case upon the impeachment of the debt and upon that alone, and failing in that allegation and that impeachment, the whole suit fails. That being the case, there might have been a sale of this estate under this decree, including the whole interest or of so much as was necessary. Upon the

(1) 15 I.A. 51 = 10 A. 272.

1888 NOV. 1. — PRIVY COUNCIL. — 12 M. 142 (P.C.)= 16 I.A. 1= 5 Sar. P.C.J. 271=13 Ind. Jur. 9.

documents their Lordships have arrived at the conclusion that the Court intended to sell, and that the Court did sell, the whole estate, and not any partial interest in it.

Their Lordships do not intend in any way to depart from principles which they have acted upon in prior cases. The High Court, in dealing with the case, entirely agrees with the Subordinate Judge in the view which he took of the evidence, and would so far confirm his ruling; but it says, "but in view of the recent ruling of the Privy Council that a sale in execution of a money decree of the right, title, and interest of an Hindu father will affect only the interests of the father, the plaintiff is entitled to a declaration that the sale in execution of the decree of 1879 has affected the interests of the first defendant only and not those of the plaintiff." The "recent ruling" referred to is probably that to be found in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (1).

The High Court seems to have acted on the rule so laid down as a rigid rule of law, apparently applicable to this particular case. But the distinction is obvious. In *Hardi Narain's* case all the documents showed that the Court intended to sell and that it did sell nothing but the father's share —the share and interest that he would take on partition, and nothing beyond it—and this tribunal in that case puts it entirely upon the ground that everything showed that the thing sold was "whatever rights and interests the said judgment-debtor had in the property" and nothing else.

Their Lordships are of opinion that the decision of **[148]** the Subordinate Judge was entirely right, and that the decision of the High Court was wrong in holding that less than the entirety of the estate was sold.

Their Lordships therefore will humbly advise Her Majesty that the decision of the High Court varying the decision of the Subordinate Judge be reversed, that the appeal to the High Court be dismissed with costs, and that the decree of the Subordinate Judge be reinstated, and their Lordships give the appellant the costs of this appeal

Solicitors for the appellant: Messrs. *Rowcliffes, Rawle & Co.*

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12 M. 148=1 Weir 533.

APPELLATE CRIMINAL.

Before Sir Arthur J.H Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

QUEEN-EMPRESS *v.* RAMASAMI.* [15th and 20th November, 1888.]

Penal Code, Sections 95, 477—Destruction of a valuable security—Unstamped document purporting to be a valuable security—Act causing slight harm.

A, having had certain transactions with B, wrote out a rough account showing his indebtedness to B and signed the total. The paper was not stamped. B afterwards presented it to A and demanded payment of the total amount. A paid part only and after an altercation tore up the paper:

Held, that the act of tearing up the paper constituted the offence of destroying a valuable security, and the harm caused was such that a person of ordinary sense and temper would complain of it.

[F., 25 C. 207=1 C.W.N. 681 (682).]

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* Criminal Appeal No. 447 of 1888.

(1) 11 I.A. 26=10 C. 626.

1888 Nov. 20. — APPELLATE CRIMINAL. — 12 M. 148 = 1 Weir 533.

APPEAL against the conviction and sentence of C. Ramachandra Ayyar, Acting Sessions Judge of Nellore, in Sessions case No. 26 of 1888.

The appellant was a sub-overseer on the Nellore Railway and the complainant was a contractor employed by him on railway work. The appellant having become indebted to the complainant to the amount of Rs. 164, wrote a rough account containing figures only with no particulars, and signed the total. This document he handed to the complainant and promised to pay the money due on [149] the receipt of final bills for the work done. The document was not stamped. The complainant sometime afterwards presented this document to the appellant for payment; but the appellant paid only Rs. 25, saying that that was all that was due on it. The complainant then asked him either to pay the whole debt or return the paper, whereupon an altercation took place and the appellant tore the paper into four fragments and threw them down. Three of these fragments were produced in Court; they contained the appellant's signature to the total of Rs. 164, but not the name of the complainant.

The appellant was convicted by the Sessions Court of the offence of destroying a valuable security and sentenced to one year's simple imprisonment and a fine of Rs. 200.

Mr. *Grant* for appellant argued that by reason of the document in question being valueless for want of a one anna stamp the offence charged had not been committed, and that in any case the harm caused was so slight as to render Section 95 of the Indian Penal Code applicable to the case.

The *Acting Government Pleader* (*Subramanya Ayyar*), for the Crown, *contra*, referred to *ex-parte Kâpalavaya Saraya* (1) and High Court Proceedings 5th August 1873 (2).

The Court (COLLINS, C. J., and WILKINSON, J.) delivered the following

JUDGMENT.

The appellant has been found guilty under Section 477, Indian Penal Code, and sentenced to simple imprisonment for one year, and a fine of Rs. 200. The Judge finds that the accused tore up an account in the handwriting of the accused and signed by him, which showed a balance of Rs. 164 in favour of the complainant, the first witness, and that he did so with the intention of defrauding the first witness.

On behalf of the appellant it is contended that the document which appellant tore up is not a valuable security, inasmuch as it was not stamped as required by law, and therefore was inadmissible for the enforcement of any legal claim. It appears to us, however, that the document, though not a valuable security, is one which purports to be a valuable security. It is in the handwriting of the accused, and shows, according to the evidence of the first witness, which the Judge accepted, that a sum of Rs. 164 was [150] due by defendant to the first witness. All that we have to consider here is the document in its present state. Though unstamped and therefore inadmissible in evidence in support of a legal claim, it undoubtedly purports to be a valuable security, that is, a document whereby the accused acknowledged that he lay under a legal liability. It has been laid down in England (see 2 East's Pleas of the Crown, p. 955) that forgery may be committed of a promissory note on unstamped paper even though the law prohibits the affixing of the stamp afterwards. All the Judges agreed that it was not necessary to constitute forgery that the

(1) 2 M.H.C.R. 247.

(2) 7 M.H.C.R. App. xxvi.

1888 Nov. 20. — Appellate Criminal. — 12 M. 148 = 1 Weir 533.

instrument should be available in support of a claim in a Court of law: that though a compulsory payment by course of law could not have been enforced for want of the proper stamp, yet a man might equally be defrauded by a voluntary payment being lost to him. The principles there laid down are equally applicable to cases falling under Section 477 in consequence of the use of the words "purports to be." To show the fallacy of the argument we may take the case of a duly stamped and executed deed of sale or mortgage torn up while the party was on the way to the registration office. It could hardly be maintained that because the document for want of registration did not create any legal right therefore the wanton destroyer of it could not be held liable under Section 477.

It is then argued that the act of the accused was intended to cause such slight harm that no person of ordinary sense and temper would complain of it. We are unable to accede to this argument. Section 95, Indian Penal Code, was only intended to provide for those cases which fall within the letter, but not within the spirit of the penal law. The tearing up by the prisoner of an account in his own handwriting and signed by him, showing advances made by the first witness, repayments made by him, and the balance due by him to the first witness, he having just made a payment to first witness of a sum far short of the amount actually due, cannot in our judgment be considered to be an act to which the provisions of Section 95 apply.

On the merits we consider that the charge was amply made out by the evidence for the prosecution, and we therefore confirm the finding of the Judge. We do not, however, consider that the case was one which called for such a severe sentence as that pronounced by the Judge.

[151] The appellant has been on bail since the 11th October. We therefore alter the sentence of imprisonment to one of simple imprisonment for one month from this date, and we confirm that part of the sentence which imposes a fine of Rs. 200, but direct that only 139 of the sum, if paid, be given to the complainant, and we further direct that, if such fine be not paid, the appellant be further simply imprisoned for one month.

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12 M. 151 = 13 Ind. Jur. 53 = 1 Weir 480.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

QUEEN-EMPRESS *v.* APPASAMI.* [18th January, 1889.]

Penal Code, Sections 415, 419, 463—*Cheating by personation—Forgery.*

A falsely represented himself to be B at a University Examination, got a hall ticket under B's name and headed and signed answer papers to questions with B's name:

Held, that A committed the offences of forgery and cheating by personation.

[**F.**, 15 A. 210 (215) = 13 A.W.N. 96; **Appl.**, 28 M 90 (101) = 1 Weir 538-A; **R.**, 1 P.R. 1907 = 32 P.L.R. 1907; Rat. Unr. Cr. Cas. 627 (629).]

APPEAL against the conviction and sentence of R. Sewell, Sessions Judge of Bellary, in Sessions case No. 47 of 1888. The Sessions Judge recorded the following findings on the evidence:—

* Criminal Appeal No. 525 of 1888.

"That the appellant falsely represented himself to be one Vellore Absalom David at the University Matriculation and First in Arts Examinations held at Bellary in December 1887, got a hall ticket under that name, sat under that name in the hall, and for three-and a-half days wrote answer papers to questions, signing his name 'V.A David' and attesting the papers in the heading provided as being the papers of Vellore Absalom David."

1889 JAN. 18. — APPELLATE CRIMINAL. — 12 M. 151= 13 Ind. Jur. 53=1 Weir 480.

Upon these findings the Sessions Judge following the decision of the High Court of Madras under similar circumstances in Criminal Appeal No. 103 of 1871, in preference to that of the High Court of Allahabad in *Empress* v. *Dwarka Prasad* (1), convicted the appellant of personation and forgery under Sections 415 and 463 of the Penal Code.

[152] Mr. *Nelson* for appellant argued that the facts alleged did not constitute an offence, that no harm or loss was attempted to be caused, and that no unlawful intent was proved

Mr. *Wedderburn* and Mr. *Grant*, *contra.*

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

We see no reason to doubt the appellant's identity with the person who appeared at the examination at Bellary under the name of Vellore Absalom David. The attention of the witnesses who identified him was specially directed to the candidate, and we see no reason for distrusting either the honesty of their testimony or the accuracy of their recollection.

The question then arises whether the appellant has committed the offences defined in Sections 415 and 463 of the Indian Penal Code. By falsely pretending to be one Vellore Absalom David he induced an officer of the University to deliver to him certain property, *i.e.*, a ticket, entitling him to enter the examination room, and be there examined for the Matriculation test of the University, which ticket would not have been given had the superintendent not been so deceived. Then by writing the examination paper (Exhibit I) the appellant made a false document with the intention of causing it to be believed that that document was made by one Vellore Absalom David. These acts will respectively constitute the offences of cheating and forgery if they were done fraudulently. We are of opinion that the acts of the appellant in obtaining by personation a ticket from the superintendent, and in signing the name of Vellore Absalom David on the examination papers, clearly indicate an intention on his part to lead the University authorities to believe that the examination papers were answered by Vellore Absalom David, and by this means to endeavour to procure the grant of a certificate to the effect that Vellore Absalom David had passed the Matriculation examination of the Madras University. The certificate, if granted, would have a certain recognized value, and we hold it would have been obtained by means of fraud.

We are fortified in this opinion by the fact that in 1871 a Bench of this Court (HOLLOWAY and KINDERSLEY, JJ,) came to a similar conclusion on similar facts, (Criminal Appeal No. 103 of 1871.)

[153] We hold, therefore, that the appellant was rightly convicted under Sections 419 and 465 of the Indian Penal Code and dismiss this appeal.

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(1) 6 A. 97.

1888
Nov. 23.

APPELLATE CRIMINAL.

12 M. 153 = 2 Weir 738.

12 M. 153 = 2 Weir 738.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS *v.* COMMER SAHIB.* [23rd November, 1888.]

Evidence Act, Sections 26, 27—Confessional statements made in the custody of police—Test of admissibility.

The test of the admissibility under Section 27 of the Evidence Act of information received from an accused person in the custody of a police officer, whether amounting to a confession or not, is:—"was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact."

[F., 14 B. 260 (264) (F.B.); R., 31 M. 127 = 12 M.L.J. 66 (68) = 3 M.L.T. 270; U.B.R. (1906) 3rd Qr. Evidence, 3.]

THIS was a case of which the records were called for by the High Court under Section 439 of the Code of Criminal Procedure.

The prisoner was charged with the offences of theft in a building and house-breaking by night under Sections 380 and 457 of the Penal Code, and was tried by H. H. O'Farrell, Acting Sessions Judge of Tanjore, and a jury. There was evidence tracing the stolen property to the possession of the prisoner, and also evidence of certain statements with reference to it made by him while in the custody of the police. Upon the latter point the Acting Sessions Judge directed the jury in paragraph 7 of his charge as follows:—

"There is no doubt that the prisoner was taken to the village of Kasapuram on the 10th and 11th August, and there this property was produced on his demand by the prosecution witnesses Nos. 3 to 8. Any statements made by the prisoner that these cloths had been previously deposited with the witnesses are confessional statements made while the prisoner was in the custody of the police, and you must entirely dismiss them from your minds. They are entirely inadmissible as against the prisoner, and only so much of them is admissible for the purpose of corroborating the [154] fact that the property was found with these witnesses as distinctly alleges that matter. In other words you must take the bare fact that the prisoner said that certain articles were found with certain persons; not that he said that he had himself left them with these persons."

With regard to these directions the Acting Sessions Judge referred to *Adu Shikdar* v. *Queen-Empress* (1) and *Empress of India* v. *Panchom* (2).

The High Court (MUTTUSAMI AYYAR and PARKER, JJ.) passed the following

PROCEEDINGS.

The High Court is of opinion that the law was not correctly laid down to the jury by the Acting Sessions Judge in paragraph 7. The general rule applicable to confessions made by prisoners whilst in the custody of a police officer is contained in Section 26 of the Indian Evidence Act, and the proviso contained in Section 27 refers to an exception to that rule.

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* Proceedings of the High Court, No. 1079, Judicial.

(1) 11 C. 635. (2) 4 A. 198.

1888 Nov. 23. — APPELLATE CRIMINAL. — 12 M. 153= 2 Weir 738.

The material words are "so much of such information, whether it amounts to a confession or not as relates distinctly to the fact thereby discovered may be proved." The reasonable construction is that in addition to the fact discovered, so much of the information as was the immediate cause of its discovery is legal evidence.

The statement made by the prisoner in this case, *viz.*, that he had deposited the cloths produced with the witnesses who delivered them up on demand was the proximate cause of their discovery and was admissible evidence. If he had proceeded further and stated that they were cloths which he stole on the day mentioned in the charge from the complainant, that statement would not be evidence, for it would be only introductory to a further act on his part, *viz.*, that of leaving the cloths with the witnesses, and on that ground it would not be the immediate cause of, or the necessary preliminary to, the fact discovered. The test is: "was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact." This appears to us substantially the principle on which the cases reported in *Adu Shikdar* v. *Queen-Empress*, *Empress of India* v. *Pancham*, and *Reg* v. *Jora Hasji* (1) were decided.

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12 M. 155=13 Ind. Jur. 52.

[155] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Shephard.

SETHURAMA (*Plaintiff No. 2*), *Appellant v.* PONNAMMAL AND OTHERS (*Defendants*), *Respondents.**
[4th and 18th December, 1888.]

Hindu Law—Succession—Bandhu—Paternal great aunt's grandson.

According to the Hindu Law of Succession in force in the Madras Presidency, the grandson of a paternal great aunt of the deceased inherits to him as a bandhu.

SECOND appeal against the decree of S. Gopalacharyar, Subordinate Judge of Madura (East) in Appeal Suit No. 139 of 1887, affirming the decree of P. S. Gurumurthi Ayyar, District Munsif of Madura, in Original Suit No. 77 of 1886.

This was a suit to declare the plaintiffs entitled to receive Rs. 2300, the amount of compensation awarded under the Land Acquisition Act, Act X of 1870, on the assumption of certain land by Government. The plaintiffs claimed as heirs to one Karpura Sokku Pandaram, the younger, with whom they were connected in the manner displayed by the following pedigree:—

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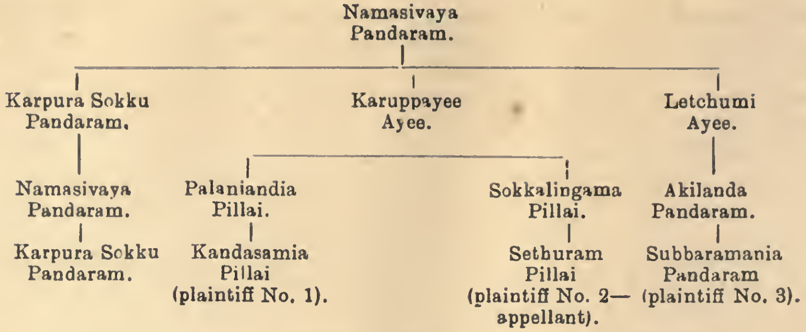
* Second Appeal No. 133 of 1888.

(1) 11 B.H.C.R. 242.

1888
DEC. 18.

APPELLATE CIVIL.

12 M. 155 = 13 Ind. Jur. 52.



The defendants set up title to the land in question on various grounds, and pleaded, *inter alia*, that even if the plaintiffs were related to the last holder as alleged, they could not succeed as his heirs under Hindu Law. The District Munsif adopted this **[156]** view of Hindu Law and dismissed the suit. On appeal the Subordinate Judge affirmed the decree of the District Munsif, saying :

"The preliminary point argued before me is whether the plaintiffs are the heirs to the alleged last male-holder. As already stated, plaintiffs' relationship to him is that of son's son of father's paternal aunt. The father's paternal aunt's son is no doubt a *bandhu*, but his son is not. See Mayne on Hindu Law (1), West and Buhler's Digest of Hindu Law, p. 488; Sarvadhikari's Hindu Law of Inheritance (Tagore Law Lectures for 1880), pp.696 to 706. *Kissen Lala* v. *Javallah Prasad Lala* (2). The plaintiffs have therefore no title."

Plaintiff No 2 preferred this second appeal to the High Court.

Kalianaramayyar, for appellant.

Subramanya Ayyar, for respondents.

The Court (COLLINS, C.J., and SHEPHARD J.) delivered the following

JUDGMENT.

The only question raised in this appeal is whether the appellant is, according to Hindu Law, the heir of the last male-holder, Karpura Sokku Pandaram. The relationship between the latter and the appellant is as follows :—

The deceased Karpura is great-grandson in the male line of the common ancestor, Namasivaya, while the appellant is the daughter's grandson of the same person. In other words he is a grandson of the paternal great aunt of the deceased Karpura. The Sub-Judge has held that standing in this relation to the deceased he is not his *bandhu*. We are of opinion that the appellant, being within seven degrees of the deceased on his father's side, was his sapinda. He does not belong to the same *gotra*, because a female intervenes, *viz.*, the appellant's grandmother, but he is what is called a *bhinna gotra sapinda* or *bandhu*. The contrary opinion, maintained by the Subordinate Judge and contended for by the respondents, is based on the assumption that the examples of *bandhus*, given in the commentaries are exhaustive and not merely illustrative. It is now clearly established that this assumption is erroneous, and that if any one comes within the definition of *bandhu*, though not specially named, he is entitled to succeed as such It is sufficient to refer to a case which was not cited

(1) See 4th ed. § § 464 *et seq.*

(2) 3 M.H.C.R. 346.

—*Ratnasubbu* v. *Ponnappa* (1), in which referring to the Privy Council decision (2) this Court [157] held that the grandson of the maternal uncle of the deceased's mother was entitled to succeed as a bandhu *ex-parte materna.* The decree of the Subordinate Judge must be reversed and the case remanded to be disposed of according to law. Costs to be provided for in the revised decree.

1888 DEC. 18. — APPELLATE CIVIL. — 12 M. 155 = 13 Ind. Jur. 52.

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12 M. 157 = 13 Ind. Jur. 49.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

NARASIMHA AND ANOTHER (*Plaintiffs*), *Appellants v.* AYYAN CHETTI (*Defendant*), *Respondent*.*
[10th, 11th and 12th December, 1888.]

Civil Procedure Code, Section 539—*Interest necessary to support a suit under—Suit to remove a trustee.*

The plaintiffs, having an interest as the managers of a temple in seeing to the due performance of the religious part of the administration of a certain charity endowed for the sustenance of Brahmans and connected with the temple, and being further interested in its administration as Brahmans entitled under certain circumstances to share in the benefits of the charity, sued under Section 539 of the Code of Civil Procedure to remove defendant from the trusteeship of the charity on the ground of fraudulent mismanagement;

Held, that the plaintiff's interest did not support the suit.

Quaere.—Whether a suit for the removal of a trustee will lie under the above section.

[F., 17 M. 462 (464) (F.B.); R., 20 A. 46 (50); 21 B. 48 (50); 14 M. 186 (189); 2 C.L.J. 460 (470).]

APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in Original Suit No. 2 of 1885.

This was a suit by the plaintiffs praying for the removal of the defendant from the office of trustee of a certain charity endowed by one Kuthan Chetti for sustenance of Brahmans, and for the appointment of the plaintiffs as trustees.

The plaintiffs, who are Brahmans, stated that they were the hereditary adhinakartas of the temple in question, and had by inheritance a certain precedence in the temple ceremonies; that the charity referred to above was dispensed in a choultry attached to the temple, and that the defendant who was appointed trustee by the deeds of endowment had been guilty of fraudulent [158] mis-management; and that the Collector had accorded to them sanction to institute this suit.

The defendant denied the above allegations of fact and contended that the suit did not lie as framed.

The following issues were framed (among others):—

(1) Whether the suit falls under Section 539 of the Code of Civil Procedure, or under Act XX of 1863, so far as the religious endowment is concerned, and under Madras Regulation VII of 1817 so far as the charitable endowment is concerned, and whether, if under these special enactments, the jurisdiction of this Court under Section 539 of the Code of Civil Procedure is ousted?

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* Appeal No. 160 of 1887.

(1) 5 M. 69. (2) *Girdhari Lall Roy* v. *The Bengal Government*, 12 M.I.A. 448.

1888 DEC. 12. — APPELLATE CIVIL. — 12 M. 157 = 13 Ind. Jur. 49.

(2) Whether the plaintiffs have such interest in the trust as to entitle them to sue?

On the above issues the District Judge said—

"*First issue.*—It is admitted by the parties, as well as proved by Exhibits G and I (the deeds of endowment), that the object of Kuthan Chetti's endowment in this case was two-fold, first, to supply a daily offering to the deity in the Srinivasa Perumal Covil of Thogur and designated the 'kuruni ariseikattalai' of one marcal of rice to be cooked and mixed with curds and afterwards distributed as 'prasada,' and, secondly, to build an annachattrum in the said village to feed Brahman travellers. The first must be considered a religious purpose, and the second a charitable one. To give this Court jurisdiction under Section 539 of the Code of Civil Procedure, it is necessary that the purposes of the trust besides being charitable or religious should be public. It is contended for the defendant that this is not a public trust, inasmuch as the scheme was started by a private individual who retained the management of it in his own hands, and made no dedication of it to the public by a valid trust-deed. But I overrule this objection, as I consider that Exhibit G clearly creates a trust which is further vested by Exhibit I in the defendant, and that the purposes of it may be decided public, as they are generally for the benefit of a whole section of the community, namely, the travelling Brahman population. The next contention for the defence, so far as the religious part of the endowment is concerned, is that while there exists the special enactment Act XX of 1863 for the proper appropriation of endowments of lands relating to temples, the words 'religious purposes' in Section 539 of the Code should be considered as [159] referring only to cases where the endowments do not relate to temples. If, however, the Legislature had intended this, they would surely have expressed their intention by the insertion of a saving clause to the desired effect. The fact that the words 'or religious' are an addition made by Act XIV of 1882 to the section as it originally stood, makes it appear that they were purposely added in order to admit a suit of this kind against a trustee, who is not one of the class of trustees contemplated by Act XX of 1863 which refers to trusts already in existence and not to such as might subsequently be created. And so with regard to the other contention in connection with the charitable part of the endowment that it is governed by Madras Regulation VII of 1817, and its superintendence being vested by Section 2 of the said Regulation in the Board of Revenue they should also have been made parties to this suit,—it may be assumed that the Regulation referred only to endowments then existing, for its language speaks of only what is and what has been and not of what will be; not a single provision is made therein for what is to be done in the case of future endowments—the only future it deals with is in regard to escheats. But if this interpretation is wrong and the Regulation is applicable to this case, it has been held in *Ponnambala Mudaliyar* v. *V. R. Pandia Chinnatambiar* (1), that it merely provides supplementary remedies and does not deprive the ordinary Courts of their jurisdiction. So that on the first issue, I find that this Court has jurisdiction over the case under Section 539 of the Code of Civil Procedure.

"*The second issue* is whether the plaintiffs have such a 'direct interest' in the trust as to enable them to bring the suit. The case they

(1) 7 M.H.C.R. 117.

1888 DEC. 12. — APPELLATE CIVIL. — 12 M. 157 = 13 Ind. Jur. 49.

set up is that they are the present managers of the temple, and as such, have a direct interest in seeing to the due performance of the religious part of the trustee, *i.e.*, the daily offerings to the Perumal in the temple which yield the 'prasada,' in which they further claim a right to share, first, in their capacity as managers, and then as Brahmans of the agraharam, should the remainder of the 'prasada' not all be required for distribution among travellers. Although I consider the plaintiffs have not proved by their evidence that they are the actual managers of the temple, for they keep no accounts, or that the managers, *qua* managers, have a right to share in the 'prasada'—the evidence on [160] the point being contradictory, yet I find they have a right to interfere in the management, as well as to take a portion of any cooked rice that may be left after travellers have been fed. It is proved that Rangayyan, the father of the first plaintiff and uncle of the second, was the joint manager of the temple with Kuthan Chetti, the defendant's predecessor, and while I believe the defendant is now, as he states, the sole manager, it is admitted by him that the Brahmans of the village assist him in the management, and that they have been accumstomed to take the 'Prasada' that is left over. I think that these admitted privileges gives the plaintiffs such a direct interest in the trust as is contemplated by Section 539 the terms of which do not state and do not seem to imply that the interest required should necessarily be a beneficial one. I therefore find this issue in plaintiffs' favour.'

The decree of the District Judge dismissed the suit so far as it prayed for the removal of the defendant, but contained certain directions as to the management of the charity.

The plaintiffs appealed and the defendants preferred a memorandum of objections against the above decree so far as it was not in accordance with their respective cases.

Seshagiri Ayyar, for appellants.

Pattabhirama Ayyar, for respondent.

The Court (KERNAN and WILKINSON, JJ.) delivered the following

JUDGMENT.

We are of opinion that the plaintiffs had not a direct interest in the trust within the term of Section 539 of the Civil Procedure Code and that the suit was not, therefore, maintainable. See *Jan Ali* v. *Ram Nath Mundul* (1).

Again we think that it is not at all clear that a suit to remove a trustee can be maintained under Section 539.

It has been pointed out by Mr. Pattabhirama Ayyar that Section 539, in most parts of it, follows the provisions of Romilly's Act (2), which enabled trusts of certain classes to be carried out by summary procedure and not by suit; amongst the objects of that Act one was to appoint a new trustee and it was held that under the Act, a trustee could not be removed hostilely. No doubt, Section 539 provides that a suit may be brought to appoint the trustee and for other purposes, and it contains a proviso that further relief may be [161] given according as the nature of the case required. Such grounds of relief would be some matter consequent on the relief, which the section enables to be granted.

(1) 8 C. 32. (2) 52 Geo. 3 C. 101.

1888 DEC. 12. — APPELLATE CIVIL. — 12 M. 157 = 13 Ind. Jur. 49.

We dismiss this appeal, and as the Judge had not jurisdiction to try the case, we reverse the decree, so far as it gave any directions for the performance of the trust, or gave the plaintiffs any relief or decided any rights therein of either plaintiffs or defendant.

Appellant is to pay the costs of this suit throughout, including this appeal.

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12 M. 161.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

NANJAPPA (*Plaintiff*), *Appellant*, *v.* NANJAPPA AND ANOTHER (*Defendants*), *Respondents.**
[20th November and 10th December, 1888].

Contract Act, Sections 63, 74—*Penalty—Stipulation for enhanced interest—Interest on decree amount up to date of payment—Remission of part performance of contract—Sum accepted on account of interest.*

A hypothecation bond provided for payment of interest on the principal sum at the rate of 9 per cent., and contained a further provision, that on default being made in payment of interest accruing due, interest should be paid from the date of the bond at the rate of 15 per cent. Default was made when the first and second payments of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum a little more than the arrears calculated at 9 per cent. In a suit by the creditor :

Held, (1) that the plaintiff had not waived any right under the bond by accepting the payment on account of interest.

(2) that the provision for enhanced interest calculated from the date of the bond on default, was of the nature of penalty under Section 74 of the Contract Act.

(3) that the plaintiff was entitled to interest on decree amount from date of decree to date of payment at 6 per cent.

Balkishen Das v. *Run Bahadur Singh* (1) discussed and distinguished; *Baij Nath Singh* v. *Shah Ali Hossain* (2) dissented from.

[**Diss.**, 15 A. 232 (260); **F.**, 14 B. 274 (278); 18 M. 175 (177); 25 M. 343 = 11 M.L.J. 421; **Appr.**, 19 C. 392 (400); **R.**, 30 C. 15 (17); 31 C. 83 (87) = 8 C.W.N. 66 (69); 36 M. 229 (263) = 24 M.L.J. 135 (165) = 13 M.L.T. 20 (43); 2 C.W.N. 234; 11 O.C. 307; **D.**, 14 B. 200 (203).]

SECOND appeal against the decree of J. D. Irvine, Acting District Judge of Coimbatore, in Appeal Suit No. 138 of 1887, modifying [162] the decree of T. Ramasami Ayyar, District Munsif of Udumalpet, in Original Suit No. 28 of 1887.

This was a suit to recover the sum of Rs. 2,313-12-0 due on a registered hypothecation bond, dated 23rd February 1882.

The portions of the bond which are material for the purposes of this report ran as follows :—

"We have hypothecated to you the undermentioned properties consisting of well, lands, and house, &c., for Rs. 1,500, which sum we have received from you in cash . . . . We shall therefore pay, on the 13th Masy of each year, the interest on the said amount at $\frac{3}{4}$ per cent. per mensem, and pay the principal amount in the fifth year, *i. e.*, 13th Masy of Viyaya year, together with the interest of that year. In case of

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* Second Appeal No 251 of 1888.

(1) 10 C. 305 = 10 I.A. 162. (2) 14 C. 248.

default to pay the interest on the dates on which they may be due, and in case of default to pay the principal amount on the date it is due, we shall pay on demand the interest accruing on the said amount for the period of default at $1\frac{1}{4}$ per cent. per mensem from the date of the document and the principal. If interests or the principal amount be paid towards this document, we shall endorse the payments on this."

1888 DEC. 10. — APPELLATE CIVIL. — 12 M. 161.

The following endorsement appeared on the document, signed by the debtors :—

" Paid on 17th June 1884 Rs. 285 on account of the interest in respect of this bond. This sum of Rs. 285 was paid."

No payment other than that referred to in the above endorsement was made in respect of the bond.

The District Munsif passed a decree for the full amount claimed, which was calculated according to the terms of the document quoted above. The defendants, however, appealed on the ground that the stipulation for an enhanced rate of interest should be construed as a penal clause, since it related back to the date of the bond. The District Judge on appeal modified the decree of the District Munsif expressing his decision as follows :—

" The bond was executed in February 1882. In 1883, defendants made default and again in 1884, plaintiffs took no action on this but in June 1884 accepted payment by defendants of Rs. 285 on 'account of interest.' The actual amount of interest then due at 9 per cent. was Rs. 270. At the enhanced rate it would have been Rs. 450. It appears to me that the accpetance by plaintiff of this sum of Rs. 285 was in effect a condonement by him of the previous default and evinced an intention on his part not to **[163]** press for the enhanced rate. Under these circumstances, I consider that although the subsequent default gave plaintiff a right to enforce the terms of the bond, the enhanced rate for the first two years should not have been allowed. Taking this view, plaintiff is entitled to receive the principal, Rs. 1, 500 I interest for three years at the enhanced rate, Rs. 675, total Rs. 2,175. This sum, with proportionate costs, I award him ; but, inasmuch as he has received this large sum as interest, I disallow further interest."

The plaintiff appealed to the High Court. No memorandum of objections or cross-appeal was preferred by defendants.

Mr. *K. Brown*, for appellants.

There was no waiver or relinquishment of his rights under the bond by reason of the plaintiff's acceptance of the sum of Rs. 285 in June 1884 by virtue of Section 63 of the Contract Act or any other provision of law. The District Judge should have decreed interest up to the date of payment to the plaintiff, and otherwise should have confirmed the decision of the District Munsif who was right in enforcing the terms of the agreement. *Balkishen Das* v. *Run Bahadur Singh* (1) explained and applied in *Baij Nath Singh* v. *Shah Ali Hosain* (2).

Sankaran Nayar, for respondents.

The terms of the agreement come within the purview of Section 74. of the Contract Act. *Jaganadham v. Ragunadha* (3), *Mackintosh* v. *Crow* (4), and other authorities referred to in these cases. The Privy Council decision cited related to a decree and not a contract, and is inapplicable. *Shirekuli Timapa Hegda* v. *Mahablya* (5).

(1) 10 C. 305 = 10 I. A. 162. (2) 14 C. 248. (3) 9 M. 276.
(4) 9 C. 689. (5) 10 B. 435.

1888 DEC. 10. — APPELLATE CIVIL. — 12 M. 161.

Mr. *K. Brown in reply.*

The Privy Council case is an authority on the rule of public policy in Section 74 of the Contract Act. Moreover, the case arose on a decree by consent; the distinction drawn by West J., in the passage cited, was disapproved in *Baij Nath Singh* v. *Shah Ali Hosain* (1), and is not sound. Here, there is no sum fixed within the meaning of Section 74 of the Contract Act.

The Court (PARKER and SHEPHARD, JJ.) delivered the following

JUDGMENT.

The action is brought to recover from the defendants the principal and interest due under a bond executed by the defendants on the 23rd February 1882. According to the [164] terms of the bond, the defendants became bound to pay on the 23rd February in each year interest on the principal sum at 9 per cent. and the principal sum, Rs. 1,500, on the 23rd February 1887, together with interest then due: in case of default in paying interest or principal on the due dates, the defendants were bound to pay on demand the interest accruing on the principal amount "for the period of default at 1¼ per cent. per mensem from the date of the document and the principal." Default was made in 1883 and again in 1884, and after June 1884 no payment was made by the defendants. The suit was brought in January 1887. The District Judge, giving the defendants credit for Rs. 285, paid in June 1884 as a complete satisfaction for the two years' interest then actually due and payable, gave the plaintiff a decree for the principal sum and interest upon it at the enhanced rate for three years. Without deciding the question raised on the appeal he disallowed the claim for such interest accruing due on the first default, on the ground that the plaintiff had excused it by accepting the sum of Rs. 285 in June 1884. Seeing that the sum paid was greater than what was due for interest at the original rate, it is difficult to understand how the defendants can have supposed that the plaintiff had remitted any part of his claim, and anyhow there is no sort of evidence of any release given by the plaintiff or of any other discharge of the obligation to pay the whole sum of Rs. 450. Although the defendants' vakil was unable to support the decree on the reason given by the District Judge, it was open to him to support, and he did support it on the ground that the Court ought to have treated the stipulation for interest at 15 per cent., payable from the date of the bond as penal, and therefore only to have allowed reasonable interest by way of compensation. It has been held by this Court in several cases—*Vengideswara Putter* v. *Chatu*(2), *Vythilinga* v. *Sundarappa* (3), *Jaganadham* v. *Ragunadha* (4)—that such a stipulation as is found in the present bond should be treated as penal and should not be enforced by the Court; and the same view has been taken in several cases by other High Courts, see cases collected in *Sungut Lal* v. *Baijnath Roy* (5), *Bansidhar* v. *Bu Ali Khan*(6), *Khurram Singh* v. [165] *Bhawani Baksh*(7). The question raised by the learned Counsel for the plaintiff was whether, since the decision of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh*, this view of the law can still be considered to be correct, and reliance was placed on *Baij Nath Singh* v. *Shah Ali Hosain* as an authority for the position that the cases above referred to must be treated as overruled by the Privy Council decision. In the Privy Council case the

(1) 14 C. 248. (2) 3 M. 224. (3) 6 M. 167. (4) 9 M. 276.
(5) 13 C. 164. (6) 3 A. 260. (7) 3 A. 440.

question arose with regard to a decree made on the footing of a compromise according to which the plaintiff was to receive interest on the decretal sum at the rate of 6 per cent. and the defendants were to pay principal and interest by instalments of Rs. 30,000 a year. Provision was made for substituting interest at 12 per cent. on default in payment of the instalment in several contingencies, and the particular provision which is material related to the contingency of the first instalment not being duly paid. On such default being made the decree-holder was entitled to interest at 12 per cent. from the date of the decree; and default was made, the instalment not being paid till after the due date. It was also provided that, in case of default which was construed as meaning on default in payment of any instalment except the first, interest should be paid at the higher rate on the entire decretal money from the date of default. It was argued that this latter provision for enhanced interest payable upon the whole decretal money was of a penal character; but the Judicial Committee observed, "It was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances." In their opinion the decree-holder was entitled to the whole decretal sum and interest at 6 per cent. from date of decree or so much thereof as might remain due after giving credit for all payments made on account together with additional interest at the same rate on the first instalment from the date of the decree to the payment of such instalment, and also additional interest upon the principal sum for the period between the day on which the second or any subsequent instalment became due and the day on which it was paid. While it must be admitted that by this decision the enhanced interest was allowed on the first instalment from the date of decree, it does not appear from the report that any special [166] argument was directed against the particular stipulation. According to the report it was the other stipulation, *viz.*, that for payment of enhanced interest on the whole decretal money that was impugned in the argument, and this stipulation was not open to the objection that it made the higher rate of interest payable from the date of decree. It is further to be observed that the Judicial Committee were not dealing with a contract having regard to the provisions of the Contract Act, but with a decree, and as West, J., has pointed out "the principles which govern the enforcement of contracts and their modification when justice requires it do not apply to decrees which as they are framed embody and express such justice as the Court is capable of conceiving and, administering," *Shirekuli Timapa Hegda* v. *Mahablya* (1). For these reasons we are of opinion that we are not bound by the decision of the Judicial Committee to treat the cases decided by this Court as overruled.

1888 DEC. 10. — APPELLATE CIVIL. — 12 M. 161.

In our opinion there is a substantial distinction between a stipulation in a bond to pay enhanced interest from the date of default and a stipulation to pay such interest from the date of the bond. It is clearly established by the English cases that, whereas there is nothing in the nature of a penalty in an arrangement under which a debtor on failure to pay a smaller sum than that actually due within a given time is remitted to his obligation to pay the larger sum, a stipulation for the payment of a sum exceeding the actual debt, if that debt is not paid at the time when it is due, is regarded as a penalty against which equity will relieve. *Thompson* v. *Hudson* (2). *The Protector Endowment Loan Co.* v. *Grice* (3). By the cases

(1) 10 B. 435 (438). (2) L.R. 4 H.L. 1. (3) L.R. 5 Q.B.D. 121.

1888 DEC. 10. — APPELLATE CIVIL. — 12 M. 161.

in this country it is well established that an agreement to pay a sum of money on a given day with interest at a certain rate with a stipulation that in default the debtor shall thenceforward pay a higher rate of interest is strictly enforceable. In such an agreement no question of penalty arises because it imposes an obligation on the debtor to pay a larger sum than what was originally due. In the words of Section 74 of the Contract Act no sum is named as the amount to be paid in case of such breach. At the moment of the breach no larger sum can be exacted by the creditor, but from that date the terms on which the debtor holds the money became less favourable. By [167] the default he accepts the alternative arrangement of paying a higher rate of interest for the future. On the other hand where the stipulation is that on default the higher rate shall be payable from the date of the original obligation, the debtor does on default become immediately liable for a larger sum, *viz.*, the difference between the enhanced and the original rate of interest already due, *Mackintosh* v. *Crow* (1).

This liability cannot be regarded as the price paid for the further enjoyment of the money allowed to him, because the amount is fixed and bears no relation to the time during which the money may continue unpaid. In the present case, the difference amounts to 6 per cent. on Rs. 1,500, *viz.*, Rs. 90. On default, the debtor became obliged to pay that sum in addition to the principal and interest originally due under the bond. If a stipulation is penal which entitles a creditor, on his debtor's default in paying an instalment due, to demand double the amount of that instalment or 100 per cent. why is not the provision, in the present case, by which 6 per cent., on the original debt is claimed, open to the same objection? It is said there is in the present case no sum *named* within the meaning of Section 74 of the Contract Act and that therefore that section is not applicable. To that argument we would reply that though no sum is named in rupees the extra sum payable is fixed and ascertainable beforehand, or at any rate at the time when default is made. To hold that more than this is required, and that it is necessary that the exact sum should be mentioned in the bond, is in our judgment to countenance an easy mode of avoiding the effect of the section altogether. If regard is had to the date of default when the liability to payment of the extra sum accrues, it is clear that the objections taken by Mitter, J., in *Baij Nath Singh* v. *Shah Ali Hosain* to Wilson, J.'s, position in *Mackintosh* v. *Crow* lose all their force. Mitter, J., argues that, because besides this liability another liability to pay higher interest in the future accrues, the whole stipulation cannot be brought within the terms of Section 74, but surely the addition of this obligation to pay in the future does not make the obligation to pay for the past any the less an obligation to pay a certain sum.

For these reasons and upon the authority of the cases decided by this Court, we hold that the provisions of Section 74 ought to have [168] been applied to the present case, and that therefore the decree of the District Judge, though passed on wrong grounds, may be sustained. We modify the decree by allowing the plaintiff further interest at the rate of 6 per cent. from date of decree till date of payment, and otherwise dismiss the appeal with costs.

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(1) 9 C. 689.

12 M. 168 (F.B.).

1888 Oct. 23.

FULL BENCH.

12 M. 168 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

VENKATA (*Plaintiff*), *Appellant in S.A.* 1140 *of* 1886 *v.* CHENGADU AND OTHERS (*Defendant*), *Respondents.*

MUNUSAMI (*Plaintiff*), *Appellant in S.A.* 1141 *of* 1886 *v.* MUNIGADU AND OTHERS (*Defendants*), *Respondents.*

VENKATA (*Plaintiff*), *Appellant in S.A.* 1142 *of* 1886 *v.* RAUTHU REDDI AND OTHERS (*Defendants*), *Respondents.**

[7th September and 23rd October, 1888.]

Limitation Act—Act XV of 1877, *Section* 6, *Schedule II, Articles* 12, 95—*Revenue Recovery Act (Madras)—Madras Act II of* 1864, *Section* 59—*Suit to set aside a sale for arrears of revenue—Fraud—Limitation.*

Suit, in July 1885, to set aside a sale of land of the plaintiff, sold in July 1884 as if for arrears of revenue under Act II of 1864 (Madras), on the ground that the sale had been brought about by fraud and collusion between the purchaser and the village officers; the plaintiff had knowledge of the alleged fraud more than six months before suit:

Held, that the law of limitation applicable to the case was Section 59 of Act II of 1864, and not Section 95 of the Limitation Act, and that the suit was therefore barred.

Venkatapathi v. *Subramanya* (I.L.R., 9 Mad., 457) explained, *Baij Nath Sahu* v. *Lala Sital Prasad* (2 B.L.R., Full Bench, 1), and *Lala Moharuk Lal* v. *The Secretary of State for India* (I.L.R., 11 Cal., 200) considered.

[**F.**, 17 M. 134 (137); 3 M.L.J. 255; **R.**, 17 M. 189; 26 M. 638; 24 M.L.J. 41 (45); 4 O.C. 182 (185); **D.**, 26 M. 495.]

SECOND appeal, No. 1140 of 1886, against the decree of H. T. Knox, Acting District Judge of North Arcot, in appeal suit **[169]** No. 97 of 1886, affirming the decree of T. Sami Rau, District Munsif of Chittore, in original suit No. 273 of 1885.†

This was a suit to set aside a sale for arrears of revenue under Madras Revenue Recovery Act, Act II of 1864.

The plaintiff's brother acquired the land in question from the first defendant and died. After his death the plaintiff succeeded to his brother and entered into enjoyment of the land and paid the Government kist thereon, but the patta remained in the name of defendant No. 1. On the 18th July 1884 the land was sold for arrears of revenue accrued due in respect of other lands of defendant No. 1, and purchased by defendant No. 2, who obtained a certificate of sale on 1st September. According to the allegations of the plaintiff, the sale was fraudulently brought about by defendant No. 2 in collusion with the karnam and monigar of the village; there was at the date of the sale no arrear of revenue due on the land, and neither the plaintiff nor defendant No. 1 was served with notice to pay any sum by way of revenue. It was further alleged that the sale was not duly proclaimed, and various irregularities were committed with reference to it.

The plaintiff took proceedings under Section 38 of the Revenue Recovery Act, and the sale was set aside by the Deputy Collector on 28th

* Second Appeals Nos. 1140 to 1142 of 1886.

† Second Appeals Nos. 1141 and 1142 were similar to Second Appeal No. 1140 of 1886.

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January 1885. The Collector, however, reversed this decision on 26th March 1885.

The plaint in the suit was filed in the District Munsif's Court on 10th July 1885, the Secretary of State being joined as defendant No. 3. Defendant No. 1 was *ex parte*. Defendant No. 2 pleaded, *inter alia*, that the plaintiff's suit was barred by Section 59* of Madras Act II of 1864; that the Deputy Collector had no authority to cancel the sale; that the plaintiff's application to cancel the sale was of no effect, and that Section 14 of the Limitation Act XV of 1877 had no application to this suit. It was contended for defendant No. 3 also that the suit was barred by Section 59 of Madras Act II of 1864; that the Deputy Collector's action in annulling the sale [170] was *ultra vires*, and that his decision was rightly reversed by the Collector on appeal.

Both the District Munsif and the District Judge held that the suit was barred by the law of limitation in Section 59 of the Revenue Recovery Act.

The District Judge observed:

"It is no doubt the case that the plaintiffs and the Revenue Officers, who first dealt with the application, and the defendants, who appealed to the Collector, had an erroneous idea that the Collector had power to set the sale aside, and that the plaintiffs were doing their best to bring their grievance before the proper tribunal. Still the defendants cannot be prevented from pleading the limitation which has arisen in their favour by the common mistake of the parties, which has resulted in the discovery by the plaintiffs of the proper Court, when it is too late for that Court to investigate their case."

The plaintiff preferred this second appeal.

Mr. *Kernan*, for appellant, relied on *Venkatapathi* v. *Subramanya* (1), and argued that the limitation bar was saved by Section 95 of the Limitation Act, which was not excluded by the Revenue Recovery Act, and cited *Golap Chand Nowluckha* v. *Krishto Chunder Dass Biswas* (2), *Nijabutoola* v. *Wazir Ali* (3), and *Guracharya* v. *The President of the Belgaum Town Municipalities* (4).

The Government Pleader (Mr. *Powell*) and *Bhashyam Ayyangar*, for respondents.

The Court (PARKER and WILKINSON, JJ.) made the following order of Reference to the Full Bench:

The plaint lands were acquired by plaintiff's undivided brother, Krishna Reddi, but the patta was allowed to remain in the name of defendant No. 1. After the death of Krishna Reddi, the plaintiff continued to pay kist for the lands, but for an arrear which accrued upon other land in the patta of defendant No. 1 these lands were attached and sold under the Revenue Recovery Act. There can be no doubt as to their liability to be so sold, standing as they did in the patta of defendant No. 1, but plaintiff seeks relief on the ground that defendant No. 2, the purchaser, has colluded with defendant No. 1, and the monigar and karnam of the village in order to deprive him of the land.

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* "Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act, except as hereinbefore provided, from applying to the Civil Courts for redress: provided that Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose.".

(1) 9 M. 457. (2) 5 C. 314. (3) 8 C. 910. (4) 8 B. 529.

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[171] The sale took place on 18th July 1884; the sale certificate was granted to the defendant No. 2 on 1st September 1884; the Deputy Collector purported to set aside the sale on 28th January 1885, but his order was reversed by the Collector on 25th March 1885. Notice of suit under Section 424 of the Civil Procedure Code was given to the Collector on 10th April 1885, and the suit was finally brought on 16th July 1885.

The Courts below found that the suit was barred under Section 59, Act II of 1864, and that the time ran from the date of the sale (18th July 1884). Appellant's Counsel contends that the suit is to set aside the sale on the ground of fraud; that the suit is governed by Article 95, Schedule II of the Limitation Act, and refers to *Venkatapathi* v. *Subramanya* as a conclusive authority.

The facts of that case appear to have been exactly similar to the present, but the point argued before the Bench which decided that second appeal seems to have been whether Article 12 or Article 95 of the Limitation Act applied. It appears to have been assumed is second appeal that the provisions of the general Limitation Act were applicable, and there is nothing to show that the point was taken that the shorter limitation provided by the special law was the one which would apply. The point was, it is true, taken in the Courts below; the District Munsif holding that even if the limitation of Section 59 of the Revenue Recovery Act did not apply, the suit was barred under Article 12, while the Subordinate Judge was of the same opinion and considered it unnecessary to decide whether Section 59 of the Revenue Recovery Act barred the suit. The plaintiff appealed, but there is nothing to show that the respondent in second appeal relied upon Section 59, Act II of 1864, or that the point was argued.

We do not feel any doubt that the plaintiff is a "party deeming himself aggrieved by proceedings under the Revenue Recovery Act," and therefore under the provisions of Section 59 should sue within six months from the time at which the cause of action arose.

Act II of 1864 is a local law applicable to the recovery of arrears of revenue in the Madras Presidency, and Section 6 of the general Limitation Act declares that when a period of limitation is specially prescribed by such a law for any suit, appeal or application, nothing in the general Limitation Act shall affect or alter the period so prescribed. The cases that have been quoted [172] at the Bar merely go to show that the provisions of the general Limitation Act are to be applied in computing such period, but are not authorities for the *alteration* of such period. *Reference under Forest Act V of* 1882 (1), *Golap Chand Nowluckha* v. *Krishto Chunder Dass Biswas*, *Nijabutoola* v. *Wazir Ali*, *Guracharya* v. *The President of the Belgaum Town Municipalities.*

Were it not for the decision in *Venkatapathi* v. *Subramanya*, we should have had no hesitation in dismissing this second appeal, especially as we find that in a later case, *Yellaya* v. *Viraya* (2), a suit to redress a grievance caused by proceedings under Act II of 1864 has been held to be barred under Section 59, but the point is an important one, and inasmuch as the decision in *Venkatapathi* v. *Subramanya* lays down in terms that such suits such as the present are governed by Article 95, Schedule II of the general Limitation Act, we will refer to the Full Bench the question "Is the suit governed by the special limitation prescribed in Section 59, Act II of 1864, or by the provisions of the general Limitation Act?"

(1) 10 M. 210. (2) 10 M. 62.

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Mr. *Kernan*, for appellant.

The case is governed by Article 95, Schedule II of the Limitation Act. See *Venkatapathi* v. *Subramanya*, which governs the present case. The cases cited before the Division Bench show that notwithstanding the special period of limitation prescribed by special Acts the Courts have applied the provisions of the Limitation Act so as to extend the period beyond the specified time; similarly the Court should apply the general provisions of the Limitation Act relating to fraud to the Revenue Recovery Act. Section 59, Revenue Recovery Act, does not apply to the case because the plaintiff was not a "party" within this section. The word party denotes a plaintiff or defendant and present before the Court in the proceeding—such as a defaulter, see Section 6, Revenue Recovery Act—a destrainer or tenant paying arrears, Section 11, or claimant under Section 17. The legislature would have used the word 'persons' if its intention was to give the section the more general scope.

Section 59, Revenue Recovery Act, does not apply because the proceedings were not taken under the Act. No notice was given to plaintiff or first defendant. No proclamation of sale was made. The steps to be taken under the Revenue Recovery Act were not taken. The sale was held secretly. See also *Baij* **[173]** *Nath Sahu* v. *Lala Sital Prasad* (1), *Lala Mobaruk Lal* v. *The Secretary of State for India* (2), *Sadhusaran Singh* v. *Panchdeo Lal* (3), *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar* (4), in which it was held that non-compliance with Section 6, Act XI of 1859, was not a mere irregularity, but that sale was *null* and *void*. See also distinction between Section 59 and Section 60 of Revenue Recovery Act. The former refers to proceedings under the Act, the latter to anything done or *purporting to be* done under the Act, from which it should be inferred that the Legislature in Section 59 contemplated proceedings validly and regularly held under Act and not to colourable proceedings as in Section 60. See also Standing Order of the Board of Revenue, No. 109.*

The Government Pleader (Mr. *Powell*) and *Bhashyam Ayyangar*, for the respondents *contra*.

The further arguments adduced in this case appear sufficiently for the purpose of this report from the judgment of MUTTUSAMI AYYAR, J.

JUDGMENT.

MUTTUSAMI AYYAR, J.—This is a reference to the Full Bench, and the facts which have given rise to it are shortly these. The land, forming the subject of this litigation, originally belonged to the plaintiff's undivided brother, Krishna Reddi, and upon his death it vested in the plaintiff by right of survivorship. The patta relating to it, however, stood in the name of the first defendant, Mala Chengadu, and the land was sold under Act

* It is undesirable that lands transferred by a registered holder, however informally, to another party, and on which no arrears are due, should be sold for arrears of revenue due by the registered holder on other lands which are not brought to sale. Collectors are directed not to sell lands in possession of alienees until all the other lands and property in possession of the registered holder are first sold unless the arrear due is caused by the default of the alienee. Whether the lands to be sold are in the possession of the registered holder or not and whether the arrear is due by the registered holder or by the alienee on the portion alienated, should be ascertained by local inquiry.

(1) 2 B.L.R. F.B. 1.
(2) 11 C. 200.
(3) 14 C. 1.
(4) 3 C. 300.

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II of 1864 for arrears of revenue which accrued upon some other land included in the same patta but belonging to Chengadu.

The sale took place on the 18th July 1884, and the present suit to set it aside was brought on the 16th July 1885. The ground of claim was that the second defendant, the purchaser, colluded with the karnam and the monigar of the village and fraudulently brought about the sale, in order to deprive the [174] plaintiff of his land. The plaint stated that the second defendant was the plaintiff's enemy, that the assessment due on the land in dispute for fasli 1291 was not in arrear, that it was sold for arrears amounting to Rs. 4-6-2 due by the pattadar on some other land, and that it was purchased for Rs. 12-4-0, whilst it was worth Rs. 200. It was alleged further that neither the pattadar nor the plaintiff was served with notice to pay the arrears, that the sale was not duly proclaimed, that it was held secretly, and that the provisions of Act II of 1864 were not duly complied with. The defendants pleaded, *inter alia*, limitation in bar of the claim and relied on Section 59 of the Revenue Recovery Act. The District Munsif, and on appeal, the District Judge upheld the contention and the plaintiff preferred a second appeal from their decision. The Divisional Bench that heard the second appeal alluded to the decision in *Venkatapathi* v. *Subramanya*, and observing that it laid down in terms that such suits as the present were governed by Article 95, Schedule II of the general Limitation Act, referred to the Full Bench the following question :—

"Is the suit governed by the special limitation prescribed in Section 59, Act II of 1864, or by the provisions of the general Limitation Act?"

It is contended for the appellant that Section 59 of Act II of 1864 is not applicable to cases of fraud, and it can only apply when the procedure prescribed by the Act has been duly followed and when the sale can properly be termed to be a sale held under it. Our attention is drawn to Act XI of 1859, to the decisions in *Baij Nath Sahu* v. *Lala Sital Prasad*, *Lala Mobaruk Lal* v. *The Secretary of State for India in Council*, *Sadhusaran Singh* v. *Panchdeo Lal*, *Venkatapathi* v. *Subramanya*, *Yellaya* v. *Viraya*, and to the Standing Order of the Board of Revenue No. 109. On the other hand it is argued for respondents that the suit is governed by Section 59 of Act II of 1864, and reliance is placed on Sections 5 and 6 of the general Limitation Act and on the decisions reported in *Raj Chundra Chuckerbutty* v. *Kinoo Khan* (1) *Reference under Forest Act V of* 1882, *Behari Loll Mookerjee* v *Mungolanath Mookerjee* (2), *Golop Chund Nowluckha* v. *Krishto Chunder Dass Biswas*.

I have no hesitation in holding that the suit before us is governed by Section 59 of Act II of 1864. That section saves the [175] right of parties deeming themselves aggrieved by any proceedings under that Act to apply to the Civil Courts for redress, and provides that such Courts "shall not take cognizance of any suit instituted by such parties for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose." The sale impugned by the appellant was a proceeding under Act, and as it had taken place more than six months before the suit, it would be clearly barred but for the alleged fraud. Does fraud then make any difference? The answer to this question is that suggested by Mr. *Bhashyam Ayyangar*, the Pleader for the second respondent, *viz.*, that the cause of action

(1) 8 C. 329. (2) 5 C. 110.

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would then arise from the date on which the fraud was discovered, but that the period of limitation would still be six months. It is provided by Section 18 of Act XV of 1877 that "when any person having a right to institute a suit has, by means of fraud, been kept from the knowledge of such right, the time limited for instituting a suit shall be computed from the time when the fraud first became known to the person injuriously affected by it." Though this provision is contained in the general Act of Limitation, and Act II of 1864 is a special law applicable to Revenue sales, yet it applies to the case before us, as Section 6 of Act XV of 1877 directs only that the period of limitation, prescribed by the special Act, shall not be affected by that enactment. This view, however, does not help the plaintiff; for the District Judge observes that the plaintiff had knowledge of the alleged fraud more than six months before suit. I am unable to accede to the suggestion of the appellant's Counsel that the sale in the case before us is not a proceeding under Act II of 1864 within the meaning of Section 59. The true import of the expression "Aggrieved by any proceedings under the Act" is not that the proceedings should be in accordance with the Act and therefore perfectly legal, but that the proceedings, though defective and irregular and therefore not in strict conformity to the provisions of the Act, should be taken professedly under it. If the suggestion of the appellant's Counsel were to prevail, there would be no grievance at all to be redressed by a Civil Court. The section presupposes that certain proceedings were professedly taken under the Act, and that there might possibly be a valid claim to redress on the ground that they were not in accordance with the provisions of the Act, and then directs that [176] the claims shall not be adjudicated upon the merits, unless it is preferred within six months from the time when the cause of action arose.

It may be an open question whether the proceedings contemplated in Section 59 or those which are vitiated by mere errors of procedure or include those taken without jurisdiction and, therefore, not within the purview of the Act. For instance, there may be a sale when there are no arrears of revenue, or the land sold may not be included in the patta or holding liable to be sold for the purpose of liquidating them. Though in the case before us there was no arrear of revenue on the plaintiff's land, yet there was an arrear on other land included with it in one patta, and it has already been held that one part of a holding is liable to be sold for the arrear due on another portion of the same holding. It is therefore not necessary for the purposes of this reference to determine the question whether, when there are no arrears for which the land in dispute is liable to be sold under Act II of 1864, the sale is a proceeding under the Act.

Another point pressed upon us is that neither the pattadar nor the plaintiff had, according to the plaint, a demand served upon him, and that neither of them was a party to the proceedings held under the Act. It is true that the Collector is bound under Section 25 to cause a written demand to be served on the defaulter and that he can only proceed to recover the arrears under Section 26 by the attachment and sale of the land after the demand has been served on the defaulter, and he has neglected to pay the arrears pursuant to the terms of the demand; but, under Section 5, the Collector has power to sell the land when there is an arrear due upon it, and Sections 25 and 26 only regulate the mode in which that power is to be exercised. The omission to conform to the prescribed procedure is certainly always an irregularity and may also at

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times be a material irregularity, but I see no sufficent reason to say that the proceeding, however irregular it may be, is not a proceeding under the Act. A distinction should be made for purposes of limitation between a sale in fact and a valid sale; and whenever there has been a sale in fact and it has been made in the professed exercise of the power conferred by the Act, the provision inserted for the limitation of suits must be taken to refer rather to the *factum* than to the validity of the sale, and the sale, however irregular, must be considered to be a proceeding under the Act.

[177] It is then said that the plaintiff was not a party to the proceedings held under the Act, and that he could not be bound by the sale; but I am unable to accede to this suggestion either. It is provided by Section 38 that when land is purchased at a Revenue sale, the certificate of sale shall be conclusive evidence of the fact of the purchase, and by Section 39 that the legal effect of such sale is the lawful succession of the purchaser to all the rights and property of the former land-holder in the land sold. It is further enacted by Section 40 that any Court of competent jurisdiction shall put the purchaser in possession in the same manner as if the purchased land had been decreed to the purchaser by a decision of the Court. It is therefore clear that the intention of the Legislature is to seat the former land-holder as if he was a party, when a sale is held under the provisions of the Act.

The next contention is one founded on the Standing Order of the Board of Revenue, No. 109; construing it together with the provisions of Act II of 1864, I hold that it was designed to give a discretion to Collectors and thereby regulate departmental practice, but that it was not the intention to deprive them of the statutory power vesting in them under Act II of 1864, or to create a right to set aside a Revenue sale after it has been concluded, for the reason that it was held contrary to the terms of the departmental order.

With reference to the decisions cited on behalf of the appellant, none of them appear to me to support this appeal. Act XI of 1859 has no application in this Presidency, and the Full Bench decisions of the High Court at Calcutta in *Baijnath Sahu* v. *Lala Sital Prasad*, and in *Lala Mobaruk Lal* v. *The Secretary of State for India in Council*, are founded upon that enactment.

In the first case as sale was professedly made for arrears of revenue, and it was shown that there were no arrears; and the Court held that the Collector had no right to sell, and that it could not really be said to have been a sale under the Act, if the Collector had no right to make it. In the case before us, however, there was an arrear for which the plaintiff's land was liable to be sold.

The question raised for decision in the second case was whether non-compliance with the provisions of Section 6 of Act XI of 1859 was one of the errors of procedure intended to be cured by Section 8 of Bengal Act VII of 1868.

Mr. Justice Mitter and Mr. Justice Tottenham differed in opinion, the former holding that it was not an irregularity that **[178]** could be so cured, and the latter holding the contrary view. The Full Court held that the error was not a mere irregularity, nor one of those errors of procedure, which were intended to be cured by Section 8 of Bengal Act VII of 1868. The learned Chief Justice delivering the judgment of the majority of the Court observed that the sale was professedly held under the Act, but that the question was whether it was a sale under the Act, if the Collector had no right to sell, and that the principle laid down in

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Baijnath Sahu v. *Lala Sital Prasad* applied. It is therefore argued for the appellant before us, that whenever it can be shown that some material error of procedure negatives the Collector's right to sell, the sale, though professedly made under Act II of 1864, is not in law a sale or proceeding under the Act. The scheme of Act XI of 1859 and of Bengal Act VII of 1868 appears to differ from that of Madras Act II of 1864, and the decisions cited proceed, with reference to that scheme, on the view that the Civil Court is at liberty to entertain a suit to set aside the sale for arrears of revenue, if it can be shown that the Collector had no power to sell, either because there were no arrears, or because there was some material irregularity, which would invalidate the sale. If we were at liberty to enter on the merits, we might come to the same conclusion, but what we are concerned with is the question of limitation, which refers, as already observed, to the *factum* rather than the validity of the sale. (Compare Act XI of 1859 and the cognate Acts with Act II of 1864.) I do not see my way to hold that, for purpose of limitation, material error of procedure stands on the same footing with the absence of power to sell. A sale, without jurisdiction to sell, may, on general principles, be said to be void *ab initio*, and therefore, legally non-existent; but a sale, where there is power to sell, but the power is not properly exercised, is only voidable and cannot be said, it seems to me, to have no legal basis nor legal existence until it is set aside by a suit instituted within the time prescribed for such suits. As for the decision in *Sadhusaran Singh* v. *Panchdeo Lal*, it affirms the ruling in *Lala Mobaruk Lal* v. *The Secretary of State for India in Council* that Section 33 of Act XI of 1859, does not bar the Civil Courts from taking cognizance of suits in which it can be shown that the Collector has no right to sell.

[179] The next case relied on is that of *Venkatapathi* v. *Subramanya*. In that case there was really no arrear of revenue. The plaintiff there paid the assessment to the village officers who appropriated it to their own use, and making it appear that there was an arrear, when there was none, fraudulently brought the plaintiff's land to sale and purchased it for their own benefit, though in the name of the brother-in-law of one of them. The decision rests on the ground that the plaintiff was entitled upon the facts of that case to assume that the Revenue sale was valid as against the Collector and to claim relief against the parties in possession on the ground of fraud. There the purchaser at the Revenue sale did not buy the land for himself, but bought it benamee for the village officers, who first defrauded the plaintiff by converting the assessment paid to them on account of Government to their own use, then deceived the Collector first by making him believe that there was an arrear and that he had jurisdiction to sell the land, and next by putting forward the brother-in-law of one of them as the purchaser, while they really brought the land for their own benefit. On those facts the plaintiff's claim, it was considered, might be treated as one to treat the village officers as holding the land in trust for him by reason of their fraud and not as one brought to set aside the sale under Section 59 of ActII of 1864. On this view Article 95 of the general Limitation Act was considered to be applicable. It is therefore an authority for the position that if the plaintiff's claim can be decreed, in the special circumstances of a case, on the ground that the real purchaser, by virtue of his fraud in creating a jurisdiction to sell, when there is none, can be regarded as holding the land purchased in trust for the real owner, notwithstanding the Revenue sale, it is not a claim under the special Act, but a claim to relief on the ground of fraud governed

by Article 95 of Act XV of 1877. It is clearly no authority in support of the contention that a Revenue sale is no proceeding under the Act, when there was an arrear for which the land might be sold under the Act.

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The other cases cited are in favour of the respondents' contention

For these reasons I would hold that the suit before us is governed by the special limitation prescribed in Section 59 of Act II of 1864, subject to the provisions of Section 18 of Act XV of 1877.

KERNAN J.—I would add to the last paragraph "and that the suit should have been brought within six months from the discovery of the fraud."

[180] PARKER, J.—I agree that the suit is governed by the special limitation prescribed by Section 59. Madras Act II of 1864, for the reasons expressed by us in making the order of reference. The suit is therefore barred.

WILKINSON, J.—I concur.

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12 M. 180.

APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

ABBOY (*Plaintiff*), *Appellant v.* ANNAMALAI AND ANOTHER (*Defendants Nos.* 3 *and* 4), *Respondents.** [26th November and 18th December, 1888.]

Lis pendens—*Transfer of Property Act—Act IV of* 1882, *Section* 52—*When a suit becomes contentious—Priority of registered mortgage.*

As soon as the filing of the plaint is brought to the notice of the defendant, the proceeding becomes contentious, and any alienation subsequent to that is subject to the doctrine of *lis pendens.*

A mortgage was executed on 25th June and was registered. On the same day, prior mortgagees filed a suit against the mortgagors on an unregistered mortgage of the same land : they obtained a decree and attached the mortgage property :

Held, that the registered mortgagee was entitled to priority and his mortgage was not affected by the rule of *lis pendens.*

[F., 21 A. 408 ; 1 O.C. 281 ; 30 P.R. 1891 ; 80 P.R. 1903 (F.B.) ; R., 29 A. 339 (P.C.) =4 A.L.J. 329=9 Bom.L.R. 656=5 C.L.J. 563=11 C.W.N. 561=34 I.A. 102 =17 M.L.J. 263 ; 19 P.L.R. 1904; D., 31 B. 393=9 Bom.L.R. 530.]

APPEAL against the decree of E. C. Johnson, Acting District Judge of South Arcot, in Appeal Suit No. 209 of 1887, affirming the decree of V. Malhari Rau, District Munsif of Chidambaram, in Original Suit No. 553 of 1886.

This was a suit to recover Rs. 196-8-0 due on a registered mortgage-deed executed to the plaintiff by defendants Nos. 1 and 2 on 25th June 1884. Part of the consideration for the execution of this mortgage to the plaintiff was the discharge by him of a previous encumbrance. On the 4th September 1878, defendants Nos. 1 and 2 had executed a mortgage of the same lands to the father of defendants Nos. 3 and 4. This mortgage was unregistered. On the date of the execution of the registered [181] mortgage to the plaintiff, defendants Nos. 3 and 4 filed a suit—Original Suit No. 231 of 1884—on the unregistered mortgage of 4th September

* Second Appeal No. 647 of 188.

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1878; and subsequently having obtained a decree, attached the mortgage property in execution. The present plaintiff intervened in execution, but his objections were overruled. He accordingly filed the present suit against the mortgagors and the prior mortgagee.

Defendants Nos. 1 and 2 were *ex-parte.*

Defendants Nos. 3 and 4 pleaded, *inter alia*, that the plaintiff and defendants Nos. 1 and 2 had fraudulently colluded together to defeat their rights under the prior mortgage; that the plaintiff's mortgage had been executed *pendente lite*, and that they were accordingly entitled to priority in respect of their prior mortgage though unregistered.

The District Munsif observed:—"Defendants Nos. 3 and 4 made no attempt......to show there was any fraud in the transaction. On the other hand there is enough to make out that the plaintiff acted *bona fide* and with great circumspection.........I hold there was no collusion between plaintiff and defendants Nos. 1 and 2 to defraud defendants Nos. 3 and 4." The District Munsif, however, held that the rule of *lis pendens* was applicable, and passed only a personal decree against defendants Nos. 1 and 2 and dismissed the suit as against defendants Nos. 3 and 4.

The Acting District Judge affirmed the decree of the District Munsif.

The plaintiff preferred this second appeal.

Krishnasami, Ayyar, for appellant.

Pedroza, for respondents.

The arguments adduced on this second appeal appear from the judgment of the Court (COLLINS, C.J., and WILKINSON, J.).

JUDGMENT.

Three questions have been argued in second appeal. First, it is argued that the doctrine of *lis pendens* does not apply, as the suit does not become contentious until summons is served on the defendant; secondly, it is maintained that the plaintiff's suit as against defendants 3 and 4 should not have been dismissed, as even if defendants 3 and 4 have priority, the plaintiff would be entitled to a decree declaring his lien on the property subject to the mortgage of defendants 3 and 4. It is further argued that plaintiff is entitled to priority as he stands in the [182] shoes of a prior mortgagee. Both the Lower Courts have held that, as the plaintiff's mortgage-deed, Exhibit A, was executed on the day on which defendants 3 and 4 presented their plaint in Original Suit No. 231 of 1884, the plaintiff took subject to the decree passed in that suit. The question we have to decide is when does a suit or proceeding become contentious? The doctrine of *lis pendens* is that no alienation during suit can be allowed to affect the rights of those claiming under the decree in the suit. But in order that third parties should be bound by the decree passed in the suit it is, it appears to us, essential that they or that the parties through whom they claim should have had notice, for as remarked by Couch, C.J., in *Kailas Chandra Ghose* v. *Fulchand Jaharri* (1) practically there is no substantial difference between *lis pendens* and having notice of the suit. Until therefore defendants 1 and 2 had notice of the suit filed by defendants 3 and 4 to recover the amount due on the mortgage to their father, they were at liberty to transfer or create a further encumbrance on the property. It was apparently on this ground that a Bench of the Calcutta Court recently held in *Radhasyam Mohapattra* v. *Sibu Panda* (2) that a suit did not become contentious until the summons was served on

(1) 8 B.L.R. 474. (2) 15 C. 647.

the defendant. It may, of course, happen that the defendant will not contest the claim, but that does not really affect the question. So soon as the filing of the plaint is brought to the notice of the defendant, the proceeding becomes contentious, and any alienation subsequent to that is subject to the doctrine of *lis pendens*. In the present case, therefore, the plaintiff was not affected, and as his mortgage is registered, it has priority over the unregistered deed of defendants 3 and 4.

The decrees of the Lower Courts are, therefore, modified so far as the defendants 3 and 4 and the property comprised in their mortgage is concerned, and plaintiff will obtain a decree rendering the mortgaged property liable for the sum of Rs. 196-8-0 with further interest and costs in all Courts.

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12 M. 183.

[183] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

VENKANNA AND OTHERS (*Defendants*), *Appellants v.* AITAMMA (*Plaintiff*), *Respondent*.*
[30th August, 1888 and 15th January, 1889.]

Civil Procedure Code, Section 13—Res judicata—Declaratory decree—Maintenance suit, decree in—Annual payments.

A Hindu widow obtained a decree in 1876 which provided that she should receive future maintenance annually at a certain rate, but did not specify any date on which it should become due. In 1887 she filed the present suit claiming arrears of maintenance at the rate fixed in the decree of 1876;

Held, that the suit did not lie. *Sabhanatha* v. *Lakshmi* (I.L.R., 7 Mad., 80), distinguished.

[F., 22 M. 175; R., 4 M.L.J. 330.]

SECOND appeal against the decree of J. W. Best, District Judge of South Canara, in Appeal Suit No. 249 of 1887, affirming the decree of A. Vankataramana Pai, District Munsif of Mangalore, in Original Suit No. 25 of 1887.

This was a suit by a Hindu widow against the brother and nephews of her late husband to recover Rs. 392-2-0 as arrears of maintenance due up to December 14, 1886, at the rate of Rs. 110 per annum.

The above rate of maintenance had been determined in the decree passed by consent in a previous suit—Original Suit No. 39 of 1876. In that suit the plaintiff had claimed future maintenance as well as arrears of maintenance already accrued, and obtained a decree which provided that she should receive future maintenance at the above rate annually, but did not specify any particular date on which the annual payments were to be made. An application made by the plaintiff some years afterwards for the execution of this decree was rejected as being barred by limitation. In the present suit it was pleaded that the claim was barred by the law of limitation, and also that the claim was *res judicata* under Section 13 of the Code of Civil Procedure.

[184] The District Munsif held that the suit was not barred by the law of limitation, on the ground that twelve years had not elapsed since any part of the arrears became payable (Limitation Act, 1877, Schedule II,

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* Second Appeal No. 28 of 1888.

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Article 128), and that it was not affected by Section 13 of the Code of Civil Procedure. As to the latter point he said :—

"The claim for future maintenance was made and allowed by mutual consent of the parties, but the wording of the decree was defective in that it did not specify a 'certain date' *vide* Article 179 (6) of the Indian Limitation Act, 1877), for payment, and it was decided that the execution was barred. The omission to specify a date for payment deprived the plaintiff of the right to enforce such payment by process of execution upon the decree, but the right to maintenance has not been lost and may be enforced by a fresh suit *Sabhanatha* v, *Lakshmi*(1). This right was never denied, but has been established by the decree on the defendant's admission.

"Further, the decree was passed in terms of the compromise effected between the parties, and the fact that by those terms the parties did not choose (as since finally decided) to give the plaintiff the right to enforce annual payments on account on her maintenance *in the same suit*, does not amount to a determination by the Court on the merits negativing the existence of such right. Even when after trial of a suit, the Court declines to grant a decree for recovery of annual payments in execution in the same suit, but declares that the claimant possesses the right to such payments, there would be nothing to prevent a fresh suit for each year's amount."

The District Munsif accordingly passed a decree for the amount claimed and his decree was affirmed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. *Subramanyam*, for appellants.

This suit being a suit for arrears of maintenance, is not governed by *Sabhanatha* v. *Lakshmi* (1). The widow is precluded by the decree in original suit No. 39 of 1876 from suing a second time in respect of the same relief : that decree was not a declaratory decree. *Sanjeeviyah* v. *Nanjiyah* (2).

Ramachendra Rau Saheb, for respondent.

[185] The Lower Courts were right in regarding the decree of 1876 as a declaratory decree. *Vijaya* v. *Sripathi* (3), *Ruka Bai* v. *Ganda Bai*(4). The proper way to enforce the plaintiff's right to future maintenance established by that decree was to bring a fresh suit. *Vishnu Shambhog* v. *Manjamma* (5).

The further arguments adduced on this second appeal appear sufficient for the purpose of this report from the judgment of the Court (COLLINS, C. J., and SHEPHARD, J.).

JUDGMENT.

The defendants appeal against a decree allowing the plaintiff a sum of Rs. 454 on account of arrears of maintenance, which are claimed at a rate fixed by the decree in a former suit between the parties (Original Suit No. 39 of 1876). It is objected on behalf of the defendants that the plaintiff was precluded from bringing the present suit, because in the former suit she had prayed not only for arrears of maintenance, but also for maintenance at the same rate in the future; and it was argued that whether or not relief in respect of future maintenance was granted, the present suit would not lie, because in accordance with her prayer in the suit of 1876, she might have obtained a decree which she might

(1) 7 M. 80. (2) 4 M. H. C. R. 453. (3) 8 M. 94.
(4) 1 A. 594. (5) 9 B. 108.

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have put in execution as regards future arrears as they became due. It seems clear that in the former suit, she did ask for relief as to future maintenance and that it was intended to give her such relief, but unfortunately the decree was so drawn up, no date of payment being given, that it has been held that it is incapable of execution. It is contended for the plaintiff that the principle on which the defendants rely is inapplicable, because a Court trying a maintenance suit can only settle the rate of maintenance payable under the then existing circumstances, and cannot make a decree fixing the amount for ever afterwards. It is true that the decree in a maintenance suit is not final in the sense, that the rate fixed can never be altered. If there is a change in the circumstances of the family and the persons obliged by the decree, it may be that they are entitled to have the rate of maintenance reduced ; but it does not follow that a decree for future maintenance cannot be made, or that it is not final until the circumstances of the family are proved to have altered for the worse.

We think there is no doubt that such a decree may be made, and that when a person entitled to maintenance not contended **[186]** with asking for a declaratory decree has asked for a decree relating to future maintenance, he cannot thereafter bring a separate suit to recover arrears of maintenance. If his former decree has provided for payment periodically and is properly drawn up, he can recover arrears in execution. If his former decree has made no such provision or is not regularly drawn up, it must be either because the relief asked for has been refused or because some mistake has been made. In the former case his remedy is by appeal in the latter, which is the present case, he can obtain redress by review. The present case differs from *Sabhanatha* v. *Lakshmi* (1), for there it was a declaratory decree only that the plaintiff had obtained in the former suit, and the point now under discussion did not arise. We think the appeal must be allowed. The decrees of the Courts below must be reversed and the suit must be dismissed but without costs.

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12 M. 186.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

LUIS AND OTHERS (*Defendants in O.S. No.* 11 *of* 1888), *Petitioners* v. LUIS (*Plaintiff in O.S. No.* 11 *of* 1888), *Respondent.**
[23rd November, 1888.]

Civil Procedure Code, Sections 494, 588, 622—*No appeal lies against an order for issue of notice made under Section* 494—*Revision by High Court of an order purporting to be made on appeal from such an order.*

A petition praying for a temporary injunction in a suit was presented by the plaintiff in a Subordinate Court.

The Judge refused to pass orders on it without hearing the defendants, and ordered notice to issue to them. The plaintiff appealed to the District Judge who granted the injunction prayed for :

Held, that no appeal lay from the Subordinate Court, and that the District Judge had purported to exercise a jurisdiction not vested in him by law.

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* Civil Revision Petition No. 204 of 1888.

(1) 7 M. 80.

1888 Nov. 23. — APPELLATE CIVIL. — 12 M 186.

PETITION under Section 622 of the Code of Civil Procedure, praying the High Court to revise the order of J. W. Best, District Judge [187] of South Canara, dated 17th April 1888, and made on civil miscellaneous appeal No. 19 of 1888, presented against the order of C. Gopala Nayar, Subordinate Judge of South Canara, dated 7th April 1888, and made on civil miscellaneous petition No. 126 of 1888.

The plaintiff in original suit No. 11 of 1888 on the file of the Subordinate Court of South Canara preferred a petition, civil miscellaneous petition No. 126 of 1888, under Section 493 of the Civil Procedure Code, praying for the issue of a temporary injunction against the defendants in that suit. The Subordinate Judge on 7th April 1888 made the following order on the petition:—

"The case seems to be one of importance. I am disinclined to pass orders without hearing the other side. Notice for hearing on the 11th June."

The petitioner preferred an appeal to the District Court.

The District Judge on the 7th April 1888 made an order granting the temporary injunction which was subsequently varied by an order made by him on the 17th April 1888.

The respondents preferred this petition to the High Court under Section 622 of the Code of Civil Procedure.

Mr. *Subramanyam*, for petitioners.

Subba Rau, for respondent.

The Court (WILKINSON and SHEPHARD, JJ.) delivered the following

JUDGMENT.

We are of opinion that the Judge exercised a jurisdiction not vested in him by law, in that no appeal lay from the order of the Subordinate Judge. The Subordinate Judge, as required by Section 494, resolved, before granting the temporary injunction, to issue notice to the defendants. Such order was one made under Section 494, and there is no provision under Section 588 for an appeal from such an order. It is argued that inasmuch as the plaintiff stated that the object of granting the injunction would be defeated by the delay, the order of the Subordinate Judge was virtually an order refusing the prayer for an injunction and that therefore an appeal lay. We are unable to concede this. The order made by the Subordinate Judge was not the formal expression of his decision on the question, whether an injunction should be granted or not. A discretion is vested in the Court by Section 494 of refusing to grant a temporary injunction if satisfied [188] that the object of granting an injunction will not be defeated thereby, and no appeal is provided in case of his refusal. The orders of the Judge were, therefore, *ultra vires*, and we set them aside.

Petitioners will have their costs in both Courts.

12 M. 188.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

VENKATANARASIMHA (*Plaintiff*), *Appellant v.* SURYANARAYANA AND OTHERS (*Defendants*), *Respondents**.
[27th November, 1888 and 15th January 1889.]

Regulation XXV of 1802 (*Madras*), *Section* 11—*Regulation XXIX of* 1802 (*Madras*), *Sections* 5, 7, 10, 16, 18—*Suit for dismissal of a zemindari karnam—Jurisdiction.*

A suit by a zemindar for the dismissal of a zemindari karnam cannot be entertained by a District Munsif.

The Subordinate Court, and the District Court where there is no Subordinate Court, is the tribunal that has taken the place of the Court of Adawlut of 1802.

APPEAL against the order of G. T. Mackenzie, Acting District Judge of Kistna, made in Original Suit No. 22 of 18?7, directing that the plaint be returned to the plaintiff for presentation in the Court of the District Munsif

This was a suit field by a zemindar to obtain the dismissal of defendants who are karnams on his zemindari. The District Judge was of opinion that the Madras Regulations XXV and XXIX of 1802 contained nothing to oust the jurisdiction of the District Munsif within the meaning of Section 11 of the Code of Civil Procedure and observed :—

"I consider that the power to try such suits as this is given to Courts of Judicature generally, and that if the phrase Adawlut of the Zilla is used elsewhere in conection with the subject, it was not intended to restrict this jurisdiction to the District Court, but that the phrase is used merely as a synonym for Court of Judicature."

He accordingly made an order to the effect stated above.

Plaintiff preferred this appeal.

Mr. *Shaw*, for appellant.

[189] The District Court and not the District Munsif's Court is the successor of the Court of Adawlut. *Ramakistnam* v. *Ragavachari* (1) *Ramchandra* v. *Appayya* (2).

Narayana Rau, for respondents.

The suit should have been instituted in the District Munsif's Court under Section 15 of the Code of Civil Procedure. Such Courts are Courts of Judicature within the meaning of Madras Regulation XXIX of 1802, Section 5, which provides for the dismissal of karnams "by the sentence of a Court of Judicature"; and Madras Regulation VI of 1816, Section 12, did not affect their jurisdiction to entertain suits for dismissal of karnams. There is a decision of the Sadar Court precisely in point. *Cottaysami Taver* v. *Darasimaya* (3); *Ramachandra* v. *Appayya* (2) was a second appeal from a District Munsif, and the jurisdiction of the Munsif was taken for granted, as also in *Venkayya* v. *Subbarayudu* (4). *Ramakistnam* v. *Ragavachari* (1) only related to the infliction of fines on karnams, and *Ponnusami* v. *Kirishna* (5) turned on the construction of a different Regulation, Madras Regulation IV of 1816.

The further arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.)

* Appeal against Order No. 96 of 1888.

(1) 3 M. 405. (2) 7 M. 128. (3) Sadar Court Rulings, 1854, p, 108.
(4) 9 M. 283. (5) 5 M. 222.

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JUDGMENT.

The appellant, the zemindar of Nuzvid, sued for the dismissal of the respondents, karnams in his zemindari. He brought the suit in the District Court of Kistna, but the District Judge held that he had no jurisdiction to entertain it and ordered the plaint to be returned for presentation in the Court of the District Munsif. It is contended for the appellant that the District Court is the Court of competent jurisdiction. The contention appears to us to be well founded, whether regard is had to the course of legislation or of judicial decisions in this Presidency. The first Regulation on the subject is Regulation XXV of 1802. On referring to Section 11,* we see no reason to doubt that the Court designated as [190] competent to dismiss a zemindari karnam was the Adawlut of the Zilla or the Zilla Court. It is true that in two places in the same section the expression "A Court of Judicature" is used, but the sense in which that expression is to be understood is controlled by the direction contained therein as to the procedure to be followed by a zemindar when he has a cause of complaint against a karnam for breach of duty. The material words are: "The "zemindar shall be free to institute a suit in the Adawlut of the Zilla for "the purpose of bringing such karnam to trial and punishment, but where "a zemindar may deprive a karnam of his office without such previous "regular process, the zemindar shall be liable to make such satisfaction "for the injury as the Adawlut of the Zilla may decree." Reading, again, Sections 5, 7, 10, 16 and 18 of Regulation XXIX of 1802, the Adawlut of the Zilla appears to be the Court thereby intended to deal with the punishment or dismissal of karnams. We are unable to attach weight to the observation of the Judge that "the old Madras Regulations are loosely drawn, and it is doubtful whether any expression used in those regulations was used designedly, and that the draftsman appears to have varied his phrases or to have used synonyms without intending to convey an altered meaning." Observations such as these are at variance with the rules of judcial interpretation, which must govern the construction of enactments so long as they are in force, however loosely they may have been drawn. The next enactment, to which we may refer are Regulations I and VII of 1827, which constituted auxiliary Courts and Courts of Native Judges and invested them with the same power and authority within the limits assigned to their local jurisdiction, subject to the condition that they were not to try original suits of more than Rs. 5,000 in value,

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* *Section* 11.—"The zemindars or landholders shall support the regular and estab-"lished number of karnams in the several villages of their respective zemindaris.

"The karnams shall be appointed from time to time by the zemindars and shall "obey all legal orders issued by them; but the karnams shall not be liable to be "removed from their offices, except by the sentence of a Court of Judicature.

"Where a zemindar, or his under-farmers, tenants for raiyats, may have cause of "complaint against a karnam for breach of his duty, such zemindar shall be free to "[190] institute a suit in the Adalut of the Zila for the purpose of bringing such karnam "to trial and punishment; but where a zemindar may deprive a karnam of his office "without such previous regular process, the zemindar shall be liable to make such "satisfaction for the injury as the Adalut of the Zila may decree.

"Where a karnam may be dismissed from his office by the sentence of a Court of "Judicature, the zemindar shall in the first instance select a successor from the family "of the last incumbent, provided any member of that family be found capable of per-"forming the duty of karnam; but where no member of the family may be capable of "discharging the duty of karnam, in that case the zemindar shall exercise his discretion "in the appointment of a proper person. The name of the person appointed to suc-"ceed to the office of karnam shall be reported to the Collector of the Zila by the "zemindar."

and subject also to [191] certain other restrictions in the case of Native Judges, which it is not necessary to mention for our present purpose.

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By Madras Act VII of 1843, Zillah Courts were established under the designation of Civil Courts, and they were authorized to exercise the same civil jurisdiction as was exercised by the Provincial Courts of Appeal, which were then abolished, except that they were directed not to try original suits of less than Rs. 10,000 in value. In every district in which a Court was constituted under Regulation I or VII of 1827, it was authorized to take the place of the old Zillah Court in regard to suits for an amount or value less than Rs. 10,000, and there was no restriction placed upon its jurisdiction or power to entertain special suits, such as those for the dismissal of karnams, which had until then been cognizable by the Court of Adawlut or the former Zillah Court. Neither the Civil Courts Act nor Section 11 of the Code of Civil Procedure introduced any change in this respect. The conclusion to which we come is that the Subordinate Court and the District Court, where there is no Subordinate Court, is the tribunal that has taken the place of the Court of Adawlut of 1802.

In *Ramakistnam* v. *Ragavachari* (1) it was held that under Regulations XXV and XXIX of 1802, the Adawlut of the Zilla (now District Court) in the district of Trichinopoly was the Court competent to fine a zemindari karnam for breach of duty. The power to dismiss and to fine rests on the same provision of law. In *Ponnusami* v. *Krishna* (2) it was held by the Full bench of this Court that it was the Subordinate Court that was competent to exercise the special jurisdiction conferred on the old Zillah Courts by Regulation IV of 1816, Section 35, Clause 1. The decision in *Ramachandra* v. *Appayya* (3) is not in point, the question decided by it being that a shrotriemdar is not a zemindar or a proprietor within the meaning of Regulation XXV and XXIX of 1802. Nor is the case of *Venkayya* v. *Subbarayudu* (4) on all-fours with this case, the object of that suit being a declaration that a particular appointment made by a proprietor was invalid. The case of *Chandramma* v. *Venkatraju* (5) was also a suit for a declaration that an appointment made by a zemindar was in excess of his [192] authority. The course of decisions therefore does not support the opinion of the Judge.

We set aside his order and direct him to re-admit the plaint and deal with it in accordance with law. The costs of this appeal will be costs in the cause.

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12 M. 192 = 13 Ind. Jur. 176.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

NAGAPPA (*Plaintiff*), *v.* ISMAIL (*Defendant*). *
[28th January and 6th February, 1889.]

Limitation Act—Act XV of 1877, *Schedule II. Article* 75—*Bond payable by instalments—Default in payment of an instalment - Waiver of a condition of forfeiture on default in payment of one instalment—Acceptance of an instalment overdue.*

A bond, payable by instalments, provided that if default was made in paying one instalment the whole debt should become due. The amount of the third

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* Referred Case No. 15 of 1888.

(1) 3 M. 405. (2) 5 M. 222. (3) 7 M. 128.
(4) 9 M. 283. (5) 10 M. 226.

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instalment was paid five days after it became due. The Lower Court found that this payment was accepted by the obligee as a payment made on account or in satisfaction of the third instalment, and not as a mere part payment in reduction of the whole debt, and that the circumstances indicated an intention to waive the forfeiture though there was no express waiver:

Held, that the acceptance of the amount of the third instalment constituted a waiver within the meaning of Article 75 of Schedule II of the Limitation Act, 1877.

[F., 4 C.P.L.R. 21(25); R., 17 B 555; 20 B. 109 (116); 27 B. 1 (15); 32 M. 284=4 Ind. Cas. 38 (42)=19 M L.J. 372=5 M.L T. 351; 8 Ind. Cas. 510=9 M.L.T. 36 (39) =(1911) 1 M.W.N. 79 (82).]

CASE stated for the decision of the High Court under Section 617 of the Code of Civil Procedure by V. Subramanyam, District Munsif of Penukonda, in Small Cause Suit No. 122 of 1888.

The case stated is recited sufficiently for the purpose of this report in the judgment of the High Court.

The bond executed by the defendant to the plaintiff upon which the case arose ran as follows:—

"Bond dated 15th Makasudda of the year Vikrama, executed and given to Tadimari Mallappa, guardian of Namagundha Nagappa, by Gudhudi Fakir Saheb's son, Pedda Ismail Saheb, residing, in Jadala.

"The whole of the interest up to date in the matter of former account and bonds being deducted, the sum due in the matter of [193] principal is Rs. 55-14-0, in letters rupees fifty-five and annas fourteen. Particulars of instalments which were arranged:—

"Rs. 9-5-0, 15th Makasudda of Vishu.
,, 9-5-0, 15th Makasudda of Chitrabhanu.
,, 9-5-0, 15th Makasudda of Swabhanu.
,, 9-5-0, 15th Makasudda of Tarana.
,, 9-5-0, 15th Makasudda of Parthiva.
,, 9-5-0, 15th Makasudda of Vyaya.

"I bind myself to pay according to these instalments. If I fail to pay in that manner, and should I fail as regards any instalment, I bind myself to pay, without having reference to subsequent instalments, with interest at Rs. 1-8-0 per cent. per month from the date of the execution of the bond. I bind myself to get the payment entered only below this bond. The payments which are not entered in this bond shall not be accepted. To this effect is the bond executed and given with my consent.

"Mark of PEDDA ISMAIL.

"Witness to this—

"(Signed) KARNAM CHANNAPPA, witness.
"(Signed) MOVURAPPA, witness."

The bond bore the following endorsements, each being signed for the debtor:—

"Paid towards (the amount of) this bond on the 12th Makasudda of Vishu Rs. 9-5-0.

"Paid on 10th Makasudda of Chitrabhanu Rs. 9-5-0.

"Paid on the 5th Magha Bahula of Swabhanu towards this bond Rs. 9-5-0."

Act XV of 1877, Schedule II, Article 75, to which the question referred related, enacts that for a suit "on a promissory note or bond payable by "instalments, which provides that, if default be made in payment of one "instalment, the whole shall be due," the period of limitation is three years;

and, that the period begins to run "when the first default is made, unless "where the payee or obligee waives the benefit of the provision, and then "when fresh default is made, in respect of which there is no such waiver."

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The parties were not represented.

The Court (MUTTUSAMI AYYAR and WILKINSON, JJ.) delivered the following

JUDGMENT.

[194] This is a reference made by the District Munsif of Penukonda under Section 617 of the Code of Civil Procedure. The defendant executed in plaintiff's favour a bond for Rs. 55-14-0, payable in six equal annual instalments, commencing on the 15th day of Makasudda of the year Vikrama, corresponding to the 14th February 1881. The bond stipulated that, if default was made in paying any one instalment, the whole debt was recoverable at once with interest at 18 per cent. per annum. Four instalments were paid, and the payments of the first three were endorsed on the document. The third instalment was accepted on the 16th February 1884, five days after it had fallen due. It appears that the fourth instalment was also accepted when it was overdue, but its payment is not endorsed on the bond, nor evidenced by writing. The plaintiff sued to recover the fifth and sixth instalments alleging that fresh default had been made in payment of the fifth instalment. The suit was brought within three years from the date on which the fourth instalment fell due, but it would be barred if the cause of action is taken to have arisen when default was made in payment of the third instalment. Upon these facts, the question referred to us is, whether acceptance of an instalment in arrear amounts to a waiver within the meaning of Limitation Act, Schedule II, Article 75.

It is provided by Article 75 that time begins to run when the first default is made, unless where the payee or obligee waives the benefit of the provision (under which the whole debt becomes due), and then when fresh default is made, in respect of which there is no such waiver. It was held in *Papamma Row* v. *Toleti Venkaiya* (1) that if the obligee accepted one or more sums as an instalment or instalments due under the bond, such acceptance amounted to a waiver of the condition of forfeiture, and put an end to the cause of action which accrued, so that the bond was set up again as a bond payable by instalments. In *Satracherla* v. *Setarama* (2) it was observed that the clause providing for forfeiture of the right to pay the debt by instalments creates a case of election for the benefit of the creditor at each default, that the creditor may waive the benefit of the provision on each occasion, and that the question whether there is a waiver on any particular occasion is one of fact. It was also pointed out there that it must be ascertained whether **[195]** the payment was accepted on account of a specific instalment, so that an intention to waive the forfeiture might be inferred, or as a mere part payment of the balance due. According to the decisions, therefore, in this Presidency, the acceptance of a payment as the instalment in arrear under the bond and in its satisfaction is a waiver. It was similarly held in *Cheni Bazh Shaha* v. *Kadum Mundul* (3) that a waiver consists in the receipt of an instalment after due date instead of insisting on payment in full. The decision in *Gumna Dambershet* v. *Bhiku Hariba* (4) was passed with reference to Limitation Act XIV of 1859. It was

(1) 5 M.H.C.R. 198. (2) 3 M. 65. (3) 5 C. 97 (100). (4) 1 B. 125.

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12 M. 192 = 13 Ind. Jur. 176.

no doubt observed in *Mumford* v. *Peal* (1) that the abandonment of a right accruing on default and the revival of the right to pay the debt by instalments must be established by cogent evidence. In that case it was held that mere acceptance of a payment after a default had been made in the payment of an instalment was not sufficient proof of a waiver, because the acceptance of the payment was an act consistent as explained in *Satracherla* v. *Setarama* (2) with an intention to treat it as a part payment on account of the balance due. The mere acceptance of a payment after default in the payment of an instalment may not be sufficient, but when the payment is accepted on account of the specific instalment in arrear as contradistinguished from a part payment on account of the whole debt, there may be sufficient evidence of a waiver. Hence it was that this Court observed in *Papamma Row* v. *Toleti Venkaiya* (3), that the payment must be accepted as a payment on account of an instalment or instalments due under the bond. It is not necessary that the creditor should say expressly that he waives the forfeiture, but it is sufficient if from the amount paid and accepted and the circumstances attending the payment, and the conduct of the parties, an intention to set up the bond notwithstanding the default as one payable by instalments is unequivocally indicated. In the case before us, the District Munsif finds that the payment made after the third instalment had fallen due was accepted as a payment made on account and in satisfaction of the third instalment, and that an intention to waive the forfeiture is sufficiently indicated.

Our answer, therefore, to the question referred to us is that the **[196]** acceptance of the amount of an instalment in arrear on account or in satisfaction of such instalment and not as a mere part payment in reduction of the whole debt amounts to a waiver within the meaning of Act XV of 1877, Schedule II, Article 75.

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12 M. 196 = 2 Weir 519.

APPELLATE CRIMINAL.

Before Sir Arthur, J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

QUEEN-EMPRESS *v.* ARUMUGA AND OTHERS.*
[22nd November, 1888.]

Criminal Procedure Code, Section 297—*Evidence of accomplice—Corroboration—Misdirection to Jury.*

A Judge should caution a Jury not to accept the evidence of an approver unless it is corroborated: the omission to do so amounts to misdirection.

[R., 35 M. 397 (405) = 13 Cr.L.J. 352 (386) = 14 Ind. Cas. 896 (930) = 12 M.L.T. 1 (46) = 1912 M.W.N. 549 (595); 22 M.L.J. 490 (592) = 1912 M.W.N. 207.]

APPEAL against convictions by W. F. Grahame, Acting Sessions Judge of Tinnevelly, and a Jury, in Sessions Case No. 30 of 1888 on charges of dacoity, house-breaking by night, and theft in a building.

The Sessions Judge said to the Jury in the course of his charge:—

"Witnesses, 1. *Gangan Pujari*, 2. *Virasinnu*, 3. *Gurusami*, and 4. *Solai Nadan*, are the only witnesses for the prosecution whose evidence is of importance. Of those witnesses, the fourth *Solai Nadan*, is an approver.

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* Criminal Appeals Nos. 433 and 503 of 1888.

(1) 2 A. 857 (863). (2) 3 M. (65). (3) 5 M.H.C.R. 198.

According to the evidence of those witnesses, a band of twelve or thirteen men, among whom were the prisoners and witness 4, *Solai*, made their way into the inclosure of the temple of *Gangai Amman* near *Vepalapati*, tied the hands of witnesses 1, 2 and 3, unlocked the door of the temple with a key which first witness, *Gangan Pujari*, had, and stole from the temple cloths, money and other articles worth about Rs. 300.

1888 Nov. 22. — APPELLATE CRIMINAL. — 12 M. 196 = 2 Weir. 519.

"The men also took some ornaments which had been worn by *Gangan Pujari* and his mother and sister, who slept at the temple that night. They then fastened up in the temple witnesses 1, 2 **[197]** and 3 and the mother and sister of *Gangan Pujari*, and then made their escape. The property before the Court has been identified as part of the property stolen from the temple, and the approver, *Solai*, has pointed out the two bill-hooks and one brass pot as having been thrown into a well because none of the robbers would take them, and the other brass pot as having been taken by first prisoner. The seventh witness, Head Constable Subramania Pillai, has deposed that the bill-hooks and brass pot were found in the well. First witness Gangan identified only prisoners 3 and 4. Witness 2 Virasinnu, and third witness Gurusami identified only prisoners 1 and 3, and the complicity of prisoners 2 and 5 rests on the evidence of the approver alone."

The Jury returned a verdict of guilty against all five prisoners, and the Sessions Judge sentenced them to seven years' rigorous imprisonment.

The prisoners preferred this appeal.

Mr. *Norton* and *Anandacharlu*, for appellants.

The Acting Government Pleader (*Subramanya Ayyar*), for the Crown.

The Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

It is admitted by the Government Pleader that the case against the second and fifth prisoners rests substantially on the evidence of the approver, as the third witness for the prosecution did not mention the name of fifth prisoner when before the Magistrate.

The Sessions Judge should have cautioned the Jury not to accept the approver's evidence unless it was corroborated, and in our opinion it is misdirection not to do so. We set aside the conviction of the second and fifth prisoners and order them to be discharged.

As regards the first, third and fourth prisoners, there is other evidence corroborating the approver. We therefore confirm the conviction of the first, third and fourth prisoners, but we reduce the sentence to four years' rigorous imprisonment.

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FEB 5.

FULL BENCH.

12 M. 198
(F.B.).

12 M. 198 (F.B.).

[198] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

REFERENCE FROM THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.* [5th February, 1889.]

Stamp Act—Act I of 1879, *Section* 3 (11)—*Instrument professing to effect a partition ultra vires of the executants —Instrument of partition.*

Persons incorrectly purporting to be co-owners of certain property agreed to divide it in severalty by written documents:

Held, that the arrangement fell within the definition of "instrument of partition" in the Stamp Act, 1879.

CASE stated by the Board of Revenue and referred to the High Court under Section 46 of the Stamp Act, 1879.

The documents upon which the case stated arose ran as follows :—

"Deed of relinquishment of right executed by Sree Panuganti Sesharayanim Garu in favour of Sree Ravu Venkayamma Garu, wife of Sree Ravu Gopalaurayanim Garu, and inhabitant of Katrenulapalle, Padmanayakavelama (by caste) and inamdar, dated 22nd June 1887.

"Of the property which was given to your sister (my wife) Sree Panuganti Lakshmi Venkayamma Garu and to you by your mother, which was lent out to people, which was jointly held by the late Sree Panuganti Lakshmi Venkayamma Garu and you, and which consists of the valuable securities specified in the schedule, *viz.*, documents, bonds, notes, decrees and debts, I take the documents, bonds, notes, decrees and debts from No. 94 to No. 179 (both inclusive) shown in the list, and renouncing all rights I have through her to the remaining documents, bonds, notes, decrees and debts amounting to (valued at) Rs. 17,290-6-11, from No. 1 to No. 93 (both inclusive), I execute this deed of release in your favour. In the proceedings you may adopt [199] to recover the money on the documents, &c., so relinquished, neither I nor my heirs shall raise dispute of any description at any time.

"This deed of reliquishment of right is executed with my free will and consent.

"(Signed) SREE PANUGANTI SESHARAYANIM GARU."

"Deed of relinquishment of right executed by Sree Ravu Venkayamma Garu in favour of Sree Panuganti Sesharayanim Garu, inhabitant of Katrenulapalle, Padmanayakavelama (by caste), inamdar and son of Sree Panuganti Butchiah Garu, dated 22nd June 1887.

"Of the property which was given to my sister (your wife) Sree Panuganti Lakshmi Venkayamma Garu, and to me by our mother, which was lent out to people, which was jointly held by me and the late Sree Panuganti Lakshmi Venkayamma Garu, and which consists of the valuable securities specified in the schedule, *viz.*, documents, bonds, notes, decrees and debts, I take the documents, bonds, notes, decrees and debts, from item No. 1 to item No. 93, (both inclusive) shown in the list, and renouncing all rights I have to the remaining documents, bonds, notes, decrees, debts, amounting to (valued at) Rs. 16,906-9 5, from item No. 94 to item No. 179 as per list, I execute this deed of release in your

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Referred Case No. 16 of 1889.

favour. In the proceedings you may adopt to recover the money on the documents, &c., so relinquished, neither I nor my heirs shall raise dispute of any description at any time.

"This deed of relinquishment of right is executed with my free will and consent.

"(Signed) SREE RAVU VENKAYAMMA GARU."

The case was stated as follows :—

"The Board are not unanimous, and the case will, therefore, be submitted, under Section 46 of the General Stamp Act, to the Honorable the Judges of the High Court for decision.

"The facts are briefly as follows: a mother died leaving property to two daughters, who enjoyed it jointly; one daughter died and her husband quarrelled with the surviving daughter about the property; to stop such quarrelling, a division of the property was made between the surviving daughter and the deceased daughter's husband, which is evidenced by the two documents, the nature and liability of which to duty are the matters now under discussion.

[200] "The documents are counterparts of each other and run as follows :—

"Deed of relinquishment of right of the property which was given to {my sister and me / my wife and you} by {our / your} mother, which was held jointly by {my sister and me / my wife and you} I take from No. {1-93 / 94-179} on the accompanying list, and renouncing all rights I may have to the remainder, execute this deed of release in your favour."

(Signed)

"The first question is, can the two documents be read together? The Board think not.

"The second is, individually, what are they? On the face of them, they are releases, and the Board think that it is only by what they purport outwardly to be that they can be judged for purposes of stamp-duty.

"If once the question of their legal validity is entered on, the matter becomes more complicated; for the husband having no right to the property can execute no valid 'release,' and the surviving daughter's 'relinquishment of right' in his favor becomes a gift.

"At the same time each document contains an acceptance as well as release, and, *prima facie*, this is a partition; and it is only when the legality of the matter is gone into that it is seen that the two parties are not co-owners.

"Taken together, the two documents evidence a partition; taken singly, they evidence a release; legally, only one of them is of any effect, and that is as a gift.

"The point, therefore, upon which the Board are in doubt is as to the extent to which they are justified, for purposes of assessment to stamp-duty, in going behind the outward purport of a document, and considering its actual legal validity, whether by itself, or taken in connection with others, and they accordingly refer, for the decision of the High Court, the question how the documents ought to be stamped."

The Acting Government Pleader (*Subramanya Ayyar*), for the Board of Revenue.

Subba Rau, contra.

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FULL BENCH.

12 M. 198 (F B.).

[201] The Full Bench (COLLINS, C.J., MUTTUSAMI AYYAR, PARKER and WILKINSON, JJ.) delivered the following

JUDGMENT.

Although the documents are styled releases, we are of opinion that they are really instruments of partition.

The parties purport to be co-owners of the property and in that capacity agree to divide the property in severalty.

This arrangement falls within the definition of "instrument of partition" in Clause 11, Section 3 of the Stamp Act.

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12 M. 201.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS *v.* SOBHANADRI.* [11th February, 1889.]

Criminal Procedure Code, Section 195—*Sanction to prosecute—Registration Act—Act III of* 1877, *Sections* 34, 35, 41—*Forged document—Registered by Sub-Registrar.*

A mortgagor was charged with making a fraudulent alteration in his mortgage-deed which was then registered by a Sub-Registrar:

Held, that the sanction of the Sub-Registrar was not necessary for a prosecution on a charge of forgery.

Venkatachala, in re (I.L.R., 10 Mad., 154), *Queen-Empress* v. *Subba* (I.L.R., 11 Mad., 3) explained.

[F., 4 M.L J. 189 (192).]

CASE reported for the orders of the High Court by W. A. Happell, District Magistrate of Godavari, under Section 438 of the Code of Criminal Procedure.

Rallabhandi Sobhanadri was charged in the Court of the Sub-Magistrate of Kothapetta with committing forgery by fraudulently altering a mortgage-deed. The mortgage-deed was subsequently registered. The question arose whether the Magistrate had jurisdiction to take cognizance of the offence for want of sanction under Section 195 of the Code of Criminal Procedure.

The case was stated as follows:—

"The complainant, Tadigadapa Gopalakrishnamma, who attested a mortgage deed executed by the accused Rallabhandi Sobhanadri, on 30th October 1888, in favour of Vogeti Ramakrishnayya, asserts that, after the deed was executed, but before it was registered, the [202] accused struck out the words 'Tadigadapa Gopalakrishnamma Garu's inam,' and inserted the words 'my inam field' instead, that he did so with a dishonest intention, *viz.*, to assert his claim to field 557 which belonged to the complainant, and that he thereby committed forgery. This mortgage-deed has been registered by the Kothapetta Sub-Registrar; and if a Sub-Registrar is a Court within the meaning of Section 195 of the Code of Criminal Procedure, then the Sub-Magistrate had no power to entertain the complaint without the Sub-Registrar's sanction.

"In 1881 Mr. Justice Innes decided that a Sub-Registrar is not a Court (see Weir's Criminal Rulings, 1882, page 400). A few years later a

* Criminal Revision Case No. 34 of 1889.

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Divisional Bench of the High Court in *Queen-Empress* v. *Subba* (1) decided that a Sub-Registrar is not a Court. In 1886, another Divisional Bench of the High Court in *Venkatachala, in re* (2) decided that a Sub-Registrar is a Court. The latest ruling, however, is that of the Bombay High Court in *Queen-Empress* v. *Tulja* (3), and they ruled that a Sub-Registrar is not a Court within the meaning of Section 195 of the Code of Criminal Procedure. My own opinion is that a Sub-Registrar is not a Court. That was the opinion I held in 1886 and which I communicated to the Mayavaram Sub-Magistrate, who, in consequence, committed a certain forgery case to the Tanjore Sessions; but that opinion was overruled by Brandt and Parker, JJ., in *in re Venkatachala*. Their ruling, though the latest passed by the Madras High Court is opposed to two previous rulings of the same Court and to a ruling of the Bombay High Court. I therefore request that the question be referred to the High Court for an authoritative ruling."

Counsel were not instructed.

The further facts appear from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

JUDGMENT.

The decision of Turner, C. J., and Hutchins, J., now reported in *Queen-Empress* v. *Subba* (1), was not overlooked in the case *in re Vencatachala* (2), but the ground on which it was distinguished was that in the earlier case, the Sub-Registrar was acting under part VI (Sections 34-35) of the Registration Act and in the latter case under part VIII (Section 41).

[203] In the former case, the Sub-Registrar could not determine whether or not the document was executed, and if execution was denied, he was obliged to refuse registration. The document could hardly therefore be said to be given in evidence before him by a party to any proceeding; whereas in the latter case (that of a will), Section 41 makes it incumbent upon the Sub-Registrar to satisfy himself that the document has been really executed by the testator, and the document has to be given in evidence before him in a proceeding in which the Sub-Registrar has to determine whether it shall or shall not be registered. A Sub-Registrar acting under Section 41 is exercising similar powers to a Registrar acting under Sections 73-75, as to which see High Court Proceedings, 12th May, 1881, No. 962 (4). We think, therefore, the Joint-Magistrate is in error in saying that the two rulings of this Court are in conflict, though we agree with him that in the case under reference, the sanction of the Sub-Registrar is not necessary. The Bombay case, *Queen-Empress* v. *Tulja* (3), is no doubt in conflict with the Madras decision *in re Venkatachala*, it may be well if the point again arises that the question should be reconsidered.

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(1) 11 M. 3. (2) 10 M. 154. (3) 12 B. 36.
(4) Weir's Criminal Rulings, 3rd ed., p. 844.

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FULL BENCH.

12 M. 203 (F.B.) = 1 Weir 758.

12 M. 203 (F.B.)=1 Weir 758.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

REFERENCE UNDER SECTION 39 OF ACT V OF 1882.*
[11th September, 1888 and 15th February, 1889.]

Forest Act—Act V of 1882 *(Madras), Section* 6—*Tree patta—Occupier of land.*

The holder of a tree *patta* is a *known occupier of land* within the meaning of Section 6 of the Madras Forest Act.

[F., 12 M. 226 (228); R., 21 M. 433 (466); 36 M. 148 (149)=22 M L.J. 201 (203)= 10 M.L.T. 488=(1911) 2 M.W N. 532.]

CASE stated for the opinion of the High Court by G. Mac Watters, Collector of Salem, under Section 39 of the Madras Forest Act.

This case depended on the construction of the last clause of Section 6 of the Madras Forest Act. The question referred was whether Madhava Rau and eleven others, who held a joint *patta* with him of certain tamarind trees, were entitled to be served with a notice [204] to the same effect as the proclamation made by a Forest Settlement officer on a notification of Government under Section 4.†

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* Referred Case No. 3 of 1887.

† *Section* 4 : "Whenever it is proposed to constitute any land a reserved forest, the Governor-in-Council shall publish a notification in the Fort St. George Gazette and in the Official Gazette of the district—

(*a*) specifying, as nearly as possible, the situation and limits of such land ;
(*b*) declaring that it is proposed to constitute such land a reserved forest ;
(*c*) appointing an officer (hereinafter called the Forest Settlement officer) to enquire into and determine the existence, nature and extent of any rights claimed by, or alleged to exist in favor of, any person in or over any land comprised within such limits, or to any forest produce of such land, and to deal with the same as provided in this chapter.

The officer appointed under clause (*c*) of this section shall ordinarily be a person other than a forest officer; but a forest officer may be appointed by the Governor in Council to attend on behalf of Government at the enquiry prescribed by this chapter."

Section 6 : "When a notification has been issued under section 4, the Forest Settlement officer shall publish in the Official Gazttte of the district, and at the head-quarters of each taluk in which any portion of the land included in such notification is situate in every town and village in the neighbourhood of such land, a proclamation—

(*a*) specifying, as nearly as possible, the situation and limits of the land proposed to be included within the reserved forest ;
(*b*) setting forth the substance of the provisions of section 7 ;
(*c*) explaining the consequences which, as hereinafter provided, will ensue on the reservation of such forest ; and
(*d*) fixing a period of not less than three months from the date of publishing such proclamation in the Official Gazette of the district and requiring every person claiming any right referred to in section 4, either to present to such officer, within such period, a written notice specifying, or to appear before him within such period and state the nature of such right, and in either case to produce all documents in support thereof.

The Forest Settlement officer shall also serve a notice to the same effect on every known or reputed owner or occupier of any land included in or adjoining the land proposed to be constituted a reserved forest, or on his recognized agent or manager. Such notice may be sent by registered post to persons residing beyond the limits of the district in which such land is situate."

The *pattadars* in question, not having been served as above, did not assert their claim till after the expiry of the time fixed in the proclamation. Subsequently, however, the following application was made :—

"There is a tree patta for 11 tamarind trees in Naralapulli village. These trees were held on *patta* and enjoyed for the last 6 years by my brothers Srinivasa Row and Hanumantha Row, and, after them, by their sons Vyasamurthi Row and Vencoba Row and were leased for 5 years from 1884 to one Thammana Chetti of Chinna Mekalapully.

[205] "Now I hear that the trees have been included in the Maharajagadai Reserve, and I was also told by the lessee when I had been to Maharajagadai a few days ago, that it was decided by your honor that the lessee should enjoy the trees until his lease expired, and that then the tope should be included in the Government reserve. The Government accounts and village officers will prove that my brothers and others held the *patta*, and we enjoyed the trees for the last 60 years. I request that an enquiry be made and the tope in question confirmed as per *patta* and excluded from the reserve. I don't know, perhaps, the time for the preference of a claim expired or did not expire as I was given no notice in the matter. I only casually came to know of this affair when I had been to Maharajagadai. I therefore request that my claim may be admitted under Section 17 of the Forest Act and disposed of in the regular way."

On the 15th November, 1886, the Forest Settlement Officer passed the following order :—

"Claimant is not entitled to have any notice served on him under the Forest Act, as he does not own or occupy land in the reserve. It is possible that the facts stated in his petition are true, as is partly proved by the evidence on record in the claim No. 279 of 1886. As the time for preference of claims has now expired, I cannot entertain his claim; he will have to satisfy the Collector or District Forest Officer hereafter that his claim is a just one, which fact no doubt the village accounts will prove, but I cannot now entertain the claim. He should also keep this endorsement."

An appeal against this order was preferred to the Collector of Salem, who referred for the opinion of the High Court the question whether "a notice should have been served on Madhava Rau and his joint *pattadars* in respect of the tamarind trees for which they hold a joint *patta*."

Under this reference the High Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

JUDGMENT.

"The facts of the case are sufficiently stated in the letter of reference. "Act V of 1882 (Madras), Section 2, explains that 'trees' include stumps, "bamboos, and brushwood, and that 'timber' includes trees when they "have fallen or have been felled, whether cut up for any purpose or not; "but there is no definition of land, or of a tree which continues to derive "nourishments from the land. The Madras General Clauses Act contains "no definition of land, and the General Clauses Act, 1868, is in "**[206]** terms, applicable only to Acts of the Governor-General in Council. "One of the objects of the Madras Forest Act is to provide a special "tribunal and procedure for the adjudication of civil rights of a particular "class; and having regard to the provisions of the General Clauses Act, "we have already held that for the purposes of the Code of Civil Procedure

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"land includes standing crops (1). We understand the right claimed by "the petitioner to include a right to the site on which the trees stand as "well as their produce.

"We are of opinion then that the holder of a tree *patta* is an owner or "occupier of land within the meaning of the last clause of Section 6 of the "Forest Act. We express no opinion as to the effect of the words 'known "or reputed' owner or occupier in that section as they do not form the sub-"ject as reference."

With regard to the sentence at the end of the first paragraph of the above judgment the Collector of Salem was directed to explain the matter more particularly and to make a further reference to the High Court.

These directions were contained in an order of Government (made on certain proceedings of the Board of Revenue), dated 21st November 1887, in which it was said :—

"In Government Order No. 51, Revenue Department, dated 20th January 1887, it was held that the so-called "tree *pattadars* are mere lessees of trees and not owners or occupiers of land" and not therefore entitled to separate notices under Section 6 of the Forest Act.

"Government can give and frequently have given separate *pattas* to different persons for the cultivation of the land on which trees stand and for the enjoyment of the produce of the trees themselves. Under Board's Standing Order No. 6 (8) the tree *pattadar* has only a "preferential claim" to a *patta* for the land, if applied for by another for cultivation. The tree *patta* merely gives the *pattadar* a right to certain specific "forest produce," and this, of course, carries with it the right of access. A right to forest produce is placed on the same level in the Act (Section 11) as rights of way, water-course and pasture ; but it has never been contended that persons having these latter rights are, as [207] such, entitled to separate notices. The proclamations in the villages and Gazette are intended to give them notice."

In his further letter of reference, the Collector quoted circular orders of the Board of Revenue, dated 21st April 1858 and 28th April 1859, respectively, and the proceedings of the Board of Revenue, dated 27th March 1868, and proceeded to say :—

"In Malabar, Tanjore and Tinnevelly the tree *patta* carries with it the right to the land on which the trees stand, when in these districts the tree tax is considered a substitute for the land assessment, and in all districts, whenever the tree assessment is nearly equal to or exceeds the land assessment, the holder of the tree *patta* enjoys also the land.

"It was only in 1887 that the tree tax was finally decided to be credited to the Forest Revenues at all. This is now done in all cases except where it is a substitute for the Land Assessment. Before that it was credited to Land Revenue, and in later years that on trees on waste to the Jungle Conservancy Fund. The Board of Revenue in the discussions that took place about this matter in October 1886 stated 'that a 'very real distinction underlay the question of whether trees were cut 'down or were allowed to stand ; that in the latter case the trees them-'selves formed the actual crop on the land, and that the rent paid for 'them was in effect the land tax due on the land.' That claims to the rights of a tree *pattadar* were intended by the Legislature to be disposed of under the head of Forest Produce seems to me to be very inconsistent with the fact above stated, *viz.*, that the tax on *patta* trees was only

(1) Madayya *v.* Venkata, 11 M. 193.

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decided to be credited to Forest about a year ago. The forest produce referred to in Section 10 of the Forest Act appears to me to be the forest produce properly so called and as administered before the Forest Act came into force, *e.g.*, honey, wax, bamboos, galnuts, &c.

"I am of opinion that the ordinary tree *patta*, that is a *patta*, without conditions as in this case, gives the tree *pattadar* an interest in the site on which the trees stand, and that he is at the very least an occupier of such site and entitled to a special notice under Section 6 of Madras Act V of 1882."

The renewed reference having come on for hearing before Kernan and Muttusami Ayyar, JJ., the matter was referred to the Full Bench by the following

ORDER OF REFERENCE TO THE FULL BENCH.

We said in [208] our previous order that we understood the right claimed by the petitioner to include a right to the site on which the trees stand as well as their produce. This is said to be a false or erroneous assumption both by the Government and the Board of Revenue. They do so on two grounds: the first is that the tenure evidenced by tree *pattas* does not include a right to their site, and the second is that the right to the produce does not stand on a higher footing than the forest produce referred to in Section 10 of the Forest Act. It is no doubt true that the Forest Act does not contemplate the issue of a separate notice in respect of right to mere forest produce. The questions we shall have tocon sider are—(1) Whether a tree *pattadar* is a mere usufructuary without an interest in the soil, regard being had to the special tenure evidenced by such *pattas*. (2) Whether the right to the produce of the trees is a right to forest produce or in the nature of such right within the meaning of the Forest Act. Of course the opinions of Government and of the Board of Revenue are not binding upon us, but the question is one of considerable general importance, and the questions were neither fully argued nor considered. It is desirable to allow them to be fully argued on both sides and given an authoritative decision once for all. In order that the decision may be authoritative, it is desirable to have the matter argued before a Full Bench, including a Judge who has had a practical knowledge of the special tenure.

The Acting Government Pleader (*Subramanya Ayyar*) for the Crown.

The tree *pattadar* is not an owner or occupier within the meaning of Section 6 of the Forest Act and is not entitled to specific notice of the proclamation or notification. Specific notice is only required for owners or occupiers, not for those who have rights to forest produce as referred to in Section 10. It is only under that section that the Collector could entertain the appeal. Section 2 includes trees under forest produce, and therefore the tree *pattadar* is one of those persons whose claims have to be dealt with under Section 11. He has no right to the site. Thus the Board of Revenue say in their Order, upon which the further reference has been made:—

"Collectors are authorized to grant tree *pattas* or permanent tree-rent licenses for scattered trees standing in unoccupied waste land, the *pattadar* to pay tree-tax at the revised rates, and to have the usufruct of the trees with the right of transfer or alienation, [209] but to have no power to fell without permission. When an application or darkhast is made for waste land containing scattered trees which are held separately in this way, the holder of the trees is to be offered the first choice of taking the

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land at the *tarum* assessment. The tree tax is here credited to Land Revenue, Miscellaneous."

It also appears from the terms of the reference that the tree *pattadar* cannot fell the trees without permission, and if any one applies for the land on which the trees stand he is required either to take the land or to submit to eviction. He may have an interest in immoveable property, but not necessarily an interest in land. Though the tree *pattadar* may have a right in or over land comprised within the limits of a forest, still he has only a right to forest produce and cannot be regarded as the owner and occupier within Section 6.

The Full Bench (COLLINS, C.J., MUTTUSAMI AYYAR, PARKER and WILKINSON, JJ.) delivered the following

JUDGMENT.

This is a case referred to the High Court under Section 39 of the Madras Forest Act by the Collector of Salem, and the question for the Full Bench is whether the holder of a tree *patta* is an owner or occupier of land within the meaning of the last clause of Section 6 of the Forest Act. The Collector states his opinion—though with some hesitation—that the holder of the tree *patta* does fall within the section, but the Acting Government Pleader has been instructed to argue against this view.

It is urged for Government that the holder of a tree *patta* has only a right to forest produce [Section 10, Clause (*d*)], and that his claim can only be dealt with under Sections 11-13 of the Forest Act. On the other hand the Collector is of opinion that a tree *patta* gives the *pattadar* at any rate an interest as occupier in the site on which the trees stand.

It appears to us that the view of the Collector is correct. In *Sukry Kurdeppa* v. *Goondakull Nagi Reddi* (1) it was held that a document creating a right of use of growing trees for a term of years was an interest in immoveable property within the meaning of the Registration Act. The owner of a tree *patta* has it seems to us more than a mere right of access to gather the fruits of trees [210] found in a forest (see definition of forest produce, Section 2*); he has an interest during the continuation of his *patta* in the tree itself, and in all that is necessary for the growth of the tree including the soil in which it grows. Such interest, though far inferior to the interest of the owner or lessee of the soil, is still an interest in land.

In our view the class of rights referred to in Section 10, clauses (*a*) to (*d*), of the Forest Act are village communal rights. With regard to these it is reasonable that the Legislature should have provided that notice of the intention to acquire them should be made by public proclamation since it would be almost impossible to serve a separate notice upon every person interested; but the Legislature has been careful to provide that a separate notice shall be served upon every *known* or *reputed* owner or occupier of land, and the holder of a tree *patta* in a village is certainly, *quoad* his right to the trees in his *patta*, a *known* occupier.

This view can be tested by a precisely similar case in which there could be no doubt that a lease of what is defined as forest produce is an

(1) 6 M.H.C.R. 71.

* " 'Forest produce' includes the following things when found in or brought from "a forest (that is to say)—minerals (including limestone and laterite), surface-soil, "trees, timber, plants, grass, peat, canes, creepers, reeds, fibres, leaves, moss, flowers, "fruits, seeds, roots, galls, spices, juice, catechu, bark, caoutchouc, gum, wood-oil, "resin, varnish, lac, charcoal, honey and wax, skins, tusks, bones and horns."

interest in land. If for instance there was a gravel quarry within the limits of land taken up as a reserved forest which had been leased to a contractor for a term of years, there could not be a doubt that that contractor was a known occupier of land within the meaning of Section 6 and entitled to a special notice. Yet surface soil is forest produce within the meaning of Section 2. Our answer to the reference is that the holder of a tree *patta* is a known occupier of land within the meaning of Section 6 of the Forest Act.

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[211] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

BIYYAKKA AND OTHERS (*Appellants*) *v.* FAKIRA AND OTHERS (*Respondents*).* [14th February, 1889.]

Civil Procedure Code, Sections 234, 332, 588—*Death of judgment-debtor between order for possession in execution of decree and delivery of possession—Appeal against appellate order reversing an order under Section* 332.

A decree-holder in a District Munsif's Court obtained an order for possession of land in execution of his decree on 20th August, on which day the judgment-debtor died. Possession was delivered on 28th August. The persons dispossessed presented a petition under Section 332 of the Code of Civil Procedure disputing his right to be put into possession, on the ground, *inter alia*, that the judgment-debtor was not represented on the record;

On appeal against the appellate order of the District Judge :

Held, assuming that the order for possession was made prior to the death of the judgment-debtor, there was no necessity for the decree-holder to bring any other person on to the record between the date of that order and the date on which the order was executed. *Ramasami* v. *Bagirathi* (1) distinguished.

[D., 7 M.L.T. 270=5 Ind. Cas. 339.]

APPEAL against the order of R. Sewell, Acting District Judge of Cuddapah, on civil miscellaneous appeal petition No. 206 of 1887, reversing the order of A. F. Elliot, District Munsif of Cuddapah, on civil miscellaneous petition No. 443 of 1887.

This was a petition presented under Section 332 of the Code of Civil Procedure by three persons alleging that they had been dispossessed of certain immoveable property belonging to them, in execution of the decree passed in original suit No. 49 of 1887 to which they were not parties.

The plaintiff, in whose favour the decree was passed, obtained an order for possession of the immoveable property in question on 20th August 1887, on which day the judgment-debtor died. Possession was given to the decree-holder in pursuance of the above order, on 28th August, no steps having been taken in the interval for the representation of the interests of the deceased [212] judgment-debtor. On the 23rd September the present petition was filed.

The District Munsif held on the authority of *Ramasami* v. *Bagirathi* (1) that the legal representative of the deceased judgment-debtor should have been brought on to the record before the decree was executed, and accordingly directed that the petitioners should be replaced in possession.

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* Appeal against order No. 73 of 1888.

(1) 6 M. 180.

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The decree-holder filed a petition of appeal to the District Court against this order under Section 588 of the Code of Civil Procedure, and the District Judge made an order thereon reversing the order of the District Munsif, and remanded the petition for disposal on the merits observing:—

"The final order to put plaintiffs in possession was passed during the lifetime of the debtor, and no further order was required. Section 234 is permissive not mandatory. The decree-holder 'may' apply, not 'shall' apply, for execution against his representatives.

"I think the observations of Oldfield, J., in *Stowell* v. *Ajudhia Nath*(1) apply. Section 234, Civil Procedure Code, enables the holder of a decree, if a judgment-debtor dies before the decree has been fully executed, to apply to the Court which passed it to execute the same against the legal representative of the deceased; but if the section is applicable to a case where the judgment-debtor dies while execution is proceeding and after sale of property has been ordered, there is nothing in it to imply that the sale is absolutely void, if no legal representative has been brought on the record, when it has been made on the authority of a Court having jurisdiction."

The petitioner's preferred this appeal against the order of the District Judge.

Subramanya Ayyar, for appellants.

Sivagnana Mudaliar, for respondents.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and WILKINSON, J.).

JUDGMENT.

The question raised by the appellants' pleader for determination is whether the decree-holder was bound to bring on the record the representatives of the deceased judgment-debtor [213] before possession was given to him. The order for possession was passed and the judgment-debtor died on the 20th August. The warrant was executed and possession given to the judgment-creditor on the 28th August. The persons in possession then came in under Section 332, Civil Procedure Code, claiming to be in possession on their own account. The District Munsif, instead of following the procedure laid down by Section 332, held that the legal representative should have been brought in before application was made for execution, and set aside the order for delivery, directing possession to be given to the claimants. On appeal the District Judge reversed the order of the Munsif. His order was right, but the grounds given for his order were wrong. The Munsif was bound to proceed to investigate the matter in dispute, and if he then found that the claimants were in *bona fide* possession of the property on their own account or on account of some person other than the judgment-debtor, he could have made an order for restoration of the property. Section 234 had nothing to do with the case, as we must take it that the order was passed before the death of the judgment-debtor. So far as the judgment-creditor was concerned, he obtained an order for possession prior to the death of the judgment-debtor, and there was no necessity for him to bring any other person on the record between the date of that order and the date on which the order was executed. He had nothing further to do unless he wished to bring in the legal

(1) 6 A. 255.

representatives of the judgment-debtor. It was for the Court to execute the order passed, and Section 332 provides the remedy appropriate to the present case. Under these circumstances the rule in *Ramasami* v. *Bagirathi* (1) is not in point. The appeal fails and is dismissed with costs.

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12 M. 214.

[214] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MUTTUKANNU (*Plaintiff No.* 2), *Appellant v.* PARAMASAMI AND OTHERS (*Defendants*), *Respondents.**

[20th July, 1888, and 21st January and 4th March, 1889.]

Hindu Law—Dancing girl caste—Adoption—Plurality of adoptions—Immoral or illegal purpose of adoption.

As a matter of private law, the class of dancing women being recognised by Hindu law as a separate class having a legal status, the usage of that class in the absence of postive legislation to the contrary regulates rights of status and of inheritance, adoption and survivorship.

A dancing woman adopted two daughters, of whom the latter was adopted in the year 1854. It was found that the custom obtaining among dancing women in Southern India permits plurality of adoptions:

Held in second appeal, that the daughter subsequently adopted succeeded to the adoptive mother in preference to the son of the daughter previously adopted.

[R., 19 M. 127 (136).]

SECOND appeal against the decree of C. Venkobacharyar, Subordinate Judge of Madura (West), in appeal suit No. 439 of 1886 reversing the decree of V. Kuppusami Ayyar, Additional District Munsif of Madura, in original suit No. 531 of 1885.

A dancing woman named Minal hypothecated her house to defendant No. 1, who, having sued and obtained a decree on the hypothecation deed, brought the house to sale in execution, and became the purchaser. He subsequently sold one moiety of the house under Exhibit A to Minal herself and the other moiety under Exhibit IV to defendant No. 2, who was the son of a deceased daughter by adoption of Minal. Exhibits A and IV were executed on the same day.

This suit was brought by Minal against the three defendants (of whom the third was asserted to have joined with the second in obstructing Minal in the exercise of her rights) to establish, *inter alia*, her right to have access to the room set apart for the worship of the family idol in the moiety of the house which was in the possession of defendant No. 2, and to obtain a decree directing defendants Nos. 2 and 3 not to interfere with such right, and to [215] remove the obstruction caused by them to its exercise. Defendant No. 1 was *ex parte*.

During the progress of the suit Minal died, and both defendant No. 2 and one Muttukannu claimed to be her legal representatives, the former by reason of the relationship referred to above, and the latter as being herself an adoptive daughter of the deceased plaintiff. Both the District Munsif and the Subordinate Judge held that Muttukannu's claim to represent Minal was superior to that of defendant No. 2, but they differed

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* Second Appeal No. 838 of 1887.

(1) 6 M. 180.

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on the construction of the sale deeds, Exhibits A and IV. The District Munsif considered these documents reserved to Minal the right claimed by her, and provided for her having access to the room set apart for worship; and he was also of opinion that on Minal's death the right devolved on her legal representative. On appeal, however, the Subordinate Judge decided that the right of worship and of access to the room in question was personal to Minal and dismissed the suit.

This second appeal was preferred by Muttukannu, for whom it was contended that the Subordinate Judge has misconstrued Exhibits A and IV. On the other hand, it was *inter alia* argued for defendant No. 2 that the appellant was not the legal representative of the deceased Minal.

Parthasaradhi Ayyangar and *Rama Rau*, for appellant.

Subramanaya Ayyar and *Bhashayam Ayyangar*, for respondents.

The High Court (Muttusami Ayyar and Parker, JJ, held that on the true construction of Exhibits A and IV, the right claimed was heritable; but as to the objection to the admission of the appellant on to the record the Court remitted the three following issues for trial :—

(1) Was it the appellant or the second defendant's mother that was first adopted by Minal?

(2) If the latter was first adopted, was the appellant adopted during the lifetime of the second respondent's mother or after her death?

(3) If the former, when was the adoption made, and whether it was warranted by the custom of the caste, and whether such custom, if true, is valid?

Upon these issues the Subordinate Judge recorded findings to the effect that the mother of defendant No. 2 was first adopted, and that during her lifetime the appellant was adopted in 1854; **[216]** and that the appellant's adoption was warranted by the custom of the caste. He also recorded a finding that this custom was valid observing:—

"The word 'dasi' in its ordinary and accepted signification means a dancing girl in a pagoda. The Tamil expression means 'the slave of devas (gods),' The dancing girls are admitted as dasis after a certain ceremony in the temple called the tying of bottu or thali. This has been put a stop to since the passing of the Indian Penal Code. Defendant's vakil contends that those who are not so admitted cannot be dancing girls in the real sense of the term 'dasi.' In the circumstances of this case, I thought the question who are or who are not strictly dasis was not relevant. Plaintiff is a dasi admittedly and therefore the only point for consideration is whether the custom of plurality of adoptions is legal and valid in the class of dancing girls. Considering that the primary object of such adoptions is the gaining of wealth, naturally enough, plurality of adoptions came into vogue among the class, and indeed it seems to have found great favour and came to be recognized as a usage. This usage having been accepted by the community of dancing girls, and acted upon, and it not being repugnant to the feelings of the class, but one bringing wealth, it became a valid custom. The instances shown in the evidence and the consciousness of the class seem to prove clearly the existence of the custom and its validity. The documents D and E also support this conclusion. The custom, according to the evidence in the case seems to have been an ancient and uniform one. It has all the essentials to make it valid. I therefore find the third issue in the affirmative."

On the return of these findings the case came on for re-hearing before MUTTUSAMI AYYAR and PARKER, JJ., from whose judgment the arguments adduced on either side appear sufficient for the purpose of this report.

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JUDGMENT.

This second appeal comes on for disposal upon findings on issues remitted for trial. The first plaintiff, it has been found, adopted the second defendant's mother, and during her lifetime adopted again the second plaintiff. It has also been found that the custom obtaining among dancing girls in Southern India permits plurality of adoptions. The question arising for decision is whether the custom ought to be recognized as having the force of law in the class in which it obtains. We are referred **[217]** to no decided case in which a second adoption was recognized among dancing girls, though it was made during the lifetime of the first adopted daughter. There is also no foundation for it in the analogies of the ordinary Hindu law of adoption. According to it, it is only a son that can be adopted, and he can only be adopted when there is no aurasa or adopted son or such son's son or grandson alive. Though the question now raised was also raised in *Venku* v. *Mahalingha* (1), yet it was not there necessary to decide it, as it was a case from South Canara, where the custom was not shown to prevail. The first adoption was, however, considered to be valid, but the ground of decision was that the adoption was made primarily for the purpose of securing an heir competent to offer funeral oblations and that if the adopted child after attaining her age followed the profession of her prostitute mother, the prostitution which she practised was rather an incident than the object of the adoption. The evidence in the case before us shows, however, that when several adoptions are made during the lifetime of the first daughter, they are made presumably for the purpose of adding to the gains of the adoptive mother by employing them when they attain their age for purposes of prostitution. We see no reason to doubt that such adoptions are made for an immoral purpose, and that their recognition would in one sense be contrary to good morals. It is then urged for the appellant that Hindu law recognizes dancing girls as forming a separate class, that though prostitution is their ordinary profession in life, their civil rights ought to be respected, that in adjudicating upon them the profession which they follow must be excluded from consideration, and that questions of status and of successions to property must be determined according to the custom of the caste, even if the persons claiming such adjudication are prostitutes, and the property in regard to which rights are asserted is derived from an immoral source. It is further argued that when only one adoption is made, the adopted daughter ordinarily follows the profession of her adoptive mother, and if its immoral character is ignored in regard to the first adoption, there is no reason for insisting upon it in the case of other adoptions. It is then contended that the class being recognized by Hindu law, its usage must be upheld subject to the rule that when it is necessary to prove the immoral practice **[218]** as part of the transaction sought to be enforced for the purpose of establishing the claim founded upon it, as in a suit for the wages of prostitution, the claim is invalid. The decisions cited in *Venku* v. *Mahalinga*(1) are relied on in support of this contention. In *Chalakonda Alasani* v. *Chalakonda Ratnachalam*(2) it was held that a dancing girl and her adopted daughter constituted together a joint Hindu family, and that the rule

(1) 11 M. 393. (2) 2 M.H.C.R. 56.

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of Hindu law applicable to ordinary ga ns of science was applicable to them. The Court adjudicated upon the claim though the gains were derived from an immoral source. Again, in *Kamakshi* v. *Nagarathnam* (1) it was held that the right of survivorship among male coparceners of an ordinary Hindu family was applicable to a dancing girl and her sister's adopted daughter. The Court observed in that case "our view of the law is that in absence of a further positive rule, daughters must be regarded as sons and take estates of inheritance from their mother similarly to sons under the general law of inheritance." Though the right of survivorship recognised in that case was one known to ordinary Hindu law, yet the usage of the caste was upheld so far as it related to the adoption of daughters and gave them the status of male coparceners in an ordinary Hindu family though such daughters ordinarily practised prostitution, and coparcenery among them might be regarded as an association for an immoral purpose. Further, in *Mayna Bai* v. *Uttaram* (2) the Court held that though the rival claimants were the issue of an adulterous intercourse, their rights of inheritance and their rights *inter se* must be determined with reference to some local custom or usage or the analogies of Hindu law. We consider therefore that as a matter of private law it must be taken, the class of dancing women being recognized by Hindu law as a separate class having a legal status, that the usage of that class in the absence of positive legislation to the contrary regulates rights of status and of inheritance, adoption and survivorship. Although a rule of public law may supersede that of private law, yet it was pointed out in *Venku* v. *Mahalinga* (3) that the Indian Penal Code prohibited only the employment of *minors* for purposes of prostitution and any disposition which might have such employment for its object. In the case before us, the appellant **[219]** was adopted in 1854 in accordance with the custom of the caste, and before the Indian Penal Code came into operation, she had acquired the status of an adopted daughter. We are therefore of opinion that the adoption is valid as being in accordance with the custom of the caste which is recognized as a section of Hindus by Hindu law, and as contravening no rule of public law in force at the time. We set aside the decree of the Subordinate Judge and restore that of the District Munsif. Under all circumstances we direct that each party do bear her or their own costs in this and in the Lower Appellate Court.

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12 M. 219 = 13 Ind. Jur. 214.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

CHAPPAN NAYAR (*Defendant No.* 3), *Appellant v.* ASSEN KUTTI (*Plaintiff*), *Respondent.** [11th January and 8th February, 1889.]

Malabar law—Powers of karnavan—Delegation of powers of karnavan to his son, ultra vires.

The karnavan of a Malabar tarwad having been sentenced to a term of imprisonment delegated to his son all his powers as karnavan pending the expiry of his sentence.

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* Second Appeal No. 845 of 1888.

(1) 5 M.H.C.R. 161 (2) 2 M.H.C R. 196. (3) 11 M. 393.

Held, that the delegation was *ultra vires* and void.

[R., 28 M. 182 (186) (F.B.).]

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SECOND APPEAL against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 139 of 1887, modifying the decree of A. Annasami Ayyar, District Munsif of Pynad in original suit No. 205 of 1886.

Suit to eject defendants Nos. 2 and 3 from certain land. Defendant No. 1 who was karnavan of the tarwad, of which defendants Nos. 2 and 3 were members, having been sentenced to three years' imprisonment, executed a document in favour of his son, defendant No. 4, delegating to him all his powers as karnavan. Defendant No. 4 purporting to act under this document (Exhibit B of which the terms are given in the judgment of the High Court) demised the land in question to the plaintiff [220] on an improving lease. Before the expiry of the lease defendants Nos. 2 and 3 ousted the plaintiff who now brought this action for possession and to recover the value of the crop harvested by them. Defendants Nos. 1, 2 and 4 were *ex parte*.

The District Munsif held that the delegation of the karnavan's powers to his son was invalid and accordingly dismissed the plaintiff's suit. On appeal however the District Judge passed a decree for possession as prayed in the plaint, but disallowed the claim for the value of the crop.

Defendant No. 3 preferred this second appeal.

Sankara Menon, for appellant.

Sankaran Nayar, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.)

JUDGMENT

Defendants Nos. 2 and 3 are anandravans, and defendant No. 1 is the karnavan of a tarwad in North Malabar. In January 1883 the latter was convicted of forgery and sentenced to three years' rigorous imprisonment. On 13th March 1884 he executed Exhibit B in favour of his son, defendant No. 4, authorizing him to manage the affairs of his tarwad until the expiration of the sentence. In January 1885, No. 4 defendant executed an improving lease, Exhibit A, in the plaintiff's favour regarding the lands mentioned in the plaint. The plaintiff alleged that he entered into possession under Exhibit A, that defendants Nos. 2 and 3 dispossessed him and carried away the crop which he had raised. He prayed that possession should be restored and Rs. 140 awarded as the value of his crops. Both the Courts below found that he had not taken possession under Exhibit A, nor raised any crop and they dismissed the suit so far as it related to compensation claimed for the loss of crop.

Adverting to Exhibit B, the District Munsif observed that defendant No. 1 renounced thereby all his rights and obligations as karnavan in favour of his son without the consent of the other members of his own tarwad and held that it was invalid, and that Exhibit A was therefore not binding on the tarwad; but on appeal the District Judge considered that Exhibits A and B were valid on four grounds, *viz.*: (1) that it was not alleged that the execution of Exhibit B was detrimental to the tarwad; (2) that the relations between the karnavan and his anandravans were [221] so strained that the selection by the karnavan of his own son for

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management of the tarwad during his imprisonment was not unnatural; (3) that it was likely that the son's management would proceed more closely on the lines which his father would have followed; and (4) that since his release in 1886 defendant No. 1 ratified Exhibit A.

The contention in second appeal is that it was not competent to the karnavan to execute Exhibit B, and that there was no valid ratification of the transaction evidenced by Exhibit A. As regards ratification, respondent's pleader concedes that he can refer to no evidence in its support, nor could it have any legal effect if Exhibit B were void *ab initio*.

The real point for consideration is whether effect can be given to Exhibit B. There can be no doubt, and it is not denied for the respondent, that karnavanship as recognized in Malabar is a birth-right inherent in one's status as the senior male member of a tarwad. It is therefore a personal right, and as such it cannot be assigned to a stranger either permanently or for a time. If it can be delegated at all, it is capable of delegation only to a member of the tarwad, the principle being that the *de facto* manager thereby assists the karnavan during his pleasure, and is entitled to do so by reason of his connection with the tarwad and his interest in its property. We are referred to no decided cases, in support of the proposition that karnavanship is an alienable interest or is capable of being delegated to a stranger to the tarwad. If such were the case, a Mopla might become the karnavan of a Nair tarwad, and the anomaly would be apparent when it is remembered that the karnavan has to preside at the tarwad ceremonies as its representative, in addition to managing tarwad property. The decision in this case must in our judgment depend on the construction of Exhibit B. If it is an assignment of the right of karnavanship, it is void, though for a term only, on the ground that the delegate is not a member of the tarwad; if, on the other hand, it is a power of attorney limited to management of specific property as an agent subject to the general control of the karnavan, it may be valid on the ground that the karnavanship is *not* the interest assigned or delegated. Exhibit B is in these terms:—

"Muktiarnama executed on the 1st Meenam 1059, corresponding to 13th March 1884, by Perumatathil Tattatath Ambu, [222] Nair of Pallikkara Amshom and Desom of Kurumbranad Taluk, now in the Cannanore Central Jail to Puthiyadath Kunhi Kelappan of Melati Amshom and Ayanikkad Desom:—

"Though I have authorized you by the Muktiarnama last executed by me to you on the 20th Tulam 1050 to manage in my name all the affairs of my tarwad and also to have them managed, yet some obstacles having been met in the way of managing the affairs inasmuch as certain conditions were not clearly stated therein, I hereby give over and above those given by the former Muktiarnama, the following authorities:— (1) to grant to the tenants proper renewals of deeds in respect of my tarwad lands that are already in their possession and have the deeds in my name, and obtain Marupattam from them; (2) to let, in favour of new tenants on simple lease, all the lands now recovered by suit as well as those yet to be recovered by suit, and also the lands held by the tarwad along with those that you are now holding under the first Muktiarnama executed by me; (3) to obtain all the amounts, formerly decreed by the Court in my favour as well as the amounts due to me on account of documents, or on account of decrees that may be passed by

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the Court in my favour and, lastly, all the amounts due to me on any other account, and to issue receipts therefor in my name; (4) to present, on my behalf, all the petitions in respect of all matters whether Revenue, or Magisterial or Civil, and to answer, on my behalf, all the petitions and suits presented against me. I hereby vest in you full powers to manage all the affairs relating to my tarwad. I hereby admit that your demising the property and granting receipts shall have the same force, and shall be done with the same freedom, as if I myself had done it.

"Executed in the presence of Palakkat Kelappan Nair of Pallikkara Amshom and Deshom, and (2) Ittiprath Chantu Nair, and in the handwriting of Pokkiyarath Kanna Kurup of Pallikunnam Desom, Puzhati Amshom."

Though it is styled a Muktiarnama it authorizes the stranger to manage in the karnavan's name "all the affairs of his tarwad" and also to have them managed. The karnavan declares in it "I hereby vest in you full powers to manage all the affairs [223] relating to my tarwad." It does not purport to limit the agency to special matters or to the management of property only, but it purports to put the delegate in the karnavan's place in regard to all the affairs of the tarwad. The apparent intention was to impose upon the tarwad the management and the authority of the karnavan's son, and no effect can be given to it without contravening the special usage of the district. The decision of the Judge cannot be supported, and the transaction evidenced by Exhibit B was in excess of the karnavan's authority as such and in violation of the right of his tarwad. We set aside the decree of the District Judge and restore that of the District Munsif. The respondent will pay the appellant's costs both in this Court and in the Lower Appellate Court.

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12 M. 223.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

GANAPATI AND ANOTHER (*Plaintiffs*), *Appellants* v. CHATHU (*Defendant No.* 3), *Respondent*.*
[14th and 21st January, 1889.]

Civil Procedure Code, Section 13—Res judicata—*Competent Court—Pecuniary valuation of suit—Court Fees Act* (*Act VII of* 1870), *Section* 12, *Schedule II*, *Article* 17, *iii—Suit for a declaratory decree.*

A suit for two declarations filed in a Subordinate Court was valued by the plaintiffs at a sum in excess of the pecuniary jurisdiction of a District Munsif. It was pleaded that the matter in dispute was *res judicata* by reason of decrees passed in District Munsifs' Courts. No objection was taken in the Subordinate Court to the valuation of the suit.

Held that the plea of *res judicata* failed.

Per MUTTUSAMI AYYAR, J.—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one of possession of the property regarding which the plaintiff seeks to have his title declared.

[F., 15 M. 501; R., 14 C.L.J. 47 (49) = 15 C.W.N. 823 (825) = 10 Ind. Cas. 865 (866); D., 14 M. 78.]

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* Second Appeal No. 883 of 1888.

1889 JAN. 21. — APPELLATE CIVIL. — 12 M. 223.

SECOND appeal against the decrees of A. F. Cox, Acting District Judge of North Malabar, in appeal suits Nos. 260 and 285 of 1887, reversing the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in original suit No. 36 of 1886.

[224] Suit to declare that the tarwads of the plaintiffs and defendants Nos. 1 and 2 (the karnavans of the two plaintiffs respectively) have the sole uraima right to a certain devasom and that the tarwad of the defendant No. 3 has no uraima right to it. Defendants Nos. 1 and 2 were *ex parte*.

Defendant No. 3 pleaded *inter alia* that plaintiffs' claim was *res judicata* by reason of the decree in original suit No. 361 of 1884 on the file of the District Munsif of Cannanore. That was a suit brought by the present defendants Nos. 1 and 2 to compel the present defendant No. 3 to furnish accounts of the devasom affairs. The defendant denied their claim to be uralars and the suit was dismissed. The Subordinate Judge held that the plea of *res judicata* failed, because neither the District Munsif of Cannanore nor the District Munsif of Chavascherry, in respect of whose decree in another suit a similar plea was raised, was competent to try the present suit. And he passed a decree declaring that the tarwads of the plaintiffs and defendants Nos. 1 and 2 have uraima right to the devasom in question.

Against this decree both the plaintiffs and defendant No. 3 presented appeals.

The District Judge on appeal dismissed the plaintiffs' suit, being of opinion that the above plea should prevail. With regard to the competence of the Courts which decided the previous suits to entertain the present suit, he said :—

"The plaintiffs evidently feared the plea of *res judicata*, and to escape from it if possible, very cunningly valued their suit so as to take it out of a District Munsifs' jurisdiction. But in doing this, they have certainly overvalued it by taking five times the assessment of all the devasom lands on the value of the devasom structure as the basis of valuation. They are not personally interested in those lands or in the structure. The right they seek to have declared is either incapable of valuation or is worth only what they would receive as salary, and that is 720 seers of paddy a year. It is urged that they would receive fees, but, even estimating these in a liberal manner, the suit would certainly be one which could be decided in the Court of a District Munsif."

The plaintiffs preferred this second appeal on the following (among other) grounds :—

(1) The Lower Appellate Court is wrong in holding that the plaintiffs' claim is *res judicata* by the decision in original [225] suit No. 361 of 1884 on the file of the District Munsif's Court at Cannanore.

(2) The District Judge is wrong in holding that the present suit is one cognizable by the Court of a District Munsif.

(3) No objection was taken either to the valuation of the suits or to the jurisdiction of the Sub-Judge.

(4) The principle on which the suit was valued for purposes of jurisdiction is the correct one.

Bhashyam Ayyangar, for appellants.

Mr. *Gantz*, for respondent.

1889 JAN. 21. — APPELLATE CIVIL. — 12 M. 223.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and WILKINSON, JJ.).

JUDGMENT.

WILKINSON, J.—The Lower Appellate Court was wrong in holding that the appellants' claim was *res judicata*. The former suits were tried by a District Munsif, and as laid down by the Privy Council, the words "Court of competent jurisdiction," in Section 13 of the Civil Procedure Code mean a Court which has jurisdiction over the matter in the subsequent suit, in which the decision is used as conclusive, in other words a Court of concurrent jurisdiction, *i.e.*, concurrent as regards the pecuniary limit as well as the subject-matter. No objection was taken in the Subordinate Court to the valuation of the suit, and the suit as valued was not within the jurisdiction of a District Munsif. We are not prepared to say that the principle on which the suit was valued was contrary to law. We must therefore set aside the decree of the Lower Appellate Court and remand the appeal to be heard and determined on its merits. Costs to abide and follow the result.

MUTTUSAMI AYYAR, J.—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared. The declaration is made in view to protect existing possession, but it is not intended that Courts with limited pecuniary jurisdiction should take cognizance of all suits for declaratory decrees irrespective of the value of the property to which the title declared by those decrees might relate. For instance, a karnavan suing to establish his right of management is not entitled to institute his suit in the Court of the District Munsif when the value of the suit **[226]** would exceed Rs. 2,500 if it were valued as suit a for possession. On this ground also I concur in the order proposed by my learned colleague.

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12 M. 226=1 Weir 761.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

QUEEN-EMPRESS *v.* RAMI REDDI.* [13th and 15th February, 1889.]

Forest Act—Act V of 1882 (*Madras*), *Sections* 6, 10, 16, 21—*Tree* patta—*Trespass.*

The holder of a *patta* of certain trees on land which had been declared a reserved forest was convicted of trespass under the Madras Forest Act on proof that he had continued to gather the produce of the trees:

Held, that the conviction was bad for want of proof, that the pattadar's claim had been duly disposed of or that he had not preferred his claim within the period required by law.

PETITION under Sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the proceedings of the Special Deputy Magistrate of North Arcot in appeal No. 21 of 1888 confirming the conviction and sentence in case No. 106 of 1888 on the file of the Second-class Magistrate of Chittoor.

* Criminal Revision Case No. 712 of 1888.

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Petitioner was convicted of the offence of trespass under Section 21 of the Madras Forest Act. The land upon which the offence was alleged to have been committed had been constituted a reserved forest by a Government Notification, dated 16th July 1885; this notification was cancelled by a subsequent notification published on 20th August 1885; but it was subsequenty, on 8th February 1887, republished, that of 20th August 1885 being annulled.

The provisions of the Madras Forest Act as to "notifications declaring forest reserved" are as follows:—

Section 16. "When the following events have occurred, namely—

(a) the period fixed under section six for preferring claims has [227] elapsed, and all claims (if any) made within such period have been disposed of by the Forest Settlement Officer; and

(b) if such claims have been made, the period fixed by sections ten and fourteen for appealing from the orders passed on such claims has elpased, and all appeals (if any) presented within such period have been disposed of by the appellate authority; and

(c) all proceedings prescribed by section ten have been taken, and all lands (if any) to be included in the proposed forest, which the Forest Settlement Officer has, under section ten, elected to acquire under the Land Acquisition Act, 1870, have become vested in the Government under section sixteen of that Act;

"the Governor in Council may publish a notification in the *Fort St. George Gazette*, specifying the limits of the forest which it is intended to reserve and declaring the same to be reserved from a date to be fixed by such notification.

"The Forest Settlement Officer shall, before the date so fixed, publish such notification in the manner prescribed for the Proclamation under Section 6. From the date so fixed, such forest shall be deemed to be a reserved forest."

Petitioner had a *patta* of certain trees on the land constituted a reserved forest; and the trespass of which he was convicted consisted in continuing to gather the produce of the trees in question, after the publication of the Government Notification constituting the reserved forest.

As a tree *pattadar* he was a 'known occupier of the land,' and as such entitled to special notice under Section see 6: *Reference under Section* 39 *of Madras Forest Act* (1). Sections 10 and 14 of the Forest Act relate to 'claims to rights of occupancy and ownership, and proceedings with regard thereto.'

The further facts of the case and the arguments adduced on the petition appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and WILKINSON, J.).

Mr. *Subramanyam*, for petitioner.

Mr. *Wedderburn*, for the Crown.

JUDGMENT.

The prosecution of the petitioner for trespass was [228] under the circumstances clearly illegal. Section 16 of Act V of 1882 (Madras)

(1) 12 M. 203.

lays down that the Governor in Council may publish a notification declaring a forest to be reserved when certain events have occurred, and that such forest shall become reserved from the date specified in that notification. One of the events which must have occurred before the Governor in Council can declare a forest reserved is the disposal of all claims made by owners or occupiers of land. It has not been shown in the present case that the claim of the petitioner who is an owner or occupier of land (*Reference under Section* 39 *of Act V of* 1882 (1)) was disposed of prior to the notification of 16th July 1885 ; and the fact that in April 1887, subsequent to the publication of the notifications of 20th August 1886 and 8th February 1887, the Forest Officer was negotiating with the petitioner, would appear to show that his claim had never been disposed of according to law. The prosecution did not assert that the petitioner did not prefer a claim within the period required by law, and unless he had failed to do so, his right would not have been extinguished. He appears to have continued to gather the produce of the trees in his *patta* up to October 1887. We accordingly reverse the findings and sentences of the Courts below. The fine will be repaid.

1889 FEB. 15.

APPELLATE CRIMINAL

12 M. 226 = 1 Weir 761.

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12 M. 228.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KETLILAMMA (*Plaintiff*), *Appellant* v. KELAPPAN AND OTHERS (*Defendants*), *Respondents*.* [4th and 8th February, 1889.]

Civil Procedure Code, Sections 43, 244—*Separate suit on disallowance of objection to execution—Evidence Act—Act I of* 1872, *Section* 44—*Competent Court.*

In execution of a decree the defendant, who was sued as the representative of her deceased brother objected under Section 244 of the Code of Civil Procedure to the attachment of certain lands to which she set up independent title. The objection was disallowed and the land was sold. She then sued the execution purchaser to set aside the Court sale and obtained a decree against which no appeal was preferred. She now sued for possession :

[229] *Held*, that the suit lay notwithstanding the order under Section 244.

Per cur: The words "not competent" in Section 44 of the Evidence Act refer to a Court acting without jurisdiction.

[F., 21 B. 205 (212); R., 6 Ind. Cas. 93 (100).]

SECOND appeal against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in appeal suit No. 261 of 1887, affirming the decree of S. Ragunatha Ayyar, District Munsif of Tellicherry, in original suit No. 542 of 1886.

Suit by plaintiff No. 1 to recover possession of certain land with arrears of rent, as on the expiry of a demise to defendants Nos. 1 and 2. Plaintiff No. 2, was joined as having obtained a subsequent lease from Plaintiff No. 1. Defendant No. 3 claimed to be a member of the same taveri as plaintiff No. 1 and denied her right to sue. His name, however, was removed from the record.

Defendant No. 4 claimed title under the following circumstances.

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* Second Appeal No. 1508 of 1888.

(1) 12 M. 203.

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The land in question had been attached in execution of a decree obtained against plaintiff No. 1 and her brother as representatives of another brother, one Kunhi Raman Nambiar (deceased), in Small Cause Suit No. 360 of 1883 on the file of the Subordinate Court of North Malabar. Plaintiff No. 1 intervened in execution of the above decree under Section 244 of the Code of Civil Procedure, and objected that the land was her own and was not liable to satisfy the decree. But her objections were disallowed and the land was sold and purchased by defendant No. 4 who obtained the sale certificate and was put into possession in June in 1884.

Plaintiff No. 1 then sued defendant No. 4 in original suit No. 508 of 1884 on the file of the Court of the District Munsif of Tellicherry to set aside the Court sale, and obtained a decree. No appeal having been preferred against that decree, she now sued as above for possession. Both the District Munsif and on appeal the Subordinate Judge dismissed the suit on the ground that the order under Section 244 had the force of a decree, and the proceedings in original suit No. 508 of 1884 were erroneous and therefore void. *Kuriyali* v. *Mayan* (1) was referred to.

The plaintiff preferred this second appeal on the following grounds :—

(i) That the Lower Appellate Court is wrong in holding that the suit is barred by Section 244 of the Code of Civil Procedure.

[230] (ii) The decree in original suit No. 508 of 1884 is *res judicata* in favour of the plaintiff, and the Court cannot go behind the said decree by holding that Section 244 was a bar to the maintenance of that suit, and that, therefore, the whole proceedings in that suit were void.

Govinda Menon, for appellant.

Sankaran Nayar, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

It is conceded that had it not been for the intermediate suit No. 508 of 1884 the decrees of the Courts below would be right, but it is argued by the learned Pleader for the appellant that the fourth defendant's remedy against the erroneous decree was by appeal, and that he cannot now resist a suit for possession, the sale to him having been set aside. On the other hand, Section 44 of the Evidence Act * is relied upon as showing that it is open for the fourth defendant to show that the decree in suit No. 508 of 1884 was passed by a Court not competent to pass it.

We are of opinion that the words "not competent" refer to a Court acting without jurisdiction. In this view, there is no question as to the competency of the Court, though the provisions of Section 244 of the Civil Procedure Code might have been pleaded as a bar to the suit.

There was no appeal from the decree in suit No. 508, and therefore, as far as the fourth defendant is concerned, it is a final decree, and though wrong he is not in a position to resist it. The other defendants were not parties to the suit in which the order under Section 244 of the Civil Procedure

* Section 44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections forty, forty-one or forty-two, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

(1) 7 M. 255.

Code was passed and therefore the suit as against them is not barred by the provisions of that section.

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The Subordinate Judge has disposed of the appeal upon the preliminary point.

We must, therefore, reverse the decree and remand the appeal for re-hearing. Costs will abide and follow the result.

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12 M. 231=1 Weir 903.

[231] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

QUEEN-EMPRESS *v.* VENKATRAYADU.* [18th January, 1888.]

Stamp Act—Act I of 1879—*Section* 37 (*b*), *Sections* 40, 61, 63—*Prosecution for attempt to defraud Government by under-stating the value of property in a partition deed.*

A District Judge impounded a partition deed produced before him and forwarded it to the Collector under Section 35 of the Stamp Act, 1879, being of opinion that the executant of the deed had committed an offence under Section 63. The Collector under Section 69 sanctioned the prosecution of the executant, who was convicted by the Magistrate of an offence under Section 63 of the Act. On appeal the Sessions Court acquitted him on the ground that the Collector had not complied with Section 37 (*b*) or Section 40 of the Act.

Held, that the acquittal was wrong. *Empress* v. *Dwarkanath Chowdhry* (I.L.R., 2 Cal., 399), *Empress* v. *Soddanund Mahanty* (I.L.R., 8 Cal., 259), *Empress* v. *Janki* (I.L.R., 7 Bom., 82), considered.

[F., U.B.R. (1892—1896) 307 (309).]

APPEAL under Section 417 of the Criminal Procedure Code from an acquittal by W. G. Underwood, Acting Sessions Judge of Kistna, reversing the sentence of C. M. Mullaly, Joint-Magistrate of Kistna, in calendar case No. 22 of 1886.

The material portion of the Sessions Court judgment was as follows :—

"The District Court in its proceedings did not allege fraud; but as it mentioned Section 63 of the Act, it must have considered that there was an intent to defraud Government. The Collector passed proceedings :—'The parties will be prosecuted. Mr. Robinson will try the case.'

"The appellant relies on *Empress* v. *Dwarkanath Chowdhry* (1), *Empress* v. *Soddanund Mahanty* (2), *Empress* v. *Janki* (3). He also relies on the proviso of Section 61 of the Act. Subsequent to the date of the judgment, the Sub-Collector levied the deficient duty [232] Rs. 50 and a fine of Rs. 500. This was also the penalty he inflicted as Joint Magistrate. It is not disputed but that Rs. 50 is the deficient stamp duty.

"The document was impounded under Section 35. The Collector did not comply with Section 37 (*b*), and according to the cases quoted the conviction is illegal. There is nothing on record to show that the Collector satisfied himself under Section 40 that there was any intention to evade payment of the proper duty. It is urged that the Joint Magistrate by taking criminal measures before demanding the deficient duty has deprived the appellant of the benefit of the proviso of Section 61. Section 63, however, allows of a penalty of Rs. 5,000. It is clear that the two sections

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* Criminal Appeal No. 257 of 1887.

(1) 2 C. 399. (2) 8 C. 259. (3) 7 B. 82.

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are not intended to be read together. But it does not follow that Section 27 is not governed by Sections 35 and 37. Taking the rulings quoted, the finding and sentence of the Joint Magistrate are illegal, and the fine of Rs. 500 is ordered to be returned if levied."

The further facts of the case and the arguments adduced on the appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and WILKINSON, J.)

The Public Prosecutor (Mr. *Powell*) for the Crown.

Mahadeva Ayyar, for the defendant.

JUDGMENT.

This is an appeal by Government against the decision of the Sessions Judge of Kistna reversing the finding and sentence of the Joint Magistrate in a prosecution under the Stamp Act—Act I of 1879.

In December 1884 the District Court having under Section 33 of the Stamp Act impounded a partition deed produced before it, forwarded it under Section 35 to the Collector, being of opinion that the executant of the deed had committed an offence under Section 63 of the Act. The Collector under the provisions of Section 69 sanctioned the prosecution of the offender before the Head Assistant Magistrate, from whose Court the case was transferred to the Joint Magistrate. The Joint Magistrate found that there had been "*a glaring attempt to defraud Government*," property worth about Rs. 30,000 having been set forth in the partition deed as worth only Rs. 7,975. The deficient stamp-duty leviable amounted to Rs. 50. He inflicted a fine of Rs. 500.

The accused appealed to the Court of Sessions, and the Judge reversed the finding and sentence of the Joint Magistrate. He was of opinion that the conviction was illegal, because the Collector **[233]** had omitted to collect the deficient stamp-duty before sanctioning the prosecution. He relied on certain decisions of the Calcutta and Bombay High Courts.

We are of opinion that the decision of the Sessions Judge is not maintainable, and that the finding and sentence of the Joint-Magistrate were right and must be restored.

Section 37 (*b*) of the Stamp Act applies to the case of a document not duly stamped. In cases in which the omission to stamp at all or to stamp duly arises from negligence, inadvertence or ignorance of the provisions of the stamp law, it is the duty of the Collector to compel the payment of the duty. But in the present case the stamp affixed to the document was, according to the valuation of the property set forth therein, correct, and the Collector therefore had no duty to perform under Section 37. The facts affecting the amount of the duty with which the instrument was chargeable had, in the opinion of the Judge who impounded the document, not been fully and truly set forth, and the questions for determination therefore were—1st, whether the property had been properly valued, and, 2nd, if not, whether it had been undervalued with intent to defraud Government. It was not necessary, nor was it possible for the Collector, to collect any duty until it had been decided in a proper inquiry what was the real value of the property. Nor do we think that the conviction was bad, because the Collector failed to record proceedings under Section 40 to the effect that he had satisfied himself that there was an intention to evade payment of the proper duty. That section only refers to cases in which a prosecution is instituted after a penalty has been paid. It confines the power of instituting prosecutions to the Collector, and instructs him to exercise it only when it appears to him that the offence was committed

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with intention to evade payment of the proper duty. In the present case the Collector sanctioned the prosecution of the offender in 1884, and no penalty was levied in respect of the instrument until after the decision and sentence of the Joint-Magistrate.

The cases relied on by the Sessions Judge have no application to the present case, as they were decided with reference to the offence made punishable by Section 61 of the Act, and intention to evade payment is not an essential ingredient of the offence described in Section 29, Act XVIII of 1869, see *Empress* v. *Dwarkanath* [234] *Chowdhry* (1) or in Section 60, Act I of 1879. But the intent to defraud is the essential ingredient of the offence made punishable by Section 63.

For these reasons we set aside the finding of the Sessions Judge and restore that of the Joint Magistrate.

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12 M. 234.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

ABDUL AND OTHERS (*Defendants*), *Appellants v.* AYAGA AND OTHERS (*Plaintiffs*), *Respondents.* [4th February, 1889.]*

Civil Procedure Code, Section 45—Suit for declaration—Multifariousness—Malabar Law—Suit by junior members of tarwad.

Suit by some of the junior members of a Malabar tarwad against the karnavan and the other members of the tarwad, and certain persons to whom some of the tarwad property had been alienated by the karnavan, for a declaration that the alienations were not binding on the tarwad :

Held, that the suit was not bad for multifariousness. *Vasudeva Shanbhaga* v. *Kuleadi Narnapai* (2) followed.

[R., 25 M. 736 ; 1 P.R. 1905 = 83 P.L.R. 1905.]

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of South Canara, in Original Suit No. 22 of 1886.

The plaintiffs, who were some of the junior members of a Malabar tarwad, sued the karnavan, the remaining members of the tarwad, and certain persons to whom some of the tarward property had been alienated by the karnavan for a declaration that these alienations were not binding on the tarwad.

The Subordinate Judge decreed as prayed in the plaint. The alienees preferred this appeal on the grounds (among others) that the suit was bad for multifariousness, and misjoinder of causes of action, and that the decision of the Subordinate Judge was against the weight of evidence.

Ramachandra Rau Saheb, *Sankaran Nayar* and *Subba Rau*, for appellants.

Mr. *Subramanyam* and *Sundara Ayyar*, for respondents.

[235] The Court (MUTTUSAMI AYYAR and WILKINSON, JJ.) delivered the following

JUDGMENT.

Two questions are argued in this appeal, *viz.*, that the suit is bad owing to multifariousness, and that the finding of the Subordinate Judge that the alienations are not binding on the tarwad is unwarranted and

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* Appeal No. 98 of 1887.

(1) 2 C. 399. (2) 7 M.H.C.R. 290.

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not borne out by the evidence. As to the first point, the plaintiffs, who are junior members of the tarwad, sue the karnavan, certain members of the tarwad who side with him, and certain alienees for a declaration that certain documents executed by the karnavan are not binding on the tarwad or its property. It is not denied that if they had prayed for the removal of the karnavan, the alienees would be necessary parties. The same view was taken in the decision referred to by the Subordinate Judge (*Vasudeva Shanbhaga* v. *Kuleadi Narnapai* (1) with reference to a Hindu family, and we see no reason why a declaratory suit should be treated differently from a suit for possession, inasmuch as the title to be adjudicated upon is the same in both.

Their Lordships then proceeded to consider the evidence in the case, and agreeing with the findings of the Subordinate Judge, dismissed the appeal with costs.

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12 M. 235.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VENKAYYA *(Plaintiff), Appellant* v. SURAMA AND OTHERS *(Defendants), Respondents.** [7th January and 8th February, 1889.]

Civil Procedure Code, Section 13—Res judicata—*Decree in suit by a karnam as such binds his successor.*

The karnam in a certain mitta sued to recover certain land as part of the *mirazi* property attached to his office. It appeared that the plaintiff's father and predecessor in office had sued to recover the same land by virtue of his office and that his suit had been dismissed :

Held, that the plaintiff's claim was *res judicata.*

[R., 9 C.L.J. 597=12 C.W.N. 739=4 Ind. Cas. 81 (83).]

[236] SECOND APPEAL against the decree of V. Strinivasacharlu, Subordinate Judge of Cocanada, in Appeal Suit No. 22 of 1887, affirming the decree of T. R. Malhari Rau, District Munsif of Peddapur, in Original Suit No. 22 of 1886.

Suit by a karnam to recover certain land on the ground that it was part of the *mirasi* property attached to his office. The plaintiff's father and predecessor in office had brought Suit No. 312 of 1883 to recover the same land "by virtue of his office and by the custom" and had failed: the plaintiff met the plea of *res judicata* founded on the decree in that suit by the argument that he did not claim under his father's title but sued in his own right as holder of the office.

The District Munsif dismissed the suit and his decree was affirmed by the Subordinate Judge on appeal.

The plaintiff preferred this second appeal.

Subba Rau, for appellant.

Ramachandra Rau Saheb, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J. and MUTTUSAMI, AYYAR, J.).

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* Second Appeal No. 126 of 1888.

(1) 7 M. H. C. R. 290.

JUDGMENT.

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The appellant is a karnam in the mitta of Viravaram in the Godavari District, and the father of respondent No. 1 belonged to a collateral branch of the karnam's family. The land in dispute originally formed part of the emolument attaching to the office of karnam. According to the judgment in original suit No. 312 of 1883, it had been severed from the office more than 40 years ago, and passed into the possession of the respondent's branch of the family in the life-time of her paternal great-grandfather. Her father died in 1877, and during his life-time neither the appellant's father nor his grandfather sought to re-attach the land to the office. Prior to his death, the father of respondent No. 1 bequeathed his property to her, and the land in litigation passed into her possession. Thereupon, the appellant's father instituted original suit No. 312 of 1883 for its recovery, but that suit was dismissed on the ground that it was barred by limitation. Shortly after, he resigned his office, and appellant was appointed in his stead. The resignation and the appointment are found by the Courts below to have been contrived for the purpose of reviving the litigation set at rest by the final decree in original suit No. 312 of 1883. The appellant was appointed in August **[237]** 1885, and he brought the present suit in 1886. The ground of claim was that the land was attached to his office, that respondent No. 1 somehow or other got into possession and leased it out to respondents Nos. 2 and 3. Respondent No. 1 contended that the appellant's appointment was illegal, that his claim was *res judicata*, and that it was barred by limitation. The Subordinate Judge held on appeal that the claim was *res judicata*, and that it was barred by limitation, and dismissed the suit on both points. His decision is impugned in second appeal.

We consider the decision in original suit No. 312 of 1883 is binding on the appellant, and the claim was properly held to be *res judicata*. It is conceded that such would be the case if the land in question were private property, but it is contended that the emolument attached to an office is in the nature of a salary assigned to that office, and is either no property at all or at least public property, and that each karnam acquires a fresh right to enjoy the emolument on his appointment, and is entitled to enforce it by a new suit, though his predecessor in office might have sued in respect of the same cause of action and failed. We are unable to accede to this suggestion, for, when land is held on a service tenure it does not cease either to be property or private property. If the revenue due thereon was remitted by the Crown on condition that it was to be appropriated to a specific purpose, the Crown might assess the land when the revenue ceased to be so appropriated. According to the custom of the country, the land in dispute is the hereditary property of the karnam's family, held subject to the obligation of rendering service as karnam. The incident peculiar to the tenure consists in each office-bearer having property therein while lawfully in office without power to sever it from the office and with the obligation to transmit it to his successor in office. If in breach of his duty an office-bearer alienates the land and severs it from the office, his successor has a right to avoid the alienation and to sue to re-attach it to the office within 12 years from the date of his appointment. If he fails to do so, he and his future successors are barred alike, the suit brought by him being regarded not as one brought to enforce his individual right but as one instituted by the representative for the time being of the reversion. The view suggested for the appellant, *viz.*,

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that each successor may sue again on his appointment to the office, involves in it the anomaly of practically abrogating the Limitation Act. [238] The suit brought by the appellant's father was brought in the interest of all future successors consequent on the jural relation between the office and the land, and the decision passed therein is, therefore, binding on the appellant.

As to the cases cited, *Papaya* v. *Ramana* (1) is only an authority for the proposition that though Regulation XXIX of 1802 does not contain a prohibitory provision, similar to that which is found in Regulation VI of 1831, yet lands attached to the office of a karnam in permanently-settled estates cannot be alienated by the holder of the office for the time being, from the very nature of the tenure on which the land is held. In that case, the alienation was made by the father of the then second and third appellants and the suit was brought within 12 years from the alienor's death and the date when the succession to the office devolved on them. The question now before us did not arise in that case. *Babaji* v. *Nana* (2) is a clear authority in support of the principle on which we think this case should be decided. Nor is the case of *Radhabai* v. *Anantarav BhagvantDeshpande* (3) in favour of the appellant. That was a case in which the service *vatan* had been enfranchised. It was urged that, notwithstanding the enfranchisement, the *vatan* was inalienable by family custom. It was held that in the absence of fraud and collusion, judgment against one holder of such service *vatan* was *res judicata* as regards a succeeding holder, and the actual decision, therefore, is against the appellant before us. The case of *Seshaiya* v. *Gauramma* (4) decided, no doubt, that possession of a lopaikari holder or a member of the karnam's family by claim of coparcenary right was not necessarily adverse and might be taken to be permissive. But this is a matter which must have been urged in the former suit in which it was decided that the land vested in the respondent's branch in a family partition which took place more than 40 years previously. We are not now at liberty to go behind the decree passed in it and consider it on the merits. This second appeal cannot be supported, and we dismiss it with costs.

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12 M. 239.

[239] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

GOVINDASAMI (*Defendant, No.* 1), *Appellant* v. KUPPUSAMI (*Plaintiff*), *Respondent.** [21st and 29th January, 1889.]

Alteration in bond sued on—Materiality of alteration—Fraud—Evidence.

Suit on a bond, the date of which had been altered from 11th September to 25th September, while it was in the possession of the plaintiff. Fraud was not proved, and the period of limitation reckoned from the 11th September had not expired :

Held, that the bond was void as such, and was not receivable in evidence to prove the debt. *Christacharlu* v. *Karibasayya* (I.L.R. 9 Madras 399) followed.

[R., 26 B. 616 (620).]

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* Second Appeal No. 1308 of 1888.

(1) 7 M. 85.
(2) 1 B. 535.
(3) 9 B. 198.
(4) 4 M.H.C.R. 336.

1889 JAN. 29. — APPEL-LATE CIVIL. — 12 M. 239.

SECOND APPEAL against the decree of R. S. Benson, Acting District Judge of South Arcot, in appeal suit No. 253 of 1887, reversing the decree of V. Narayana Rau, District Munsif of Tirukovilur, in original suit No. 60 of 1887.

Suit to recover principal and interest due on a bond, dated 25th September 1882, and executed by defendant No. 1 to the plaintiff. Defendant No. 2 was joined as being an undivided member of the family of defendant No. 1, the bond having been executed by defendant No. 1 for family purposes.

The District Munsif found that the date of the bond had been altered from 11th September to 25th September, and, holding that this was a material alteration which vitiated the instrument on the authority of *Gogun Chunder Ghose* v. *Dhuronidhur Mundul* (1), *Sitaram Krishna* v. *Daji Devaji* (2). *Paramma* v. *Ramachandra* (3) dismissed the suit.

On appeal the District Judge reversed the decree of the District Munsif observing "there is not a syllable of evidence to show that the alteration was fraudulent either in effect or intention. Nothing turned on the date, and the cases quoted are therefore clearly irrelevant."

Defendant No. 1 preferred this second appeal.

[240] *Desikacharyar*, for appellant.

Rama Rau, for respondent.

The Court (COLLINS C.J., and WILKINSON J.) delivered the following

JUDGMENT.

This was a suit to recover the principal and interest due on a simple bond executed by the defendant. Both the lower Courts have found that the bond was executed on the 11th September 1882 and that the date was subsequently altered, while the document was in the custody of the plaintiff, to the 25th September. The District Munsif held that the alteration was a material one and vitiated the instrument. The District Judge on appeal held that nothing turned on the date and that there was no evidence that the alteration was fraudulent. He decreed for plaintiff. The defendant appeals on the ground that the alteration of the date was an alteration of the document in a material part and that the document is therefore invalid. He relies on the Full Bench decision in *Christacharlu* v. *Karisbasayya* (4). The respondent argues (1) that the alteration is not a material alteration, because it affects no one, the defendant having made a part-payment within the statutory period, and (2) that, if it be held that it is a material alteration, the document is receivable as evidence of the debt in accordance with the decision in *Ramasamy Kon* v. *Chinna Bhavani Ayyar*(5) affirmed by the Full Bench decision in *Christacharlu v. Karibasayya*(4).

In order to decide whether the alteration was material, it is necessary to consider whether the alteration affected the liability of either party. There can, it appears to us, be no doubt that the alteration of the date of the document from the 11th to the 25th September, materially affected the liability of the defendant, for it extended the time within which the plaintiff was entitled to sue.

As to the part-payment on the 11th August 1885, which the District Judge has found to be genuine, we do not think that this part-payment is sufficient to render of no effect the alteration of the date. The contract

(1) 7 C. 616. (2) 7 B. 418. (3) 7 M. 302.
(4) 9 M. 399. (5) 3 M.H.C.R. 247.

1889 JAN. 29. — APPELLATE CIVIL. — 12 M. 239.

between the parties having been reduced to writing and the only ground of action disclosed by the plaint being that which is founded upon the altered instrument, the plaintiff can only recover upon the writing. But it is undoubted [241] law that the plaintiff cannot recover upon the written contract, because it has been altered in a material part.

Nor can the document be received in evidence of the debt. As remarked by Muttusami Ayyar, J., in the Full Bench case "In all the English cases in which there was judgment for the plaintiff upon the instrument in its original condition there was a separate count which did not refer to the instrument in its altered condition as the cause of the obligation which it was desired to enforce."

In the present case the suit is not based on any antecedent transaction for which the instrument was given as security, nor did the execution of the instrument vest in the plaintiff any estate or right of the existence of which the deed would be evidence.

For these reasons we are of opinion that the alteration of the document sued on, while it was in the custody of the plaintiff, vitiated the instrument, and we reverse the decree of the Lower Appellate Court and restore that of the District Munsif.

Respondent will pay appellant's costs in this and the Lower Appellate Court.

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PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir Richard Couch, and Mr. Stephen Woulfe Flanagan.

[*On appeal from the High Court at Madras.*]

SIVARAMAN CHETTI AND OTHERS (*Plaintiffs*) *v.* MUTHAYA CHETTI AND OTHERS (*Defendants*). [24th November and 12th December, 1888.]

Village property—As to what was the common property of a village, viz., a tank—Inability of any of the co-proprietors to exclude the rest from contributing to repair it.

A village tank, on the site of an ancient one, was the common property of, and used by, all the inhabitants, of whom one family on the ground of improvements and additions made by their ancestor with the general acquiescence of the village claimed against the rest the exclusive right of repairing the tank at their own cost. But no corresponding obligation on the plaintiffs to repair was shown; and from the evidence, including that afforded by a compromise made in 1842, it appeared that the repairs were to be effected by a common collection made through the person in management, who was to account for his receipts and expenses.

Held, that it was equally at the option of the rest of the villagers either to permit the repairs to be done by the plaintiffs, or to insist on the work being done, [242] at the common cost; the tank remaining the common possession of the village, and no class of the villagers having any right to exclude the rest from contributing to the repairs.

[F., 34 M. 323 (327) = 8 M.L.T. 368; R., 28 B. 20 (50); 2 Ind.Cas. 427 = 20 M.L.J. 699 = 8 M.L.T. 399 (401); D., 13 M.L.T. 419 (420).]

APPEAL from a decree (4th December, 1882, of the High Court (1), reversing a decree (7th April 1880), of the Subordinate Judge of Madura, East.

(1) *Muttaya* v. *Sivaraman* (6 M. 229).

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The parties, both described in the record as traders, Nattukottai Chetti caste, residing in the village of Karakuddi in the Shivaganga zemindari, disputed the right to repair a village tank, constructed on the site of an ancient one. The plaintiffs, four in number, were of one family. and the defendants, originally twenty-one in number, were of different families, all inhabiting the village.

In their plaint the plaintiffs stated :—

"That their common ancestor, one Meyyappa Chetti, about 70 or 80 years ago, with the consent of the Miras Ambalagars of the Karakuddi village, dug and constructed, at his own expense, the tank known as Kalkattu urani in the village, and thereupon he and his descendants became hereditary Hakdars of the urani.

"That the ancestors of the plaintiffs, and after them, plaintiffs, as hereditary Hakdars, had, up to date, been in possession of the urani, and and at their own exclusive cost maintained the urani charity, by constructing stone-works round the urani, by digging supply and surplus channels, building flight of steps, building a large matam on the western bank of the urani, and by laying out a flower garden open to the public.

"That in the year 1842, on a complaint being made by Chidambaram Chetti, one of the plaintiffs' ancestors against the ancestors of the defendants 1 to 7, for wrongful interference with the urani, the then Collector of Madura, after inquiry, passed an order, dated 9th May 1842, to the effect that the urani was constructed at the exclusive cost of the ancestors of these plaintiffs, that they should therefore be allowed to make the repairs to the urani at their own cost according to mamul, and that the interference with the urani by the ancestors of the defendants Nos. 1 to 7 was wrongful.

"That subsequently, on the 2nd September 1842, Chidambaram Chetti and certain other Chettis of Karakuddi, executed a Kararnama before the Collector, to the effect that all the tanks and [243] uranis of the Karakuddi Ilaka Nagarattars should henceforward be common to the whole community of the Nagarattars, but that the repairs, even though they should have to be made by the general contributions of the Nagarattars, should be made by the Hakdars who have right to the urani respectively by virtue of their ancestors having originally constructed the same.

"That the terms of the Kararnama were, however, never acted upon, but it was in fact virtually abandoned so far as this urani was concerned, and that since its date, plaintiffs, and their ancestors, as Hakdars, had retained exclusive control of the urani and carried on repairs at their own cost."

Then followed the complaint that, in the year 1878, when they were about to repair the tank, they were stopped by the defendants, who claimed to take part in the work. They asked for a declaration of their sole right to repair, at their own cost, and for an injunction on the defendants ; also claiming Rs. 350 as damages for previous interference.

The defendants, who severed in their defences denied that the plaintiffs' ancestors had excavated the tank, which they alleged to have been made for charitable purposes by a former inhabitant, on whose death, without heirs, it had become the common property of the "Nattars" and "Nagarattars" of the village ; and was appurtenant to a temple on its bank, in which temple all the inhabitants were interested, all the latter contributing to its cleaning and repairs. Some of the defendants also alleged that certain flights of steps had been built, some by the plaintiffs,

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but others by the defendants, at a time prior to the disputes, which arose in 1842.

The following issues were recorded : 1st, whether the plaintiffs had the exclusive right claimed by them, or the urani was the common property of the villagers ; 2nd, whether the flight of steps which defendants Nos. 1 to 4 and 6 and 7 alleged to have been constructed by their ancestors, had been so made, or by the plaintiffs' ancestors ; 3rd, whether the flight of steps, which the 15th defendant claimed as having been constructed by his ancestors, had been made by the latter, or by the plaintiff's family ; 4th, whether the right of maintaining and repairing the steps existed in the parties constructing them, or that right resided in the village community ; 5th, whether the plaintiffs were entitled to any relief, and, if so, to what relief ?

[244] The Subordinate Judge held that the tank was common property in the sense that the public could use the water; but that the right claimed belonged to the plaintiffs, because their family, though not the actual founders of it, had spent upon it large sums of money and improved it, "with the sanction of a few and the sufferance of many persons who could claim an interest in it." The Subordinate Judge, having referred to the Kararnama of 1842, and the other evidence, found that the plaintiffs for more than 30 years before disputes arose in 1878, had the exclusive superintendence of the tank, and cleaned it at their own expense. He held that thus "an easement" had arisen, and that the plaintiffs had thereby "acquired an exclusive right to conserve and improve the tank."

On issues 2 and 3 he held that the ancestors of defendants Nos. 1, 2, 3 4, 6, 7, and 15 had originally constructed the steps, as alleged by these defendants.

On the fourth issue, he apparently held that the defendants had lost by non-user their original right of repairing the steps constructed by their ancestors, and that the plaintiffs had acquired that right.

He refused to give the plaintiffs the damages asked for by them, but declared their sole right to repair the tank at their own cost, and enjoined the defendants from entering on the tank for the purpose of repairing it.

On appeal, the Judges of the High Court (INNES AND MUTTUSAMI AIYAR, JJ.) gave the judgment, which is reported at length in *Muttaya* v. *Sivaraman* (1).

They considered that there was not any exclusive right of property in the tank itself, even alleged by either party ; and it did not appear to them that there was any authority for saying that the construction of substantial adjuncts to the property of another could give the constructor a right of property therein. They held, accordingly, that the construction of certain masonry works, without opposition, did not give the plaintiffs any right to exclude others from interfering with the conservancy of the tank generally. If it did so, then some of the defendants, *viz.*, Nos. 2 to 4 and 7, who constructed one set of steps, and the defendant No. 15, who constructed another, would equally have a right to exclude the **[245]** plaintiffs from taking any part in the general conservancy of the tank. It was not necessary to consider whether the plaintiffs who had always repaired the steps built at their exclusive costs might not have had a right to exclude others from interfering with the repairs of that particular set of steps. The relief now sought was something far beyond this, and

(1) 6 M. 229.

no ground for it had been made out. Accordingly, the High Court dismissed the suit with costs. 1888 DEC. 12.

On this appeal,— PRIVY COUNCIL.

Mr. *J. Graham, Q. C.*, and Mr. *J. D. Mayne* appeared for the appellant.

Mr. *T. H. Cowie, Q. C.*, and Mr. *R. V. Doyne*, for the respondent.

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For the appellant it was argued that the tank was used for the benefit of the village community, being, when the improvements had been made, a charitable institution, and therefore subject to the laws regulating such establishments as temples, dharmsalas, and other things. *Prima facie*, the management and supervision of such an institution and the exclusive duty of providing for, and of executing, all necessary repairs, would devolve upon the founder and his heirs. The evidence established that here such was, in fact, the prevalent usage.

[Sir Richard Couch inquired if there was shown to be any legal obligation on the appellants to undertake the repairs at their sole expense.] So far only as that the appellants' family were hereditary and exclusive managers of the tank, as representing the villagers, that family were entitled to do all acts in the management, discharging the duties of managers. Thus it was that they became "Hakdars" in respect of the tank. The villagers might have sued the family, either to retire from the management, or maintain; and thus the latter had a right, corresponding to the duty to maintain, to repair exclusively. The succession to the management of a temple ordinarily depended on similar rights—See the judgment in the *Rajah Muttulinga Setupati* v. *Perianayagum Pillai* (1).

Moreover the plaintiffs relied on a uniform usage of three-fourths of a century that, in this respect, the plaintiffs' family should represent the community. The permission accorded to the **[246]** ancestors of the defendants to construct two flights of steps into the tank would not give them a general right of interference in its management, nor any right, except, perhaps, that of keeping those particular steps in repair. Reference was made to *Churton* v. *Frewen* (2), and the *Duke of Norfolk* v. *Arbuthnot* (3) cited in the argument, and in the judgment, on the appeal to the High Court.

Council for the respondents were not called upon.

JUDGMENT.

Their Lordships' judgment afterwards, on 12th December, was delivered by

LORD HOBHOUSE.—The plaintiffs and defendants are all inhabitants of the village of Karakuddi, and the subject of dispute is a tank belonging to that village. The plaintiffs claimed in their plaint to be hereditary Hakdars, which the High Court interpret to mean rightful owners of the tank, and they prayed for a declaration that they have the sole right to repair it at their own exclusive cost, and for other relief flowing from that right and from the defendants' interference with it. The Subordinate Judge gave the plaintiffs a decree establishing their sole right to repair the tank at their own exclusive cost. Upon appeal the High Court dismissed the suit. Their Lordships are now asked to say the High Court was wrong.

The plaintiffs do not now assert that they are owners of the tank in any full or proper sense of the word; they admit that the villagers at

(1) 1 I. A. 209 (228).
(2) L.R. 2 Eq. 634.
(3) L.R. 4 C.P.D. 290 = L.R. 5 C.P.D. 390.

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large have full right to the enjoyment of it; but they contend that the function of cleaning, repairing, and generally managing and protecting the tank is an hereditary possession of their family, which they have a right to retain so long as they bear the cost of it. It may be that for generosity and public spirit their attitude deserves all that has been said of it by their counsel. But the defendants object to it; and the only question for a Court of Justice is on which side the lawful right is to be found.

Though the various classes and divisions of villagers are called by local and unexplained names, this much is clear, that the tank in dispute is on the site of an old village tank; that about the beginning of the century it was improved at the cost of the plaintiffs' family upon the request of at least some leading villagers, [247] and with the general acquiescence of the village; that since the year 1842, when there was a quarrel and a settlement, the plaintiffs' family have executed the general repairs and cleansing, and have on one occasion interfered to protect the tank from encroachment; and that some of the defendants have constructed and kept in repair flights of steps leading down into it. These matters, to which the greater part of the oral evidence relates, are not conclusive either way. But the proceedings of 1842 are of great importance and require to be carefully looked at, not because they resulted in any decree or contract binding the present parties, but because they furnish the best evidence of the true relations and legal position of the disputants.

On the 1st of April 1842, Chidambaram, who was the head of, or in some way represented, the plaintiffs' family, presented a petition to the Collector of Madura, in which he alleged that when his predecessor improved the tank, it was agreed that his family should have charge of all the affairs appertaining thereto, and maintain it for ever. Then, after stating that their opponents in the village had prevented them from cleansing the tank, he prayed, "that an order may be passed allowing us to remove the mire and maintain the said urani charity for ever as we have been usually doing, prohibiting interference on the part of the persons who are endeavouring wrongfully to trouble us, and enabling the continuance of the charity in perpetuity."

The Collector referred the matter to the local Ameen, who took evidence and made a report; and on the 9th May 1842, the Collector declared that the opponents were not justified in interfering, and gave directions to the Ameen to issue orders for the complainants to carry on the work according to custom. It is noticeable that neither in the evidence adduced to the Ameen, nor in his report, nor in the judgment of the Collector, does there appear anything to support Chidambaram's allegation of an agreement that his family should have charge of all the affairs of the tank and maintain it for ever.

The order of May 1842 was no sooner issued than the opposite party, represented by one Lakshmanan Chetti, began to petition against it. They insisted that the tank was a common charity, and denied both the right of the plaintiffs' family to maintain it solely and the fact that they had done so. And they prayed a direction "that the charity which has, according to custom, been [248] maintained by our Nagarattar community in common shall continue to be maintained in common henceforth." The immediate result of this petition was that the Collector directed that action on his previous order should be suspended till he himself came to the spot. The ulterior result was a compromise of the dispute, which for the time put an end to it.

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The Kararnama which embodies the compromise is the most important document in the case. It was entered into before the Collector himself very formally. It was prepared by the Head Sheristadar of the district. It was signed by Chidambaram and Lakshmanan, the principal disputants, and by two others, apparently a partisan of each side; and it was attested by the signatures of the Collector and the Assistant Collector. It runs as follows:—

"On Chidambaram Chettiar commencing repairs to the Kalkattu Amman urani, Lakshmanan Chettiar and others said that they also would give money for digging that urani. Chidambaram Chetti objected that it ought not to be so received, and both parties resorted to the authorities. Chidambaram Chettiar contended that, as (his) father originally built the Kalkattu urani, he was the owner. The authorities (said) that uranis dug for charitable purposes are common property, and Chidambaram Chettiar urged that other uranis in the village should be likewise common, which statement the authorities accepted as just, and Lakshmanan Chettiar and others also admitted it as right. Therefore, both the parties having agreed that all the tanks and uranis of the Nagarattars of Karakuddi are common property, we have, with our mutual consent, agreed in the presence of the authorities, that in future, on occasions of removing mud from the urani and doing other repairs, all the Nagarattars should collect the money in common, hand over the said money to the person who may be in management as the original proprietor of the urani, have the work done, and adjust the accounts in common, and that there shall be no dispute whatever about this in future. Therefore we have executed this to be held as a deed of Kararnama for the same. We will henceforward abide by this alone."

The inferences to be drawn from this document are clear enough. The tank is the property, not of Chidambaram, but of the villagers, and the repairs are to be effected by common collections through the person in management, who is to account for his receipts and expenses. The only obscurity is in speaking of the person in [249] management as the original proprietor of "the urani." Whatever may be the meaning of that expression, it cannot detract from the clear statement that all the tanks and uranis are common property. The terms of the Kararnama are fatal to the claim of the plaintiffs, that they are entitled to repair at their sole expense. Their Lordships do not find anything in the previous evidence to show that these terms are erroneous; nor anything in the subsequent evidence to show that the position of the parties has been altered. The circumstances that the plaintiffs' family have in fact executed subsequent repairs without dispute, and that they have stood forward to protect the tank when threatened with injury, are quite insufficient for that purpose.

Moreover, it is very difficult to understand how such a right as this can be claimed without a corresponding obligation, and the plaintiff's counsel are unable to show in what way any obligation is imposed on their family. There is no endowment to support the tank and no right of taking tolls or fees. It is confessedly at the option of the plaintiff's family whether they will execute the repairs or not. In their Lordship's opinion, it is equally at the option of the other villagers to permit the repair to be executed by the plaintiffs, or to insist on the work being done at the common cost.

It seems a great pity that there should be litigation on such a ground. Disputes for the purpose of avoiding a charge are much more common

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than disputes for the purpose of bearing one. But as we have a dispute of the latter kind, it must be settled, like any other, by law. And that compels their Lordships to hold that the tank remains the common possession of the village, and that no class of the villagers has any right to exclude the rest from contributing to the repair. The appeal fails and must be dismissed with costs. Their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Lawford, Waterhouse and Lawford.*

Solicitors for the respondents: Messrs. *Frank Richardson and Sadler.*

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12 M. 250.

[250] ORIGINAL CIVIL.

Before Mr. Justice Shephard.

ABDUL LATEEF *v.* DOUTRE.* [13th March, 1889.]

Civil Procedure Code, Sections 2, 268, 272—(*Official Trustees' Act XVII of* 1864)—*Public officer—Attachment by notice.*

A decree against a married woman provided that the amount due under it should be payable out of the separate estate of the judgment-debtor. The judgment-debtor was entitled to a life-interest in certain trust funds under a settlement of which the Official Trustee was the trustee. The decree-holder proceeded to execute his decree against this life-interest by notice to the Official Trustee under Section 272 of the Code of Civil Procedure, but there were no funds in the hands of the Official Trustee which would have been attachable under Section 268. The decree-holder now applied that the life-interest might be sold:

Held, that the interest of the judgment-debtor was not validly attached.

Semble: The Official Trustee is a public officer within the meaning of Section 2 of the Civil Procedure Code.

[R., 38 C. 13 (18) = 12 C.L.J. 130 = 14 C.W.N. 918 = 6 Ind. Cas. 826 (827).]

APPLICATION for the sale, in execution of a decree for Rs. 1,170, of the life-interest of a judgment-debtor under a post-nuptial settlement, dated 19th September 1873, of which the Official Trustee of Madras was the trustee.

The decree sought to be executed as above was passed in a suit brought by Abdul Lateef upon a promissory note, dated 27th January 1879, against Mrs. Doutre, the defendant, and the decree provided that the said amount should be payable from and out of the separate estate of the judgment-debtor.

By the post-nuptial settlement, referred to above, it was provided, *inter alia*, that the income of certain trust funds should be paid to Mrs. Doutre for her sole and separate use without power of anticipation by her, and the Official Trustee of Madras was appointed trustee of the settlement. The husband died on 30th July 1886. On 26th November 1886 Mrs. Doutre borrowed from Venkatesa Chetti the sum of Rs. 3,000 and as security for the loan executed to him an instrument charging her life-interest [251] under the above settlement, and gave him a power-of-attorney to receive the income of the trust funds from the Official Trustee. The

* Civil Suit No. 55 of 1882.

instrument of charge and the power-of-attorney were duly presented to and registered by the Official Trustee. On 15th January 1889 the decree-holder proceeded to execute his decree under Section 272 of the Civil Procedure Code by attachment of the judgment-debtor's interest in the trust funds above referred to, and served notice as provided in that section on the Official Trustee. There were no funds in the hands of the Official Trustee which would have been available for attachment under Section 268.

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12 M. 250.

Mr. *W. Grant* now moved for an order to sell the interest of the judgment-debtor as above.

The Official Trustee (Mr. *Wedderburn*) *contra.*

The attachment by notice is bad, for the Official Trustee is not a public officer. He can only be appointed trustee with his consent (Act XVII of 1864, Sections 8, 10), and his duties are not public, but private; and he is governed by the terms of The Married Woman's Property Act—Act III of 1874—of which Section 6 only creates an exception. In the present case the Official Trustee was appointed trustee of the defendant's marriage settlement by deed. In *Shahebzadee Shahunshah Begum* v. *Fergusson* (1) the question was merely whether the Official Trustee was entitled to notice of suit, and it was not necessary to decide the present question, for whether he was a public officer are not, he was not entitled to notice in that case. If the order sought is granted it must be made, subject to the powers of advancement for children, etc., contained in the deed.

The further arguments adduced in this case appear sufficiently for the purpose of this report from the judgment of Mr. Justice Shephard.

JUDGMENT.

The decree-holder having obtained an order which purports to be made under Section 272 of the Civil Procedure Code, applies to have the defendant's interest in property in the hands of the Official Trustee sold in satisfaction of his decree. I understand that the defendant, who is a widow, is entitled under a post-nuptial settlement to which she, her late husband, and the Official Trustee were parties, to a life-interest in property consisting of immoveable property and Government paper held by the Official **[252]** Trustee; and I am also informed that on the date of the above mentioned order there were no funds in the hands of the Official Trustee available for attachment under Section 268. The decree-holder is therefore desirous of selling the life-interest of the defendant, subject, however, to a mortgage upon it effected by her, and with that view he has obtained an order under Section 272.

The Official Trustee, who appeared in person, took exception to this proceeding, submitting in the first instance that he was not a public officer within the meaning of Section 272, or rather within the meaning of that term as defined in Section 2. The question is whether he is an officer remunerated by fees, or commission for the performance of a public duty. Having regard to the considerations mentioned by Cunningham, J., in a case where the right to notice of suit under Section 424 of the Code was under discussion, I am of opinion that the Official Trustee is a public officer. *Shahebzadee Shahunshah Begum* v. *Fergusson*(1), *Anantharaman* v. *Ramasami* (2). The mere fact that he is not generally bound to undertake trusts cannot in my opinion affect the nature of the duties in respect of a trust that he does undertake. The next question is

(1) 7 C. 499 (502). (2) 11 M. 317.

1889 MARCH 13. — ORIGINAL CIVIL. — 12 M. 250.

whether the mode of attachment adopted by the decree-holder is applicable to a case where the whole interest of the beneficiary, and not money actually payable or likely to become payable to him, is sought to be affected. There is distinct authority on this point which I think I ought to follow. The case to which I refer arose under the provision of the Code of 1859, Section 237 of which is similar to Section 272 of the present Code. By means of a notice given under Section 237 to the Collector, a decree-holder attached the debtor's share in a sum which he and another were entitled to receive by way of malikana rights, annually as compensation for certain rights in lakhiraj lands which had been extinguished; as against a subsequent mortgagee of the debtor's rights it held that the attachment could not prevail, and the reason of the decision was that an attachment under Section 237 was only good so far as it related to any specific amount which might be set forth in the request as being then payable or likely to become payable to the defendant, and that it was not applicable to a right to receive money for ever as in the case before the Court—*Nilkunto Dey* v. *Hurro Soonderee Dossee* (1) as to which see also *Salamat* **[253]** *Hossein* v. *Luchhi Ram* (2). It was further observed in the former of these cases that, though it might be doubtful whether the attachment should proceed under Section 235 or 236, in either case the defendant himself, to whom the money was payable, would be entitled to notice. I think that this construction of the section is the right one. In the present case there is no reason to doubt that the judgment-debtor has an interest in the property held by the Official Trustee, which may be attached and sold; but I must hold that her interest was not validly attached by the notice given to the Official Trustee under Section 272, and that, therefore, there can at present be no order for sale.

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12 M. 253 = 13 Ind. Jur. 216.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

MARUTHAPPA (*Plaintiff*), *Appellant v.* KRISHNA (*Defendant*), *Respondent.** [7th and 15th February, 1889.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Sections* 7, 9, 39—*Copy of* patta—*Tender.*

A landholder tendered to his tenant a notice stating that his *patta*, of which the particulars were given, had been prepared and calling on him to come within a month to the zamin cutcherry to fetch the *patta* and execute the *muchalka*:

Held, that there was sufficient tender of a *patta* to support a suit under Section 9 of the Madras Rent Recovery Act.

APPEAL against the decree of W. F. Grahame, Acting District Judge of Tinnevelly, in appeal suit No. 174 of 1888, affirming the decree of E. C. Ransom, Acting Head Assistant Collector of Tinnevelly, in summary suit No. 13 of 1887.

Summary suit by the Zamindar of Uttumalai under Madras Rent Recovery Act, Section 9, to enforce acceptance by his tenant of a *patta*.

The only issue in this case was "whether the *patta* on which the suit is based, or a copy of it, was tendered to the defendant in accordance

* Second Appeal No. 1152 of 1888.

(1) 3 C. 414. (2) 10 C. 521.

1889 FEB. 15. — APPELLATE CIVIL. — 12 M. 253 = 13 Ind. Jur. 216.

with the requirements to the Rent Recovery Act." [254] It was admitted that the following document had been tendered by the plaintiff to the defendant:—

"Notice given by Maruthappa Thevar, Zemindar of Uttumalai, to Krishna Nadan residing in the village of your *patta* for Fasli 1296 as detailed hereunder has been prepared and is ready for distribution. You are to appear before me at the zemin cutcherry at Veerakeralampudur within one month, and receive the *pattas* and execute the *muchalka*. If you fail in so doing, steps will be taken under the Act." Then follow the particulars of the *patta*.

The Head Assistant Collector decided the above issue in the negative and dismissed the suit. The plaintiff appealed and the District Judge dismissed his appeal observing: "It is clear that the zemindar is of opinion that it is sufficient for him to inform his tenants that their *pattas* are ready for distribution; and that if he does so inform them he has fully complied with all the requirements of the Act so as to enable him to sustain a suit to enforce the acceptance of a *patta*. But I am of opinion that both the language of Section 7 of the Act and that of the judgment of the High Court (Morgan, C.J., and Innes, J.) in *Sayud Chanda Miah Sahib* v. *Lakshmana Ayyangar* (1) show that it is the very *patta* to be given to the tenant in exchange for his *muchalka* which the Act requires to be tendered, and that the tender of nothing else will enable a landholder to sustain a suit to enforce the acceptance of a *patta*. For this reason I am of opinion that the Head Assistant Collector rightly dismissed the suit."

The plaintiff preferred this second appeal.

Rama Rau and *Bhashyam Ayyangar*, for appellant.

Subba Rau, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

We are unable to concur in the view taken by the District Judge. What was really decided in *Sayud Chanda Miah Sahib* v. *Lakshmana Ayyangar* (1) was that a landholder must show that he had made a written demand upon the tenant showing definitely all the terms offered or required, and that a mere indefinite demand or notice would not suffice. In *Srinivasa* [255] v. *Narayanasami* (2) it was held that a tenant demanding a *patta* from a landlord was not under a corresponding obligation to make his demand in writing. In *Narayana* v. *Muni* (3) it was held that the tender of a document containing an account of rent payable in the current fasli was good as a tender.

In the case before us the document tendered contained all the details required by Act VIII of 1865, Section 4, and was in fact a duplicate of the *patta* with a notice prefixed. Had the tenant executed a *muchalka* engaging to hold in the terms thereof, the contract would have been complete. The Judge seems to have been misled by the term "copy" in Section 39, for a copy of a *patta* served upon a tenant under the provisions of Section 39 is in reality a duplicate. The question whether the tenant was bound to go to the zemin cutcherry to take some other document does not really arise. The written document tendered him fulfilled

(1) 1 M. 45. (2) 8 M. 1. (3) 10 M. 363.

1889 FEB. 15. — APPEL-LATE CIVIL. — 12 M. 253 = 12 Ind. Jur. 216.

the conditions required by law and contained sufficient information for him to decide whether he would accept it or not. It is not pretended that he did accept it or that he executed a *muchalka*. The landlord has therefore a right of suit under Section 9. The decree of the Courts below must be reversed and the suit remanded to the Courts of first instance. The respondent must pay appellant's costs in this and in the Lower Appellate Court, and the costs in the Court of first instance will abide and follow the result.

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12 M. 255.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

GOPALA (*Defendant No.* 2), *Appellant v.* SAMINATHAYYAN AND OTHERS (*Plaintiff and Defendants*), *Nos.* 1 *and* 3), *Respondents.**
[28th November, 1888, and 8th January, 1889.]

Transfer of Property Act, Section 81—*Marshalling—Creditors of Coparcenery and separate creditors—Act XXVII of* 1860—*Adoptive son of deceased creditor—Practice—Parties to cross appeals.*

Suit by the adopted son of the obligee (deceased) of a hypothecation bond to recover principal and interest due on the bond against the land comprised in the hypothecation. Defendant No. 1, the obliger of the bond, had executed it as [256] manager of a joint Hindu family, of which defendant No. 2 was a member, and for the rightful purposes of the family. The family subsequently became divided, and the hypothecated property was divided between defendants Nos. 1 and 2. Defendant No. 1 afterwards hypothecated part of his share for a private debt to defendant No. 3, who having sued on his hypothecation and brought the land to sale in execution became the purchaser.

The District Munsif passed a decree for the plaintiff, against which defendants Nos. 2 and 3 perferred separate appeals, the plaintiff being the sole respondent to each appeal. The District Judge on appeal passed a decree directing that the plaintiff should first proceed against all the property which was not subject to the hypothecation to defendant No. 3, including the share of defendant No. 2.

Defendant No. 2 preferred a second appeal joining all the other parties:

Held, (1) that the plaintiff was under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit;

(2) that as the plaintiff and defendant No. 3 were not creditors of the same person having demands against the property of that person, no case for marshalling arose; and consequently that the direction of the District Judge was wrong.

Per cur.—Though both defendants Nos. 2 and 3 preferred separate appeals from the original decree, they only made the plaintiff respondent and defendant No. 3 omitted to make the appellant before us (defendant No. 2) a party to his appeal, but the relief prayed for in each appeal was that the original decree might be set aside so far as it was in plaintiff's favour and against each appellant ......Having regard to the relief claimed......we see no reason to hold that the appellant before us was a necessary party to the appeal preferred by defendant No. 3.

SECOND appeal against the decree of J. A. Davis, Acting District Judge of Tanjore, in appeal suits Nos. 117 and 140 of 1887, modifying the decree of C. G. Kuppusami Ayyar, District Munsif of Tanjore, in original suit No. 561 of 1885.

Suit to recover principal and interest due on a hypothecation bond, dated 25th May 1880, and executed by defendant No. 1 to the adoptive father (since deceased) of the plaintiff. Defendants Nos. 1 and 2 were

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* Second Appeal No. 382 of 1888.

members of a joint Hindu family, of which defendant No. 1 was the managing member; and the consideration for the bond sued on was a sum of Rs. 1,000 borrowed by him as such for family purposes.

In January 1881 the family property was divided between defendants Nos. 1 and 2; part of the property comprised in the hypothecation bond of 25th May 1880, *viz.*, items Nos. 1, 3, 5 and 7 fell to the share of defendant No. 1, and part, *viz*, items Nos. 2, 4 and 6 to that of defendant No. 2.

On 10th March 1881 defendant No. 1 executed a hypothecation bond of part of his share, *viz.*, items 1 and 5, for a private debt to defendant No. 3, who having obtained a decree upon the **[257]** hypothecation bond in original suit No. 2 of 1884, in the Tanjore District Court and brought the hypothecated property to sale in execution and became the purchaser.

Upon these facts the District Munsif held that the plaintiff was entitled to proceed against all the land comprised in his hypothecation bond, *viz.*, items Nos. 1—7, both inclusive, and decreed accordingly. Against this decree defendants Nos. 2 and 3 preferred separate appeals, the plaintiff being made the sole respondent in either.

The District Judge, on appeal, referring to Section 82 of the Transfer of Property Act, modified the decree of the District Munsif by adding to it a direction as follows: "That the plaintiff do first proceed against the "property, plaint items Nos. 2, 3, 4, 6 and 7 not mortgaged to the third "defendant and only after those items have proved insufficient to meet "his decree-debt against the properties Nos. 1 and 5 which are mortgaged "to the third defendant."

Defendant No. 2 preferred this second appeal joining both the plaintiff and defendants Nos. 1 and 3 as respondents.

Mr. *Subramanyam*, for appellant.

Rama Rau and *Pattabhiramayyar*, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR, and SHEPHARD, JJ.).

JUDGMENT.

It has been found by the Courts below that the defendant No. 1 executed the hypothecation bond, Exhibit A, prior to the partition between him and defendant No. 2 in consideration of money borrowed by him as managing co-parcener on account of the marriages of defendant No. 2 and his sister. There is evidence in support of the finding, and we must accept it in second appeal. The plaintiff was clearly not precluded from suing, as the adopted son of the obligee, to recover the debt due under Exhibit A, and he was under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit, nor is it shown that the partition deed, Exhibit X, has been misconstrued on any point. The material questions argued before us are that the Judge was in error in altering the original decree in an appeal preferred by defendant No. 3 against the plaintiff so as to prejudice the appellant, defendant No. 2, who was not made a party to the appeal, and in applying Section 82 **[258]** of the Transfer of Property Act in favour of defendant No. 3. It is true that though both defendants Nos. 2 and 3 preferred separate appeals from the original decree, they only made the plaintiff respondent, and that defendant No. 3 omitted to make the appellant before us a party to his appeal, but the relief prayed for in each appeal was that the original

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decree might be set aside so far as it was in plaintiff's favour and against each appellant, and so much of the property under hypothecation as severally belonged to him. Having regard to the relief claimed by each appellant before the Judge, we see no reason to hold that the appellant before us was a necessary party to the appeal preferred by defendant No. 3. It may be that before the Judge applied the doctrine of marshalling as between defendants Nos. 2 and 3 he should have made the former a party to the appeal and should have heard him also on the point; but the omission to do so was only an error of procedure and as the facts found are the same both against defendants Nos 2 and 3 and as both are parties to the second appeal before us, the question of marshalling may be effectually dealt with by us, and in this view the error of procedure is immaterial. We desire, however, to consider whether the direction of the Judge that the plaintiff should first proceed against property not mortgaged to defendant No. 3 can be supported, and we reserve judgment on that point.

The judgment on the point reserved was delivered on the 8th day of January 1889, as follows:—

The question which we reserved for consideration when this appeal was heard was, whether the decision of the District Judge was right so far as it directed the plaintiff to proceed first against property not mortgaged to defendant No. 3. The facts found to be established in this case are shortly these: Seven items of land originally belonged to a joint Hindu family which consisted of two co-parceners, *viz.*, defendants Nos. 1 and 2. In May 1880 those items were hypothecated to the plaintiff's father as security for a debt contracted by defendant No. 1, as the managing member, and for the benefit of the joint family. In January 1881 the two co-parceners entered into a partition, whereby items 2, 4 and 6 fell to the share of the second, and items 1, 3, 5 and 7 to the share of the first defendant. On 10th March 1881 defendant No. 1 hypothecated items 1 and 5 to defendant No. 3 as security for a debt which he contracted for his own use. The latter [259] instituted against the former original suit No. 2 of 1884, and purchased those items at a Court sale held in execution of the decree which she obtained. The plaintiff brought the present suit to recover his debt by the sale of items 1—7, and defendant No. 3, contended that she was entitled to the direction given by the Judge.

The Judge relied on Section 82 of the Transfer of Property Act, but that section has reference to a case of contribution, whilst the direction impugned in appeal could only be given, if it could be given at all, by way of marshalling securities under Section 81. We are of opinion that upon the facts found, defendant No. 3 is not entitled to insist that the plaintiff shall first proceed against the items which fell to the share of defendant No. 2 so as to prejudice him. Section 81 appears to enact, as a rule of law, the equity of marshalling securities as administered by the Court of Chancery in England, and the principle on which it rests is that a person having two funds to satisfy his demand shall not, by his election, disappoint a party who has only one fund—*Aldrich* v. *Cooper* (1). But as pointed out by Lord Chancellor Eldon in *ex parte Kendall* (2), no marshalling ought to be enforced unless the parties between whom it is enforced are creditors of the same person and have demands against the property of the same person. In *ex parte Kendall*, the question was considered as between

(1) 8 Ves. 308. (2) 17 Ves. 520.

the creditors of a firm which originally consisted of five partners, and the creditors of four of them who carried on the partnership business as surviving partners after the death of one of the five, and the creditors of the four insisted that the creditors of the five should be ordered to proceed first against the separate estate of the deceased partner which was available to them only. After reserving judgment, "the Lord Chancellor observed as follows: "That is an equity which the "creditors of the four have not. I am extremely well satisfied that a "creditor having a demand against one estate only of his debtor, may in "equity confine another creditor, having a demand against two estates of "the same debtor, to make good his demand against that upon which he "has no claim, so that he may go against the other; but the proposition is perfectly different, that creditors of the four partners, having no "demand against the separate estate of the deceased partner, shall "compel the joint creditors of the five, being also joint creditors of the [260] "four, to go against the separate estate of the deceased partner. "Whether it may be just or not, the creditors of the four have no other "right than the four themselves would have had, and the equity of the "creditors in these cases is worked out through the equity which the "debtors themselves have."

In the case before us defendant No. 3 was the creditor of the defendant No. 1 and not of the joint family, and items 2, 4 and 6, against which he insisted *inter alia* that the plaintiff should first proceed did not belong to his debtor, but belonged to defendant No. 2. Defendant No. 1 had no equity to insist that the plaintiff should first proceed against the separate property of defendant No. 2 in order to save his own separate estate. The direction given by the Judge is therefore bad in law, so far as it relates to items 2, 4 and 6, which fell to the share of defendant No. 2 and the decree appealed against is hereby modified by excluding those items from the direction embodied in the decree. The decree is confirmed in other respects, and the third respondent will pay the appellant the costs of this appeal. Respondents will bear their own costs in this Court.

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12 M. 260 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RAMANADAN (*Defendant No.* 1), *Appellant v.* RANGAMMAL (*Plaintiff*), *Respondent.** [20th November, 1888.]

Hindu Law—Right of a widow to reside in the family dwelling-house—Sale of dwelling-house in execution of a decree obtained against the managing members of family on a debt incurred for family purposes.

A house, being ancestral property of a Hindu family was sold in execution of a decree by which the decree-amount was constituted a charge on such property. The debt sued on had been incurred for the benefit of the family by the co-parceners for the time being, but since the death of such co-parcener's father:

Held, the widow of the latter who resided in the said house during her husband's lifetime was not entitled as against a purchaser for value in good faith under such decree (but with notice that she resided and during her husband's

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* Second Appeal No. 403 of 1886.

1888 Nov. 20. — FULL BENCH. — 12 M 260 (F.B.).

life had resided [261] in that house, and still claimed to reside there) to continue to reside for life in such portion of the house sold as she resided in subsequent to her husband's death —*Venkatammal* v. *Andyappal* (1) distinguished.

[F., 10 Ind. Cas. 985=4 S.L R. 278; 39 P.R 1896; R. 17 B. 398; 12 M. 285; 27 M. 45 (49)=12 M.L.J. 270 (273); 31 M. 500=18 M.L.J. 571=4 M.L.T. 485; 14 A.W.N. 106; 9 Ind. Cas. 524=21 M.L.J. 303=9 M.L.T. 311=(1911) 1 M. W.N. 179 (180. 181); 36 P.R. 1907=11 P.L.R. 1908=118 P.W.R. 1907; D., 20 M. 323 (326).]

SECOND APPEAL against the decree of T. Weir, Acting District Judge of Madura, in appeal suit No. 392 of 1885, affirming the decree of V. Kuppusami Ayyar, Additional District Munsif of Madura, in original suit No. 189 of 1884.

Suit to declare the right of the plaintiff, a Hindu widow, to occupy a certain house.

The plaintiff was the widow of one Sankarappa Naick, against whose sons and grandsons defendant No. 1 obtained a decree in original suit No. 3 of 1882 on the file of the Subordinate Court of Madura (West) for the principal and interest of a sum of money borrowed of him by them. The house in question which had formed part of Sankarappa's ancestral property was attached in execution of the decree; and a claim asserted by the present plaintiff having been investigated and rejected under Section 331 of the Code of Civil Procedure, the house was sold in execution and purchased by defendant No. 1 in the name of defendant No. 2.

The plaintiff now sought to set aside the order made under Section 331 of the Code of Civil Procedure, and to obtain the above declaration on the ground that she, as the widow of Sankarappa Naick, had a right to occupy the family dwelling-house for life, and that the above proceedings in execution did not bind her interest as she was not a party to the suit.

Both the District Munsif and, on appeal, the District Judge, recorded a finding to the effect that the plaintiff had occupied part of the house in question during her husband's lifetime and had continued to occupy it after his death; and though her husband and his sons had other houses at Karepetti and Madura, the District Judge said:—"The plaintiff is not "shown to have ever resided in the house in the village of Karepetti "and the other houses or shops belonging to the family in the town of "Madura have never been occupied as residences, and are not suited for "such a purpose." It was also found that the defendant No. 1 had notice, at the time of his purchase, of the fact that the plaintiff was in occupation of part of the house. On these facts the District Judge upheld the decree passed by the District Munsif [262] declaring that plaintiff was entitled to occupy the portion of the house in question in which she had resided hitherto.

Defendant No. 1 preferred this second appeal.

Subramanya Ayyar, for appellant.

Mr. *Ramasami Raju*, for respondent.

The arguments adduced on the various hearings of this second appeal appear sufficiently for the purpose of this report from the order of reference and the judgments which follow.

At the first hearing the High Court directed a trial of the issue whether the debt sued on in original suit No. 3 of 1882 had been incurred for the benefit of the family. This issue was determined in the affirmative, and no objection was taken by the respondent to the finding on this

(1) 6 M. 130.

question. The case having then come on for rehearing, the Court (Kernan and Brandt, JJ.) made the following 1888 Nov. 20.

Order of Reference to the Full Bench :—

"The facts of this case, so far as it is necessary to state them for the purposes of the reference which we propose to make to the Full Bench, are that a tenement, in part of which the plaintiff continues to live, and in which she lived with her husband and sons prior to her husband's death, was sold in November 1880 by the plaintiff's son, Alagirisami, to the first defendant in discharge of a debt incurred in 1875 by Alagirisami and his three brothers, and secured by an instrument hypothecating this property; the creditor and purchaser, the first defendant in the present suit, filed a suit against the sons and grandsons of Sankarappa, the plaintiff's husband, to obtain possession of the house or for its value, and secured a decree in original suit No. 3 of 1882 for money, which was constituted by the decree a charge on the property; and in execution of that decree he purchased the tenement in suit. FULL BENCH. 12 M. 260 (F.B.).

"The present suit is brought by Sankarappa's widow, Rangammal, for a declaration of her right to continue to reside for her lifetime in that portion of the house in which she has lived since the death of her husband. The District Munsif held the plaintiff's right to occupy for her lifetime a portion of 'the family house' notwithstanding the purchase of the interests of the male co-parceners of the family by a stranger to be established, and eviction of the widow 'without providing some other suitable [263] dwelling for her' to be prohibited, on the authority of *Mangala Debi* v. *Dinanath Bose* (1) *Gauri* v. *Chandramani* (2), *Talemand Singh* v. *Rukmina* (3), *Dalsukhram Mahasukram* v. *Lallubhai Motichand* (4), and *Venkatammal* v. *Andyappa* (5). He further held it proved that the purchaser had notice at the time of his purchase of the occupation of part of the premises by the plaintiff, as the mother of his judgment-creditors, and widow of Sankarappa, their father. The District Judge upheld the decision.

"This second appeal is preferred on the ground that the house having been sold for a family debt, the plaintiff is not entitled to decree. For the purposes of this reference, the property must be held to be ancestral.

"We called for a finding on the fourth issue (which had not been tried), *viz.*, whether the judgment-debt in original suit No. 3 of 1882, was incurred for the benefit of the family; the finding is in the affirmative, and no objection is taken to that finding.

"In *Gauri* v. *Chandramani* (2) the learned Judges cite the case of *Managala Debi* v. *Dinanath Bose* (1) as authority for their decision that the auction-purchaser of property sold in execution of a decree against a nephew of the widow's husband could not eject the widow from the house in which she had resided with her husband. It does not appear from the report whether the fact that in Mangala Debi's case the sale was a voluntary sale was specially noticed by the learned Judges.

"*Talemand Singh* v. *Rukmina* (3) simply follows the decision in *Gauri* v. *Chandramani* (2), but reference is also made in it to 'authorities referred to by West and Buhler;' but reference to that work appears to us to show at least as much authority against the view taken by the Allahabad Court as in favour of it.

(1) 4 B.L.R. O.C. 72. (2) 1 A. 262. (3) 3 A. 353.
(4) 7 B. 282. (5) 6 M. 130.

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"The case of *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1) is not noticed by either the District Munsif or the District Judge, though it is referred to and distinguished in the Bombay case *Dalsukram Mahasukhram* v. *Lallubhai* (2) cited by the District Munsif. It appears to us that the last-named case itself might be distinguished from the case before us on the ground that in the former the sale was a voluntary sale; and we entertain at present [264] little doubt as to the law on the subject as expounded in v. *Lakshman Ramchandra Joshi's case* (1) as to family property sold to pay debts (not incurred for immoral purposes) of the husband of a widow claiming maintenance or of his father or grandfather, that a sale of family property in such circumstances would be valid as against the widow, irrespective of notice of her claim on the part of the purchaser. The question for determination in the case before us is, however, somewhat different, the original debt having been incurred by the co-parceners for the time being after the death of the plaintiff's husband. The view taken by West, J., in *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1) carries it however much further, and on the grounds that the debts ordinarily take precedence of claims to maintenance and that assent to the propositions of law necessary to support the decree appealed against would seem to imply that a widow has a right difficult to distinguish from a right to a charge or lien on family property, which will affect purchasers under a title such as that in the present case, although effect has not been given to such right either by agreement or by a decree of a Court such as to constitute it a charge on specific property.

"In *Venkatammal's case* (3), however, which was decided by this Court since the latest of the two Bombay cases above referred to, and in which the circumstances connected with the sale of the property at the Court auction do not appear to be distinguishable in principle from those in the case before us, the learned Judges (Turnar, C.J., and Muttusami Ayyar, J.), while holding that the widow, the mother of Kristnasami Chetty, by whom the original debt was incurred, could not resist the sale, decided that the widow was entitled to continue to reside in the house she had theretofore occupied, and that the house must be sold subject to that right and the decree is drawn accordingly.

"For the reasons indicated above and having regard to the apparent conflict of authority, we think it desirable that the question should be considered by a Full Bench.

"We are inclined to concur with the Bombay High Court in considering that the fact of *bona fide* purchasers having notice is immaterial in cases in which ancestral property is sold to defray the just debts of a widow's husband, his father's or grandfather's [265] debts, and if the case of a sale of such property for a debt contracted by co-parceners of the widow's husband otherwise competent to deal with such property for proper purposes stands upon the same footing, notice would be immaterial in this case also.

"The question then which he would refer for the decision of a Full Bench is as follows:—

"Where ancestral property consisting of a house is sold in execution of the decree of a Court by which such property is held liable to sale in satisfaction of the sum decreed, and such decree is the result of a debt incurred not otherwise than for the benefit of the other co-parceners by

(1) 2 B. 494. (2) 7 B. 282. (3) 6 M. 130.

the co-parceners for the time being, but subsequent to the death of such co-parceners' father is the widow of the latter who resided in the said house during her husband's lifetime entitled as of right, as against a purchaser for value in good faith under such decree (but with notice that she resided and during her husband's life had resided in that house and still claimed to reside there), to continue to reside for the term of her life in such portion of the house sold as she resided in subsequent to her husband's death ?"

This second appeal came on for hearing before the Full Bench, and judgment was reserved. Subsequently the Court delivered the following

JUDGMENTS.

KERNAN, J.—I am of opinion that, upon the facts, the widow of the father of the manager has not a right as against the purchaser to reside in the house of her late husband and family.

If the debt, in respect of which the sale took place, was a debt due by her husband, no doubt could be entertained that she had no such right. The only doubt there could be, as it appears to me, is whether her right to reside in the house has not accrued as against the manager who succeeded her husband, and whether such manager could have, by any act of his, voluntarily affected her right. However, the finding is that the debt incurred by the manager was for the benefit of the family. The widow was one of the family, and, though I do not believe her right to maintenance would give her a right to increased maintenance by reason of large increase of the property of the manager, still, as the acquisition of the means of providing food and raiment for her as well as for the rest of the family was one of the objects of the manager in carrying on business, I do not see how she can resist effect being **[266]** given to the manager's act for the family benefit. If she had got a right by contract or by decree to reside in the house before the execution of the deed by the manager, she could rely on it and resist the title of the purchaser.

I would answer the reference in the negative.

MUTTUSAMI AYYAR, J.—The house in dispute was the ancestral property of one Sankarappa, who died, prior to 1875, leaving him surviving, a widow and four sons. In 1875, the sons hypothecated the house as security for money which they borrowed from the appellant, and, in 1880, the eldest son sold the property in satisfaction of the debt. Thereupon the appellant brought original suit No. 3 of 1882 against the sons and grandsons of Sankarappa to recover either the possession of the house or its value, and obtained a decree which declared the debt to be a charge upon it. In execution of the decree, he brought the house to sale and purchased it. The widow of Sankarappa had continued to live in the house with her sons and grandsons since the death of her husband, as she had lived during her husband's lifetime. She had joined neither in the execution of the hypothecation bond of 1875, nor of the deed of sale of 1880, nor had she been made a party to original suit No. 3 of 1882. She instituted the present suit to obtain a declaration of her right to continue to reside for her lifetime in that portion of the family house, in which she had lived both prior and subsequently to her husband's death. It was found by the Courts below that the purchaser had notice; at the time of his purchase, of the occupation of that part of the house by the respondent (plaintiff) as the mother of his judgment-debtors and the widow of Sankarappa, their father. Upon these facts, the District Munsif, and, on appeal, the District Judge held that

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nothing more than the interests of the male co-parceners passed by the Court-sale, and decreed the claim in respondent's favour. On second appeal, the question, whether the debt in original suit No. 3 of 1882, was incurred for the benefit of the joint family, was ordered to be tried, and a finding was returned in the affirmative. It was contended for the appellant that the decision of a Divisional Bench of this Court in *Venkatammal* v. *Andyappa* (1) was open to doubt. The question referred to the Full Bench is :—" Where ancestral property consisting of a house is sold in execution of the **[267]** decree of a Court, by which such property is held liable to sale in satisfaction of the sum decreed, and such decree is the result of a debt incurred, not otherwise than for the benefit of the other co-parceners, by the co-parceners for the time being, but subsequent to the death of such co-parceners' father, is the widow of the latter who resided in the said house during her husband's lifetime entitled as of right as against a purchaser for value in good faith under such decree (but with notice that she resided there, and during her husband's life in that house and still claimed to reside there), to continue to reside for the term of her life in such portion of the house sold as she resided in subsequent to her husband's death."

I am also of opinion that the purchase is valid against the respondent. It is found that the judgment-debt is a family debt, and I take it that the debt, though contracted only by the male co-parceners, was contracted by them, not for their exclusive benefit, but for the benefit generally of the joint family consisting of themselves and their mother. A sale for the payment of her own debt would bind her interest in the house, whatever it might be, and the decree in original suit No. 3 of 1882 was one which executed the hypothecation of 1875, and which was passed against the representatives of the joint family. In these circumstances, the respondents is not entitled to set aside the sale unless she shows that the debt, which has led to it, is not binding upon her. In *Venkatammal* v. *Andyappa* (1), there was no finding as in this case that the debt in question was a family debt, that is to say, a debt contracted for the joint benefit of the mother and her sons, and that case is not therefore on all fours with the one before us. As I took part in it, and as the soundness of the decision therein is doubted in the order of reference, I desire to state the considerations upon which a distinction was made between the mother's right of maintenance generally and her right to reside in the family house in which she had lived.

For the appellant, it is urged that the claim to maintenance creates only a personal obligation against the heir in possession. I cannot accede to this contention. The son in possession of ancestral property is no doubt under a personal obligation to maintain his mother, but this is not all. The mother is entitled to insist that the maintenance should be charged on a specific **[268]** part of ancestral property either when a partition is made by her sons or when the managing member wastes ancestral property, or when she is not duly maintained, or when for any other good and sufficient cause, the ancestral property indicated by Hindu law as the general fund from which her maintenance is to be paid is in peril. The correct view is that the obligation to maintain the mother is strengthened by giving her an interest in immoveable property and thereby enabling her to constitute that interest into a specific charge, or an actual existing proprietary interest for the term of her

(1) 6 M. 130.

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life, and to protect her right of maintenance against improvident alienation of the fund from which it is to be satisfied To this extent, the right of maintenance is a right *in re* or an interest in ancestral property. Neither Mr. Justice Phear nor Mr. Justice West, who held that such right was not an existing proprietary interest denied that it was a real right Mr. Justice Phear said:—"When the property passes into the hands of a *bona fide* purchaser without notice, it cannot be affected by anything short of an already existing proprietary right; it cannot be subject to that which is not already a specific charge or which does not contain all the elements necessary to its ripening into a specific charge. And obviously, the consideration received by the heir for the sale of the deceased's property will, so far as the widow's right of recourse to it is concerned, take the place of the property sold." He added that the widow might also doubtless follow the property for her maintenance into the hands of any one, who takes it as a volunteer or with notice of her having set up a claim for maintenance against the heir (*Srimati Bhagabati Dasi* v. *Kanailal Mitter* (1).) Adverting to that judgment, Mr. Justice West said:—"The distinction taken between the volunteer and the alienee for value rests rather on English than on Hindu notions": and the notice necessary to affect the purchase must be a notice of the existence of a claim likely to be unjustly impaired by the transaction. He added, if Mr. Justice Phear's observation were applied to the Bombay Presidency, the widow's claim in every case does contain all the elements necessary for its ripening into a specific charge and went on to state that it was however in his opinion not an existing proprietary right. He referred to the English law as applied to purchases made with knowledge of collateral rights and observed, "where [269] the right comes into existence by covenant, the burden does not at law run with the servient tenement, whereas equity says that a person who takes it with notice that a covenant has been made shall be compelled to observe it." "In cases of maintenance," he added, "the right does not come into existence by covenant, but it is a right maintainable against the holders of the ancestral estate in virtue of their holding no less through the operation of the law than if it had been created by agreement; and so, when the sale prevents its being otherwise satisfied, it accompanies the property, as the burden annexed to it, into the hands of a vendee with notice that it subsists. Equity, as between the vendee and vendor, will make the property retained by the latter primarily answerable, but such property there must be to make the sale and purchase free from hazard, where the vendee has knowledge or means of knowledge of a widow's claim that cannot be satisfied without recourse to what he proposes to buy." The conclusion he came to was that the maintenance of persons entitled to no definite share was *not an indefeasible* charge, so long as it was not reduced to certainty by a legal transaction (*Lakshman Ramchandra Joshi* v. *Satyabhama Bai* (2)) The *ratio decidendi* is that the heir in possession of ancestral property is under an obligation to maintain the mother, and that she has an interest in ancestral property to ensure its due fulfilment or *jus in re* as a strengthening right, but that that right does not ripen into an indefeasible charge, until it is referred to specific property by contract or decree, that meanwhile it is only an interest analogous to a collateral right resting in covenant, that until it is reduced to

(1) 8 B.L.R. 225. (2) 2 B. 494.

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certainty it is not an existing proprietary right, that a purchaser, however, with notice that that right cannot be satisfied without recourse to the purchase he makes, is liable for her claim, and that, if the purchase is *bona fide* and legal at the time when it is made, a subsequent change in the circumstances of the family does not invalidate a transaction legal in its inception. I am, therefore, of opinion that the contention that the right of maintenance creates no real right, but only a personal obligation, must be overruled.

Another contention is that the distinction made in *Venkatammal* v. *Andyappa* (1) between the right of residence in the family house and the right generally of maintenance is not sound [270] in principle. The right of residence of Hindu females is ordinarily referable to the family house and a purchaser may be presumed to have notice of that fact. It is reasonable to hold that he is not a *bona fide* purchaser entitled to eject her, unless it is proved that the sale is valid as against her, either because, as in this case, it is made in liquidation of a debt binding on her or an ancestral debt, or with her consent or in circumstances which would sustain a plea of equitable estoppel against her. The consideration that a real right is not a specific charge, unless that right is referable to specific property, has no application in the case of a family dwelling. Prior to the decision in *Lakshman Ramchandra Joshia* v. *Satyabhama Bai* (2), Sir Barnes Peacock, and Mr. Justice Mitter, held that an adopted son could not convey to a stranger such a right to the family dwelling as to deprive his adoptive mother of her right of residence (*Mangala Debi* v. *Dinanath Bose* (3).) The same view was taken in a Bombay case reported in *Prankoonwur* v. *Dovkoonwur* (4). There is also a Smriti of Katyayana which says "except his whole estate and his dwelling house, what remains after the food and clothing of his family, a man may give away, whatever it be whether moveable or immoveable; otherwise, it may not be given" (*Colebrooke's Digest, B. II, Ch. IV, Sect. II. text* 19). In *Gauri* v. *Chandramani* (5), the Allahabad High Court held that the widow had a valid right of residence against the purchaser of the family house at a Court-sale. Again, the view that the right of maintenance is not an already existing proprietary interest so as to affect a *bona fide* purchaser for value is in substance rather an equity founded on analogy to the English law of purchases made with knowledge of collateral rights than a strict logical deduction from texts of Hindu law or the usage of the country. According to Yajnavalky'a the mother was entitled to a share equal to that of a son when partition was made of ancestral property. This was the Smriti law on the point and the author of the Mitakshara expounded the law according to Yajnavalkya's Smriti (Mit. *Chap.* I, Section 7, 1—2). But a distinction was made by the author of Smriti Chandrika between the nature of a son's interest and of a widow's interest, and the former was characterized as independent [271] ownership, and the latter as limited to the assignment of a portion by way of maintenance. Thus, the mother's right, which originally extended to a definite share according to Yajnavalkya was limited to such a portion as would suffice for her support. According to Hindu notions, it was still a real right or a charge on ancestral property. According to the course of decisions until 1877, the mother's maintenance was considered to be a charge on ancestral property. In *Ramchandra Dikshit* v. *Savitribai* (6) it was

(1) 6 M. 130. (2) 2 B. 494. (3) 4 B.L.R. O.C. 72.
(4) 1 Borr., 2nd Ed., p. 404. (5) 1 A. 262. (6) 4 B.H.C.R. A.C.J. 73.

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laid down that by Hindu law the maintenance of a widow was a charge upon the whole estate and, therefore, upon every part of it. In *Heera Lall* v. *Mussumat Kousillah* (1), it was stated that the widow's right to maintenance was not merely a right of action against the heirs personally who take the property, but a charge on the property which formed the estate of her husband. The High Court at Allahabad observed that the charge should be enforced against the purchaser of a part of the family property with the equitable reserve that execution should, if possible, proceed in the first instance against the vendors. This is the first form of equity recognized as modifying the rule that the widow's maintenance was a charge on every part of the estate. In this Presidency, the late Sudder Court held in 1860 that a sale of property by the husband was invalid where nothing was left for the maintenance of his wife—*Lachchanna* v. *Baupanamma* (2). Thus, according to judicial decisions, the mother's right of maintenance was considered to be a charge on ancestral property until 1877. But in its nature the charge was indefinite in its scope, and, as in the case of a male co-parcener, a right to carve specific and individual property out of a general fund which is the common property of the joint family. In *Lakshman Ramchandra Joshi* v. *Satyabhama Bai* (3), a distinction was made between a charge on specific property and a *jus in re* in a general fund which might ripen into such charge, and elucidated by Mr. Justice West in a very learned judgment by reference to several authorities. The foundation, however, for the distinction is that so long as the mother lives with her sons as a member of the joint family and continues to be supported by them, she submits **[272]** to their dealing with the ancestral property, and that the interest she has in ancestral property under Hindu law to protect her claim to maintenance is indefinite and not referable to a specific portion of ancestral property and, until it is made certain and referred to some specific property, it does not acquire the character of a specific charge, so as to affect *bona fide* purchasers for value. It was the equitable protection due to *bona fide* purchasers for value that suggested the distinction between a specific charge, and the right over a general fund from which such charge might be carved out. It must be observed here that, though the mother living with and under the protection of her sons submits to their dealing with ancestral property, the submission is under Hindu law subject to this condition, *viz.*, that the managing co-parcener who deals with the property must act, either really or to the purchaser's knowledge, within the scope of his authority as the manager of a joint fund. As to the mother's right of residence in the family house, it is a right inherent in her and an incident of her status as mother and the son cannot arbitrarily eject her from it. There is no indefiniteness as to the specific property to which it is referable and as the residence of Hindu females in family houses is a fact well known in this country, a purchaser was held not entitled to eject her, unless he showed that the sale bound that interest. The reason for the distinction between a *jus in re* over a general fund and a charge on a specific part of that fund did not extend to the right of residence in the family house, and it was therefore held with special reference to the mode in which the theory of a charge in the nature of an existing proprietary right was developed, that the equity of a purchaser for value did not extend to the mother's right of residence in specific property, *viz.*, the family house, unless the sale was binding on her.

(1) 2 Agra Reports 42. (2) S. D. Madras (1860) 290. (3) 2 B. 494.

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In the case before us, however, the sale was made in satisfaction of a debt binding on her and in execution of a mortgage decree made against male coparceners as the representatives of the joint family.

I concur, therefore, in the opinion of Mr. Justice Kernan.

The CHIEF JUSTICE.—I concur.

PARKER, J.—I concur.

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12 M. 273 = 1 Weir. 375.

[273] APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS *v.* RAMANA AND OTHERS.*
[15th and 20th February, 1889.]

Penal Code, Sections 372, 373—Code of Criminal Procedure, Sections 234 and 537—Obtaining a minor for prostitution—Dancing girl caste—Adoption—Misjoinder of charges—Immaterial irregularity.

A woman, being a member of the dancing girl caste, obtained possession of a minor girl and employed her for the purpose of prostitution; she subsequently obtained in adoption another minor girl from her parents, who belonged to the same caste. She and the parents of the second girl were charged together under Sections 372, 373 of the Penal Code. The charges related to both girls;

Held, (1) that the two charges should not have been tried together, but the irregularity committed in so trying them had caused no failure of justice;

(2) that Sections 372, 373 of the Penal Code may be applicable in a case where the minor concerned is a member of the dancing girl caste.

Per Muttusami Ayyar, J.—It would be no offence if the intention was that the girl should be brought up as a daughter, and that, when she attains her age, she should be allowed to select either to marry or follow the profession of her prostitute mother.

[R., 22 C. 164 (172); 27 C. 839 (845); 15 M. 323 (330) = 1 Weir 366 (372); 19 M. 127 (132, 137); 14 Cr.L.J. 33 (34) = 18 Ind. Cas. 257 = 24 M.L.J. 211 = 13 M.L.T. 131 = (1913) M.W.N. 207 (216).]

CASE of which the records were called for by the High Court under Section 435 of the Code of Criminal Procedure.

The first and second accused, who are members of the Bhogam or dancing girl caste, gave their daughter Ramabhai, while still a young child, in adoption to the fourth accused, who was a member of the same caste. The fourth accused had some years before obtained from a woman of another caste a girl named Dasari Narayanam, who was employed by her for the purpose of prostitution while still a minor.

The first, second, and the fourth accused were, respectively, convicted by the Additional Deputy Magistrate of Kistna in Case No. 23 of 1888 of the offences of disposing of and obtaining possession of a minor with intent that such minor be employed for the purpose of prostitution, under Sections 372, 373 of the Penal Code. They appealed to the Sessions Court.

[274] The Sessions Judge on appeal reversed the conviction of the first and second accused, holding that no offence had been proved with regard to Ramabhai; he, however, held that the fourth accused was guilty in respect of Dasari Narayanam, and confirmed her conviction. He dealt with the cases as follows:—

"The Magistrate ought not to have included in this trial the case concerning the minor Ramabhai. It has no connection whatever with the case of the first witness, and, moreover, the circumstances are different.

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* Criminal Revision Case No. 720 of 1888.

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On the merits I much doubt if a conviction can be upheld in the case of the minor Ramabhai. She is the daughter of the first and second accused, who are of the Bhogam or dancing class, and she was given in adoption to fourth accused, who is the aunt of the first accused. This may have been done in order that she might inherit the property of the fourth accused. It did not place the minor Ramabhai in a position worse than that which she occupied before this adoption. The child was of the Bhogam class both before and after the adoption. I understand that Sections 372 and 373 of the Penal Code are directed against a disposal of a minor which takes her from a position where she is not so liable to become a prostitute and places her in a position where she is more liable to become a prostitute. I do not consider that these sections can apply to adoptions among the dancing women class themselves, which do not alter for the worse the status of the child.

"Taking this view of the case, I reverse the conviction of the first and second accused, and of the fourth accused as far as the minor Ramabhai is concerned.

"It appears to me that the fourth accused is guilty under Section 372 of the Penal Code with regard to the girl Dasari Narayanam, who was obtained from a woman of another caste and was actually subjected to prostitution while still a minor, the fourth accused receiving the proceeds of this prostitution. This is altogether different from the transaction with regard to the second girl Ramabhai, who was given in adoption by one member of the dancing girl caste to another and who may be intended for marriage and not for prostitution. The question whether adoption in this class is necessarily immoral is fully discussed in the judgment of Muttusami Ayyar, J., in *Venku* v. *Mahalinga* (1). The [275] sentence on fourth accused of six months' simple imprisonment and a fine of Rs. 200, in default six weeks' further imprisonment is confirmed."

The Acting Government Pleader (*Subramania Ayyar*), for the Crown.

Shadagopachariyar, for the accused.

The arguments adduced in this case appear sufficiently for the purpose of this report from the judgments of the Court (MUTTUSAMI AYYAR, and PARKER, JJ.).

JUDGMENTS.

PARKER, J.—The Deputy Magistrate was no doubt in error in trying the two charges together (Section 234, Criminal Procedure Code); but I do not think this irregularity has caused a failure of justice or that it has prejudiced the fourth accused.

The Sessions Judge has set aside the conviction on the ground that as the minor Ramabhai was of the dancing girl class before adoption, her adoption did not alter her status for the worse. The ground of decision does not appear to me to be sound in law.

Ramabhai was the legitimate daughter of parents who were married, though of the Bhogam caste, and the essence of the prosecution was not that she was adopted by the fourth accused, but that she was given by her parents and taken by the fourth accused with the intent that she should be employed or used for the purpose of prostitution. The child was of course too young to be immediately used for such purpose, but the allegation was that she was adopted by the fourth accused, herself a prostitute, who had quarrelled with another girl whom she had brought up to be a prostitute and whose earnings as a prostitute she had received, and

(1) 11 M. 393.

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that the intention of the fourth accused was to train up Ramabhai to follow the same course of life. It appears to me that if these allegations were found in the affirmative, the legal offence would be complete even though the age of the child prevented her immediate prostitution and allowed time for repentance.

In the testimony of prosecution witnesses Nos. 1, 2, 4, 5 and 7 there was legal evidence in support of the criminal intention, and the testimony of the defence witnesses that the adoption was for the purpose of the minor inheriting the fourth accused's property is not necessarily inconsistent with the allegation of the prosecution witnesses. It was for the Judge to *weigh* that evidence, but he had not done so.

[276] It has been held in *Venku* v. *Mahalinga* (1) that prostitution is not the essential condition or *necessary* consequence of an adoption by a dancing girl, but is an incident due to social influences. It is a question to be determined on the evidence and on the circumstances of this case whether the prosecution has made out the criminal intention or whether the Judge can come to the conclusion on the evidence that the adoption was merely made to secure to the fourth accused a person competent to perform her obsequies and to take her property.

The Judge has not recorded any finding upon the evidence. I would, therefore, set aside the acquittal and direct that the appeal be re-heard.

MUTTUSAMI AYYAR, J.—I am also of opinion that, though there was a misjoinder of charges, yet it was only an irregularity which did not result in failure of justice. I also think Sections 372 and 373 do not cease to be applicable, because the minor concerned is of the Bhogam or dancing girl caste. The act proved in the case before us is the giving and accepting of a minor, as it is said, in adoption. It is perfectly immaterial whether a second adoption during the lifetime of the first witness for the prosecution, who is said to have been first adopted, is valid, or whether it amounts to fosterage resulting in no jural relation. In order to support a conviction under Section 372 or 373, it would be sufficient to show that the girl was given and accepted with the intention mentioned therein. It is, however, necessary to bear in mind whilst coming to a finding as to the intention that, when an act is not *per se* criminal, the specific intent which renders it criminal must be established by cogent evidence. The minor Ramabhai is only a child of eight years of age, and the adoption took place three years ago. It is reasonable to infer that there was no intention at the time of adoption to employ her at once for purposes of prostitution. It would also be no offence if the intention was that the girl should be brought up as a daughter and that, when she attains her age, she should be allowed to elect either to marry or follow the profession of her prostitute mother. If, on the other hand, the intention was that the girl should be employed as a prostitute whilst she continues to be a minor, the accused might then be liable. Though the adoptive parent may be a prostitute, [277] yet she may have civil rights. In criminal cases the presumption of innocence must be displaced by positive evidence. As the evidence in this case was not specific in the sense indicated above, I doubted at first if we should at all interfere in revision. After reading Mr. Justice Parker's judgment, I see no objection to directing a re-hearing of the appeal in order that the Judge may come to a distinct finding with regard to the intention, and then dispose of the case, and I concur in the order proposed by Mr. Justice Parker.

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(1) 11 M. 393.

12 M. 277.

1889 JAN. 29. APPELLATE CIVIL. 12 M. 277.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SIVASANGU AND ANOTHER (*Defendants Nos.* 2 *and* 3), *Appellants* *v.* MINAL (*Plaintiff*), *Respondent.** [12th and 13th April, 1888 and 29th January, 1889.]

Hindu law—Inheritance—Rule of inheritance affected by manner of life—Maraver prostitutes—Act XXI of 1850.

A married Maraver woman deserted her husband and lived in adultery with another man, to whom she bore four children. Of these children, the two daughters associated together leading the life of prostitutes, and the two sons separated themselves from their sisters and observed caste usage. The elder daughter died leaving property in land :

Held, that the sister succeeded to the deceased in preference to the brother.

[R., 31 B. 495 (509) = 9 Bom L.R. 774 (786) ; 34 B. 553 = 12 Bom. L.R. 545 (554) = 7 Ind. Cas. 459 ; 21 C. 697 (701); 13 M. 133 ; 23 M. 171 (177) ; 17 C.L J. 438 (456) = 17 C.W.N. 679 (693) ; 24 M.L.J. 223 (227) = 13 M.L.T. 88 (90) ; 4 N L R. 31 (37) ; **Appr & Dist.**, 38 C. 493 (498) = 15 C.W.N. 807 = 9 Ind. Cas. 657 ; **D.**, 25 C. 254 (258) ; 26 M. 509.]

SECOND Appeal against the decree of S. Gopalachari, Subordinate Judge of Madura (East), in Appeal Suit No. 539 of 1886, reversing the decree of M A. Tirumalachari, District Munsif of Dindigul, in Original Suit No. 596 of 1885.

Suit to redeem certain land mortgaged by one Kuppayi, deceased, to defendant No. 1. The plaintiff was the sister of the late Kuppayi, and claimed both under a will alleged to have been executed by the latter in her favour on 8th July 1881 and also as heir by Hindu law. Defendant No. 2, who was brought on to the record by an order of the District Munsif, denied the validity of the will and claimed to be a preferential heir to the deceased, being the son of her brother.

[278] The relationship of the parties as described above was admitted, and it was also admitted that the deceased Kuppayi, who was unmarried, acquired the property in suit from a man with whom she lived as a concubine.

Kuppayi, the plaintiff, Kandasami (since deceased), who was the father of defendant No. 2 and one Karuppannan, who was brought on to the record by the order of the High Court, were the children of a woman of the Maraver caste called Karuppayi by one Shanmuga Pillai, with whom she lived as a concubine after deserting her husband. The dates when these events took place did not appear from the record of the second appeal. The plaintiff was unmarried and had lived with various paramours. The further circumstances of the family appear sufficiently below.

There was no substantial dispute as to the mortgage sought to be redeemed, and the will set up in the plaint was not established to the satisfaction of either the Court of first instance or the Court of first appeal. The sole question in this case accordingly related to the law of inheritance applicable to the case.

The District Munsif dismissed the suit and the Subordinate Judge passed a decree in favour of the plaintiff for the reasons summarized in the following order of the High Court.

Defendant No. 2 preferred this second appeal.

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* Second Appeal No. 75 of 1887.

1889 JAN. 29. — APPELLATE CIVIL. — 12 M. 277.

Bhashyam Ayyangar and *Kaliyanaramayyar*, for appellants.

Subramanya Ayyar, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following order and judgment.

This second appeal came on for hearing on Thursday, the 12th April 1888, and on Friday, the 13th April 1888, when the Court made the following

ORDER.—The appellant is the brother's son and the respondent is the sister of one Arulayi *alias* Kuppayi. About seven or eight years before suit, Kuppayi mortgaged the land in dispute to the first defendant with possession. Kuppayi died in July 1881 leaving her surviving, besides the appellant and the respondent, a brother named Karuppannan, who is not a party to the present suit. Kuppayi and her survivors were the children and grandson of one Karuppayi, a woman of the Maraver caste. Karuppayi was originally a married woman, but she since left her husband and lived in concubinage with one Shunmuga Pillai. Kuppayi, [279] the deceased, the appellant's father Kandasami, and Karuppannan, her brother, were the offspring of the illicit union between Karuppayi and Shunmuga Pillai. Kuppayi did not marry, but lived with several persons in concubinage, two of whom were the late Zemindar of Kannivadi and one Boomi Balayam Pillai. The Subordinate Judge was of opinion that she acquired the land in suit with monies which she earned by living in prostitution with the Zemindar of Kannivadi The respondent brought the present suit against the first defendant alone to redeem the mortgage executed by her deceased sister. Though she alleged also that the property in dispute was acquired jointly by her and by her deceased sister, and that the latter left a will in her favour, she since abandoned those grounds of claim. The substantial question which was insisted on throughout was whether she was Kuppayi's heir. Like Kuppayi, she also never married, but lived in prostitution. It is alleged for her that she lived with her sister when the latter died, while her brother, Karuppannan, and nephew, the appellant, lived apart. It is admitted during the hearing of this second appeal that, though the appellant's father was the son of a prostitute mother, the appellant himself was born to his father in wedlock. It does not appear from the record before us whether Karuppannan is married or not. The first defendant, the mortgagee, denied that the respondent-plaintiff was Kuppayi's legal representative, and pleaded that the appellant was the person entitled to redeem, alleging that he had in his possession other properties left by Kuppayi and received the melvaram, payable to Kuppayi under the instrument of mortgage. Thereupon, the District Munsif made him a party (defendant) to the suit, and as the second defendant, he contended that, being the brother's son of the deceased woman, he was a preferable heir. The District Munsif held that the rule of law applicable to this case was the Hindu law applicable to the fee of an unmarried sister, and that the deceased's brother Karuppannan was the lawful heir, and on this ground he dismissed the suit. The plaintiff appealed from that decision to the Subordinate Judge, and made the appellant before us one of the respondents. The Subordinate Judge considered that a prostitute was neither a maiden nor a damsel within the meaning of the rule of Hindu law which applied to the descent of sister's fee, and he was of opinion that the rule of decision was the one laid down by the [280] author of the Mitakshara in regard to the peculiar property of a woman who contracted a marriage in one of the disapproved forms. He considered that the sister might be preferred to her brother, but

that the brother excluded the brother's son and accordingly passed a decree in favour of the respondent. From this decree, the mortgagee, the first defendant, has preferred no second appeal, but the second defendant, the brother's son of Kuppayi, the deceased, has preferred this appeal.

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As Kuppayi, to whom the property in suit belonged is dead, the case before us is clearly one of vested inheritance and not of contingent reversion, in which there might be a doubt as to whether the brother or the brother's son would be the heir in existence when the reversion should fall in or become an estate vested in possession. The appellant's pleader does not attempt to controvert the position that one of the rules applicable to collateral succession in the case of ordinary Hindu property is that the nearer in degree excludes the more remote. Nor can there be any doubt as to the soundness of the rule, for, in the compact series of heirs indicated by the text of Yagnyavalcya, the author of the Mitakshara places the brother before the brother's son. As to the rule of law applicable in the case before us, both the Lower Courts are in error. A prostitute is certainly *not* a maiden within the meaning of the rule applicable to the sister's fee. Nor can property acquired by her with funds earned by prostitution be treated as stridhanam or property given to a woman who contracts an Asura marriage or a legal marriage though in one of the inferior forms prescribed by the law. A legal marriage and the character of the property as stridhanam are the prerequisites of the rule of succession mentioned by the Subordinate Judge.

The decision of the High Court in the Sivaganga case which was confirmed by Her Majesty in Council is clearly against the view that *all* property vested in a woman, however acquired, is her sridhanam governed by the special rules of succession prescribed by the Mitakshara in regard to woman's peculiar property. We are of opinion that the property left by Kuppayi must be treated as ordinary Hindu property, if the Hindu law regulated its devolution. The rule of law applicable to the children of a prostitute mother who have elected to retain Hindu usage is that of Hindu law as laid down in the decision of the Privy Council in *Myna* [281] *Boyee* v. *Ootaram* (1). We are, however, not inclined to apply this rule at once. Before coming to a decision, it is desirable, first, to make the brother of Kuppayi a party defendant, and then to determine the question. It will also be necessary to ascertain whether, as suggested by the respondent's pleader, the respondent and Kuppayi lived together and continued to practise prostitution whilst their brother lived apart from them and resumed his *status* as a member of caste, electing to follow its approved usage and regarding his sisters as degraded, and if so, whether, according to the usage of the class to which the parties to this second appeal belong, there is any special rule of preference in favour of the sister in regard to succession to the property left by her prostitute sister.

It was held by the Sudder Dewanny Adalat in *Tara Munnee Dassea* v. *Motee Buneanee* (2) that under Hindu law prostitute daughters living with their prostitute mother succeeded to the mother's property in preference to a married daughter living with her husband. The *ratio decidendi* was that the legal relation of a married and respectable daughter to her mother ceased when the latter became an outcaste. The contention for the respondent is that directly the brothers of a prostitute marry and

(1) 8 M.I.A. 400.

(2) 7 Sel. Rep. S.D.A. 273=8 I.D. (O. S.) 247.

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ADVOCATES

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resume their caste usage separating from her, their legal relation to their prostitute sister ceases.

We shall, therefore, direct the Subordinate Judge to make Karuppannan a party to the present suit, and after hearing his defence, to try whether the rule of succession applicable to ordinary Hindu property is applicable to the property left by Kuppayi; whether the respondent was an associate of her deceased sister in her degraded condition as a prostitute and lived with her at the time of the latter's death; and whether, Karuppannan, their brother, and the appellant had separated from them resuming their caste usage; if so, whether, according to the usage of the class to which the parties belong or otherwise, there is a rule of preference in favour of the sister.

Another contention in this case was that the second appeal should be dismissed on the ground that the brother excluded the brother's son, and that the appellant was not a necessary party to the present suit. If the Hindu law applicable to ordinary Hindu property governed this case, the suit must be dismissed on the [282] ground that neither the appellant nor the respondent was Kuppayi's heir. The fairer course would be to make the brother a party and to adjudicate on the claim once for all after hearing his defence instead of dismissing the appeal and thereby encouraging a multiplicity of suits.

The findings on the issues mentioned above will be returned within three months from the date of the receipt of this order, when ten days will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge added as a party to the suit Karuppannan, the plaintiff's brother (who in his written statement denied the title of the plaintiff and set up a superior claim in himself as a preferential heir,) and subsequently returned on the above issues as follows.

As to the first issue, whether the rule of succession applicable to ordinary Hindu property is applicable to the property left by Kuppayi, he said:—

"The line of heirs to the property of female depends upon (*a*) the source of the acquisition, (*b*) the *status* of the acquirer, *viz.*, whether she is a maiden, a female under coverture, or a widow.

"The sources of acquisition may be classified under five heads:—(1) gifts by relatives or stridhanam in the technical sense; (2) presents from strangers, (3) inheritance, (4) earnings by labour, skill or mechanical arts, (5) accumulations.

"The property in dispute in this case must, upon the evidence . . . be looked upon either as a present given by the Zemindar of Kannivadi when Kuppayi was in his keeping, or as a purchase made by her with such presents. It must, therefore, be treated as falling either under division (2) or division (4) above referred to.

"But Kuppayi was neither a maiden, nor a married women nor a widow. And though as regards presents from strangers and earnings by labour, &c., Katyayana makes this provision, *viz.*: 'The wealth which is 'earned by mechanical arts or which is received through affection from a 'stranger is subject to her husband's dominion,' which would seem to cover only cases where the acquisition is made by a female under coverture, there is no provision at all in the text-books, so far as I can see, in regard to the descent of property acquired by a female through prostitution, except the following which is to be found in Strange's [283] Manual of Hindu Law, para. 363:—'With prostitutes, the tie of

'kindred being broken, none of their relatives who remain undegraded in 'caste, whether offspring or other, inherit from them—*Tara Munnee Dassea* 'v. *Motee Buneanee* (1). Their issue after their degradation succeed.'" This doctrine was accepted by the High Court in *Mayna Bai* v. *Uttaram* (2). The particulars and *ratio decidendi* of *Tara Munnee Dassea* v. *Motee Buneanee*, which was also approved of in *Mayna Bai* v. *Uttaram*, have been already given in the order of their Lordships in this suit remitting issues for trial. That decision contains the nucleus for the proposition formulated by Mr. Justice L. Strange.*

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For these reasons, it seems to me that the issue under consideration must be answered in the negative, and that, at all events, the succession here would, in the first instance, devolve not on the relatives that remain undegraded in caste, but on those who are Kuppayi's heirs after the degradation, or who are her associates in the degradation.

The Subordinate Judge further found with reference to the second and third issues, that (1) the plaintiff was an associate of her deceased sister in her degraded condition as a prostitute and lived with her at the time of the latter's death; and that (2) the father of the second defendant and the second and third defendants had separated from the plaintiff and her sister, resuming their caste usage. On the fourth issue it was held that on the facts recorded under the first issue the plaintiff was the preferential heir.

This second appeal having come on for re-hearing the Court delivered the following

JUDGMENT.

We see no reason to suppose that the Subordinate Judge has come to a wrong conclusion on any of the issues referred to him for trial.

But it is argued that under the ordinary Hindu law the brother excludes the sister; that no exception can be validly made (under Act XXI of 1850) on the ground that the deceased was an outcaste.

Act XXI of 1850 was intended to apply to those who by change of religion or otherwise lose their caste, and to preserve to [284] them any right of inheritance which they might otherwise forfeit under ancient Hindu law or the usage of the country. We are inclined to doubt whether the case before us is at all with in the purview of the Act. Assuming that it is, as argued before us, the Act did not abrogate any rule of preference which might exist as between the sister of a prostitute associated with her in her degraded condition and her brother who remained in the caste, and treated her and the deceased as being out of caste.

The view taken by the Subordinate Judge that the sister is entitled to preference is supported by the principle laid down in the case mentioned,—*Tara Munnee Dassea* v. *Motee Buneanee* (1). There the competition was between a married daughter in caste and a prostitute daughter was lived with her prostitute mother when they were out of caste.

Following the opinion of the Pundit, the Sudder Dewanny Adalat held that the two prostitute daughters were alone entitled to inherit what the prostitute mother had left, and that the relation of the married and respectable daughter to the out-caste mother had been severed.

* The Subordinate Judge also referred to II Macnaghten's Hindu Law, pp. 132, 133, 137.

(1) 7 Sel. Rep. S.D.A. 273=8 I. D. (O. S.) 147. (2) 2 M.H.C.R. 196 (202).

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Although the case was decided prior to Act XXI of 1850, we observe that there is an analogy between the legal relation of two prostitute sisters living together in their degraded condition and that of two brothers living in coparcenary, while a third brother lives away from them without any community of interest.

We are referred to no authority in support of appellant's contention, and in principle the view taken by the Subordinate Judge appears to us to be sound. We therefore dismiss the second appeal and the second defendant will bear the plaintiff's cost therein. We make no order as to the costs of Karuppannan.

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12 M. 285.

[285] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SAMINATHA (*Defendant No.* 3), *Appellant v.* RANGATHAMMAL (*Plaintiff*), *Respondent.** [4th and 8th February, 1889.]

Civil Procedure Code, Section 43—*Hindu Law—Maintenance—Suit to declare maintenance fixed by a decree—A charge on land.*

A Hindu woman having obtained a decree for maintenance against her husband, now alleged that he had alienated part of his property with a view to defeat her claim for maintenance, and sued him for a declaration that certain land which he had not alienated was liable for her maintenance:

Held, that no cause of action was shown.

[Cons., 17 M. 268.]

SECOND APPEAL again the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in appeal suit No. 765 of 1887, affirming the decree of H. Srinivasa Rau, District Munsif of Tanjore, in original suit No. 360 of 1886.

Suit by a Hindu woman against her husband and two persons who professed to hold mortgages from him. The plaintiff had obtained a decree against her husband for maintenance at a fixed rate in original suit No. 400 of 1875 on the file of the District Munsif of Tanjore. Her plaint now alleged that defendant No. 1 (the husband) had fraudulently alienated the greater part of his property to defeat her claim to maintenance, and prayed for a declaration that certain lands which remained unalienated by him and their produce were liable for her maintenance. It was pleaded, *inter alia* that the suit being a second suit on the same cause of action was not maintainable by reason of Sections 13 and 43 of the Code of Civil Procedure.

The District Munsif found that the professed mortgages to defendants Nos. 1 and 2 were invalid, and passed a decree as prayed for, and the Subordinate Judge affirmed his decree, observing with reference to the plea referred to above:

"The first ground of appeal is that this second suit upon the [286] same cause of action is not sustainable, and Section 43 of the Civil Procedure Code is relied on. But that section in my opinion cannot apply to a case of this kind. As observed by Mr. Mayne in Section 379 of his Hindu Law, the maintenance of a 'wife by her husband is of course a

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* No. 1348 of 1888.

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matter of personal obligation arising from the very existence of the relation and independent of the possession of any property.' If the maintenance of a wife by her husband is a personal obligation, whether he possesses any property or no, such considerations as that every suit shall include the whole of the claim which a plaintiff is entitled to make in respect of the cause of action; if a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect thereof; and a person entitled to more than one remedy may sue for all or any of them but if he omits to sue, he shall not afterwards sue for the remedy so omitted— do not arise in a suit similar to this, where the plaintiff, when she sued her husband for her maintenance had no necessity to ask that her maintenance should be charged upon some portion of her husband's property. The necessity for such a prayer arose only when her husband commenced to waste his property. Therefore, it cannot be said that the claim for maintenance and a claim to have that maintenance charged upon the plaintiff's husband's property arose out of the same cause of action and that both the causes of action were so entwined as to disentitle her, under Section 43, to claim, in a separate suit, when the necessity for it arose, that a portion of her husband's property may be charged with her maintenance. When she brought her suit for her maintenance, she might have asked for such a charge, but her omission to do so cannot debar her now from asking for the relief."

Defendant No. 3 preferred this second appeal.

Pattabhirámyyar, for appellant.

Subramanya Ayyar, for respondent.

The arguments adduced in this case appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

In her plaint, the plaintiff does not in terms seek to make her maintenance a charge upon the property which has not been alienated. Such a suit would be barred under Section 43, Code of Civil Procedure, *Andi* v. *Thatha* (1). But she seeks for a [287] declaration that some property not alienated is subject to her claim for maintenance, and dates her cause of action from the alienation of some other property. She does not state that her husband is about to alienate this particular property, or that she has any legal lien specially upon it, but merely that her husband has alienated other properties with a view to defraud her of her maintenance.

It is urged that the right to have maintenance made a charge upon immoveable property is an equitable relief only and not a real right. This contention cannot be supported after the Full Bench decision in *Ramanadan* v. *Rangammal* (2), though in any case, Section 43, Civil Procedure Code, would operate as a bar to such a suit.

We are constrained to hold that plaintiff has alleged no cause of action which would entitle her to the declaration prayed.

The decrees of the Courts below must be reversed, and the suit dismissed with costs throughout.

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(1) 10 M. 347. (2) See 12 M. 260.

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APPELLATE CIVIL.

12 M. 287.

12 M. 287.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

MALLAN AND OTHERS (*Plaintiffs*), *Appellants in S.A.* 730 *of* 1888 *v.* PURUSHOTHAMA AND OTHERS (*Defendants*), *Respondents.** PURUSHOTHAMA AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Appellants in S. A.* 1040 *of* 1888 *v.* MALLAN AND OTHERS (*Plaintiffs*), *Respondents.** [22nd February, 1889.]

Land dedicated to family idol—Land excluded from partition of family property and declared inalienable—Subsequent purchase from Escheat Department of Government—Sale in execution.

By a partition deed by the six members of a Hindu family, it was provided that part of the land of the family should be set apart for the maintenance of the family idol and should be inalienable and the rest of the land was divided equally.

Subsequently the Government claimed the dedicated land as an escheat, and sold it to the members of the family jointly, of whom one built a house on part of [288] it—less than one-sixth—with the consent of the others. The house and it site was sold in execution of a decree against the builder :

Held, that the other members of the family were not entitled to have the house removed or the sale cancelled.

SECOND APPEAL against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in appeal suit No. 265 of 1887, modifying the decree of S. Raghunatha Ayyar, District Munsif of Tellicherry, in original suit No. 294 of 1886.

Suit to cancel the sale of certain land, described as a house site, sold to defendants Nos. 1 and 2 in execution of a decree obtained by them against defendant No. 3 in Small Cause Suit No. 1216 of 1884 on the file of the Subordinate Court of North Malabar, and praying that a house built by defendant No. 3 thereon be removed.

The land in question was described in the plaint as the property of a tarwad of which plaintiff and defendant No. 3 were members. The plaintiffs' case (which had also been set up in a petition (dismissed) filed by them objecting to the execution of the decree referred to above) rested on a deed of partition (Exhibit A) executed in 1863 by the father (Krishna Mallan) and the five uncles of the plaintiffs including the father of defendant No. 3.

Exhibit A was as follows :—

"We six have with full will agreed to divide in the undermentioned proportion the properties consisting of those which are ancestral to us six and of those which were acquired by me Krishna Mallan by my efforts with the assistance of the ancestral money.

"The paramba called theruvath thazhe in which we raised (*sic*) and which is to the west of the road in the said vatikkakem, the upstair patinhantta house (house facing east) therein, and theruvathathaya vatteri paramba which is to the east of the road, were acquired as jenmam by me Krishna Mallan. The upstair thekkini house, padi [gate], cow-shed and vatikkini, which are in the said first paramba and the upstair kizhekkini house in the second paramba, were built by Krishna Mallan.

"It is agreed that the said two parambas which are worth Rs. 2,000 shall, without being divided, be reserved to us six with equal rights, that

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* Second Appeals Nos. 730 and 1040 of 1888.

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all incomes annually arising from the said two parambas be collected by me Krishna Mallan as long as I am alive and, after me, by my sons, and that with those incomes the [289] worship of the family god and Easwara savas (divine worships) which are being performed from time of old for the prosperity of all the members of the tarwad, be performed for ever and ever.

"It is agreed that Krishna Mallan, Gopala Mallan and Atchutha Mallan shall with their respective families live separately in the upstair patinhantta house in the above-mentioned first paramba, that Rama Mallan, Lekshmana Mallan and Anantha Mallan shall with their respective families live separately in the upstair kizhekkini house in theruvath thazhe vatteri paramba, the eastern and southern verandahs thereof being excluded, and that the upstair thekkini house, padi, cow-shed and vatikkini which are in the first paramba, and the eastern and southern verandahs of the upstair kizhekkini house in the second parambas shall for ever and ever remain in the exclusive possession of Krishna Mallan and his children and be enjoyed by them.

"It is agreed that neither the said six persons jointly nor each one severally can give under a document or alienate the said two parambas and the houses therein to any other person on any right whatever, whether on kanom or on mortgage, and that, if done so, it shall not be valid.

"After deducting the properties which are reserved undivided as said above, the remaining properties which are agreed upon to be divided are those which were acquired by Krishna Mallan by his efforts with the assistance of the ancestral money."

The document then proceeded to set out the separate share of the six executants.

The land in question was admittedly part of the two barambas with regard to which the provisions of the partition deed are given above; and the plaintiff claimed that by reason of those provisions it could not be sold in execution of the decree against defendant No. 3, &c. It appeared that in 1871 the Government claimed the land as an escheat, but before it was declared to be such, the surviving executants of Exhibit A and the representatives of the others jointly purchased from Government the jenm right therein, the price being paid in six equal shares and the sale-deed being executed in the name of the six persons. Under these circumstances the District Munsif finding that the land in question was less than the one-sixth share of defendant No. 3 dismissed the plaintiff's suit.

On appeal the District Judge said:—

[290] "I accept Munsif's finding that the ground forms part of a paramba which is the undivided common property of all the six co-parceners of a family governed by Hindu Law, but I cannot understand how in this view he upheld the sale. So long as the six co-parceners continue undivided each and every one of them has a joint interest over every inch of the ground; how then this particular portion of the paramba could be sold as the debtor's sole share I cannot see. Munsif's argument is that the portion sold is less than what would fall to the debtor's share, but his share is not ascertained, and therefore any fractional part of an unascertained portion cannot be sold. The right of all the co-parceners is co-extensive over every portion of the ground and no one particular portion, therefore, could be sold as exclusively belonging to the judgment-debtor. All that could have been sold is the debtor's right, title and interest to a one-sixth share of the entire undivided property and the purchaser in auction

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may sue for a partition of his share. The debtor had no exclusive saleable interest in the portion sold, it being common to all the six co-parceners, of whom plaintiff is admittedly one. He has therefore a right to set aside the sale so far as the ground is concerned.

"As for the house it is the exclusive property of the debtor. He built it and it is saleable for his debt. I cannot see what right the plaintiff has to compel the purchaser to remove it.

"The result is that the sale of the ground is set aside as against plaintiff and his suit allowed so far dismissing it otherwise.

"Costs in these circumstances will be borne by each party throughout. Decree is modified accordingly."

Against this decree the plaintiffs preferred Second Appeal No. 730 of 1888, and defendants Nos. 1 and 2 preferred Second Appeal No. 1040 of 1888.

Subba Rau, for plaintiffs.

Mr. *Gantz*, for defendants Nos. 1 and 2.

The arguments adduced on these second appeals appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.).

JUDGMENT.

The paramba on which the house stands was no doubt set apart by the partition deed (Exhibit A) for the use of the family idol, excluded from partition and declared to be inalienable. **[291]** But in 1871 the Government claimed the paramba by right of escheat and the appellant's family purchased it from the Government, each of the six co-parceners paying a sixth part of the price. Since that time defendant No. 3 built the house now in dispute on a portion of the paramba with the consent of the plaintiffs and the other members of the family. The Government was entitled by right of escheat to put an end to the arrangement contained in Exhibit A in favour of the family idol, and defendant No. 3 was therefore at liberty as a purchaser to elect either to conform to or to repudiate the original trust. Having regard to his conduct and that of the family in regard to the house-site in dispute subsequent to 1871, it is impossible to reconcile it with an intention to continue the original trust, at least in regard to the house and its site. We are unable to adpot the suggestion that the original trust continued to attach to the house-site in dispute after 1871.

It is next urged that the house-site must be treated at all events as joint family property, that although defendant No. 3 might be entitled to one-sixth share in it, yet he had no specific property in the whole site on which he built the house, and that on this ground the plaintiff's prayer that the respondents should be directed to remove the superstructure should be allowed. It is no doubt true that defendant No. 3 had no exclusive property in the house-site, but under the circumstances of this case it would be equitable to infer an understanding among the parties that the site was to be deducted from the one-sixth share to which defendant No. 3 might be entitled if a partition were to be effected. It was certainly not the plaintiff's intention when they granted permission to defendant No. 3 to build a house that he should be evicted from it. Although they now desire to eject the respondents Nos. 1 and 2 because they are of a different caste, we are unable to hold that the equitable consideration which would be available to defendant No. 3 could not be equally available to the purchasers.

We are therefore of opinion that the decree of the Subordinate Judge ought to be set aside and that of the District Munsif restored, but we direct each party to bear his costs both in this Court and in the Lower Appellate Court.

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APPELLATE CIVIL.

12 M. 287.

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12 M. 292.

[292] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

MUTTUSAMI AND OTHERS (*Plaintiffs*), *Appellants v.* RAMAKRISHNA (*Defendant No.* 1), *Respondent.** [7th February, 1889.]

Hindu law—Joint family—Purchaser from one-co-parcener—Adverse possession—Limitation.

Plaintiffs being members of a joint Hindu family alleging division, and a sale to them by other members of their share in the family property more than 12 years before suit, sued to eject a more recent purchaser. The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it :

Held, (1) that the plaintiffs having failed to prove division as alleged were not entitled in second appeal to have their suit treated as a suit for partition;

(2) that the suit was barred by limitation, since the proposition that the possession of one co-parcener is the possession of all for purposes of limitation has no application as between a purchaser from one of the co-parceners and the other members of the family. *Ram Lakhi* v. *Durga Charan Sen* (I.L.R. 11 Cal. 683) followed.

[R., 23 B. 137 ; 9 Ind. Cas. 495=9 M.L.T. 397 (398)=(1911) 2 M.W.N. 175.]

SECOND appeal against the decree of E. C. Johnson, Acting District Judge of South Arcot, in appeal suit No. 132 of 1887, reversing the decree of K. Ramachandra Ayyar, District Munsif of Villapuram, in original suit No. 692 of 1886.

Suit by the plaintiffs to recover possession of certain land and to eject defendants Nos. 1 and 2 therefrom. The land in question was the ancestral property of a joint Hindu family of which the plaintiffs and defendant No. 3 and his two brothers were members. The plaintiffs alleged that in 1867 the land belonging to the family was divided into moieties; that a partition subsequently took place of the moiety which had fallen to defendant No. 3 and his brothers; and that the latter in 1873 sold their share to the plaintiffs who thus came to own five-sixths of the whole. The present suit was brought to eject defendants Nos. 1 and 2 who claimed under a recent purchase from defendant No. 3 and his son, who was joined as defendant No. 4.

[293] The defendants pleaded that the land in question had become the property of defendant No. 3 by reason of the other members of the family having taken for themselves other ground elsewhere. And it appeared that the plaintiffs' sale-deed was drawn up in the name of defendant No. 3 as well as in the names of his brothers, but that he had not executed it.

The District Munsif held that the division and sale alleged by the plaintiffs were proved, and accordingly passed a decree in their favour for possession. Defendant No. 1 appealed against this decree and the District Judge reversed it on appeal on the ground that the division between

* Second Appeal No. 593 of 1888.

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the plaintiffs and defendant No. 3 and his brothers was not established, and that defendant No. 3 had been in possession since 1868, his possession being adverse to the plaintiffs "from the date when he refused to become a party" to the sale-deed of 1873. The plaintiffs preferred this second appeal.

Mahadeva Ayyar, for appellants.

Sankaran Nayar, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and WILKINSON, JJ.).

JUDGMENT.

The finding is that no partition was ever effected between defendant No. 3 and his brothers, and that the latter were not entitled to convey to the appellants the specific portion claimed by them. We do not consider that the appellants are entitled to alter the nature of their action and to ask us to treat the suit as if it were a suit brought for partition. The Judge's finding that the possession of defendant No 3 was at all events adverse to the appellants from 1873 is correct. Co-parcenary as recognized by Hindu Law, can only subsist between the members of a joint Hindu family, and the contention that the possession of one coparcener is the possession of all for purposes of limitation can have no application as between a purchaser from one of the co-parceners and the other members of the family. This view is also in accordance with the case of *Ram Lakhi* v. *Durga Charan Sen* (1).

The second appeal fails and is dismissed with costs.

M. 294.

[294] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

NARASIMMA (*Plaintiff*), *Appellant v.* APPALACHARLU AND ANOTHER (*Defendants*), *Respondents.**

[27th November and 6th December, 1888.]

Civil Procedure Code—Act VIII of 1859, *Section* 246—*Limitation Acts—Act IX of* 1871, *Schedule II, Article* 15—*Act XV of* 1877, *Schedule II, Articles* 11, 13 - *Objection to execution.*

A petition under Section 246 of the Code of Civil Procedure of 1859, objecting to the execution of the decree by the attachment of certain land on the ground that the land was the property of the petitioner, was heard and dismissed in July 1875. In July 1877, within twelve years from the dispossession of the objector, he filed a suit against the decree-holder who had purchased at the execution sale, for the possession of the land held by him as purchaser at the execution sale :

Held, that the suit was not barred by limitation.

[R., 3 O.C. 84.]

SECOND appeal against the decree of J. Kelsall, District Judge of Vizagapatam, in appeal suit No. 337 of 1887, affirming the decree of K. Murtiraju, District Munsif of Yellamanchili, in original suit No. 364 of 1887.

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* Second Appeal No. 804 of 1888.

(1) 11 C. 683.

1888 DEC. 6. — APPELLATE CIVIL. — 12 M. 294.

This was a suit filed in July 1877 to recover a certain piece of land. The plaintiff claimed to be the undivided brother of the husband (deceased) of defendant No. 2. Defendant No. 1 had obtained a decree against defendant No. 2 on a bond in original suit No. 338 of 1874, and attached and purchased at the execution sale certain land in an agraharam village, then in the possession of the plaintiff and his undivided father (since deceased), whom he ejected in November 1875. This land was subsequently exchanged for the land now sued for, on the redistribution of the agraharam lands under a partition decree passed in original suit No. 222 of 1876. The plaintiff now impugned as collusive and fraudulent the proceedings in original suit No. 338 of 1874 and the bond sued on therein and claimed to eject defendant No. 1.

Defendant No. 2 was *ex parte*.

Defendant No. 1 pleaded, *inter alia*, that the plaintiff's claim was barred by limitation by reason of his having preferred an objection to the attachment in execution of the decree in original [295] suit, No. 338 of 1874, which objection was investigated and rejected on 20th July 1875.

Both the District Munsif and the District Judge found that such an objection had been made under Section 246 of the Code of Civil Procedure of 1859, and held that the suit was accordingly barred by limitation.* The District Judge discussed this question as follows :—

" If that application had been under Section 278 of the present Civil Procedure and had been disallowed under Section 281, the present suit would be clearly barred by Article 11 of Act XV of 1877.

" But the application must have been under Section 246 of Act VIII of 1859. There is nothing in the Limitation Act IX of 1871 which obliges a suit like the present to be brought within one year from the date of the order disallowing the application.

" The plaintiff says that under Artic e 143 of the old Act and Article 142 of Act XV of 1877, he has twelve years from date of dispossession, which was November 1875. The suit was filed 13th July 1877.

" I consider that the case comes under Article 14*a* of Act IX of 1871, a suit to set aside a sale in execution of the decree of a [296] Civil Court,'

* Act VIII of 1859, Section 246: In the event of any claim being preferred to, or objection offered against the sale of lands or any other immoveable or moveable property which may have been attached in execution of a decree or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in Section 220. And if it shall appear to the satisfaction of the Court that the land or other immoveable or moveable property was not in the possession of the party against whom execution is sought, or of some other person in trust for him, or in the occupancy of raiyats or cultivators or other persons paying rent to him at the time when the property was attached, or that, being in the possession of the party himself at such time, it was so in his possession not on his own account or as his own property, but on account of or in trust for some other person, the Court shall pass an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court that the land or other immoveable or moveable property was in possession of the party against whom execution is sought, as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of raiyats or cultivators or other persons paying rent to him at the time when the property was attached, the Court shall disallow the claim. The order which may be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order.

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and plaintiff has one year 'from the confirmation of the sale.' The suit is therefore barred."

The plaintiff preferred this second appeal.

Anandacharlu, for appellant.

Mr. *Michell*, for respondents.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

We accept the finding that the appellant preferred a claim under Section 246 of Act VIII of 1859, and that it was dismissed after investigation; but we do not consider that the suit is barred by limitation. In our opinion, it is a suit for possession by virtue of title not to set aside an order, nor merely to establish a right. The last sentence of Section 246, which directed that a suit should be brought within one year to set aside an order passed under it, was repealed in 1871 (1) and it was not re-enacted in Act IX of 1871. Article 15 of that Act, like Article 13 of the present Limitation Act, refers to proceedings other than a suit, while Article 11 of the Act of 1877 is new, and applicable only to orders passed under the sections of the Code of Civil Procedure which are expressly mentioned in it. This case is governed by the principle laid down in *Ayyasami* v. *Samiya* (2). Nor can we treat the suit as one brought to set aside a sale in execution of a decree of Civil Court, for the appellant was not a party to the decree in original suit No. 338 of 1874, and he is not bound to set aside the sale held in its execution before he can recover upon his title.

We shall, therefore, reverse the decree of the Lower Appellate Court and remand the appeal to be heard on the merits. The costs will abide and follow the result.

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12 M. 297=1 Weir 98.

[297] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

QUEEN-EMPRESS *v.* VARATHAPPA CHETTI.*
[7th and 26th March, 1889.]

Penal Code, Section 174—*Disobedience to lawful order of public officer—Summons by Revenue officer to give evidence in a pauperism inquiry—Act III of* 1869 (*Madras*) —*Standing Order of Board of Revenue* (*Madras*) *No.* 48*a*.

The accused, who were parties to a petition pending in a District Court, were summoned by a tahsildar to give evidence on an inquiry by him as to whether or not the petitioner was a pauper; they omitted to attend on the summons, and were charged in respect of such non-attendance under Section 174 of the Indian Penal Code and were convicted :

Held, the conviction was bad, the tahsildar not being authorised to issue the summons under Act III of 1869 (Madras).

[R., 4 N.L.R. 18 (19).]

PETITION under Sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of the

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* Criminal Revision Case No. 19 of 1888, with which were connected Criminal Revision Cases Nos. 20 to 22 of 1889.

(1) See Act IX of 1871, Sched. I.

(2) 8 M. 82.

General Deputy Magistrate of Salem in summary cases Nos. 8, 9, 10 and 11 of 1888.

1889 MARCH 26. — APPELLATE CRIMINAL. — 12 M. 297 = 1 Weir 98.

The petitioners had been convicted under Section 174 of the Indian Penal Code of the offence of intentional disobedience to a lawful order of a public servant. The order in question was a summons with which they had respectively been served requiring them to appear and to give evidence before the tahsildar of Namakal. The proceedings to which the summons related was an inquiry by the tahsildar into the allegation of pauperism by the petitioner in a District Court, to whose petition the accused were parties.

On its appearing that the tahsildar had been directed by the Collector of the district to hold the inquiry in question, and that the accused had for various reasons neglected to attend in accordance with the summons, the General Deputy Magistrate convicted the accused as above. The present petitions prayed for the [298] revision of the proceedings of the General Deputy Magistrate on the ground, *inter alia*, that the tahsildar had no authority in law to issue the summons.

Mr. *Wedderburn*, for petitioners.

The Code of Civil Procedure, Section 406, authorizes the Judge to hold inquiry as to the poverty of the petitioner, and when a special procedure is provided, it must be followed. The question of liability to Court fees is not a matter of general revenue administration, but a matter peculiarly within the cognizance of the Civil Courts.

The Collector's duty was to have any witnesses he required summoned and examined by the District Court in which the petition was filed under Sections 408 and 409 of the Code of Civil Procedure. In any case the wording of the summons was misleading, and there was no intentional disobedience of an order.

The Acting Government Pleader (*Subramania Ayyar*), for the Crown.

Pauperism inquiries are within the purview of Act III of 1869 (Madras) and so the tahsildar was lawfully competent to issue the summons. With that Act must be read the Standing Order of the Board of Revenue (Madras), No. 48*a* which is as follows :—

" 48 *a.—Application to sue* in forma pauperis *how to be dealt with.*

" On receiving notice under Section 408 of the Code of Civil Procedure regarding an application to sue *in forma pauperis*, Collectors should institute the necessary inquiries as to the real status of the applicant, and should they feel satisfied that he is a real pauper, they will not dispute such application.

" 2. But if, on such inquiry, there appear to be circumstances in the appellant's case which *prima facie*, disentitle him to sue as a pauper, the Collector should place himself in communication with the defendant or respondent in the case, and if such defendant or respondent is disposed to dispute the application, the Collector by co-operating with him and employing the same vakeel may effectually oppose the application.

" 3. When a defendant or respondent is not inclined to oppose the application, and when the Collector is of opinion that the application should be opposed, he will employ a vakeel and cite witnesses. Such cases will naturally be rare and the regulation fee for the vakeel and other costs incurred will on application be sanctioned by Government.

[299] " 4. When a person is permitted to sue as a pauper, it is not necessary that a vakeel should be employed to watch the further proceedings in the case; but should circumstances subsequently come to light which show that the indulgence granted to the plaintiff or

1889 March 26. — Appellate Criminal. — 12 M. 297 = 1 Weir 98.

appellant was one to which he was not entitled, the Collector will act in co-operation with the defendant or respondent in the manner directed in paragraph 2, or independently as laid down in paragraph 3 of this order."

JUDGMENT.

The accused, who were defendants in a pauper petition pending in the District Court of Salem, were summoned by the tahsildar of Namakal to give evidence as to whether or not the petitioner was a pauper. They neglected to appear in obedience to the summonses which were served on them personally, and the Second-class Magistrate convicted them of an offence punishable under Section 174, Indian Penal Code. It is contended that the conviction is illegal on the ground that the tahsildar had no legal authority to issue the summonses. It appears that the Collector directed the tahsildar to hold an inquiry regarding the alleged pauperism of the petitioner in the District Court and to make a report. It is urged that in connection with the pauper petition a notice was served on the Government Pleader under Section 408 of the Code of Civil Procedure, and that under the Standing Order of the Board of Revenue (48*a*) the Collector directed the inquiry. The point for decision is whether this class of cases is within the purview of Act III of 1869 (Madras). The contention of the Government Pleader is that the Collector was authorized by the Standing Order of the Board of Revenue (48*a*) to institute the necessary inquiry as to the petitioner's position in life and to satisfy himself that he was really a pauper, before deciding whether the Government ought to oppose his application for permission to sue as a pauper, that the purpose of the inquiry was the protection of the stamp revenue, and that the case was therefore one in which the evidence of the accused was required for the investigation of a matter in which the Collector was authorized to hold an inquiry within the meaning of Section 1 of Act III of 1869.

The Act purports to empower Revenue officers to summon persons to attend at their cutcherries for the settlement of matters connected with Revenue administration. The preamble states that the Revenue administration of the country is retarded, because **[300]** Revenue officers are not made competent by express provision of law to issue summonses for the attendance of persons in certain cases in which it is their duty to hold investigation. Then Section 1 enacts: "Collectors, Sub-Collectors, "Assistant Collectors, Deputy Collectors, Tahsildars, and Deputy Tahsil-"dars shall have power to summon all persons resident within the district "whose evidence may appear to them to be necessary for the investigation "of any matter in which they are authorized to hold an inquiry, and also "to require the production of any document relevant to the matter under "inquiry which may be in the possession or under the control of such "person." The intention was to create a facility towards the settlement of matters connected with Revenue administration, and the facility created consisted in empowering Revenue officers to summon persons to give evidence which may appear to be necessary for the investigation of any matter in which they are authorized to hold an inquiry. Having regard to the rule of construction that when an Act gives a special power, the power must be limited to the purpose for which it is conferred, we are of opinion that the inquiry held by the tahsildar was not within the purview of the Act. The question of the petitioner being a pauper or otherwise was not one which the Revenue authorities had to decide finally in connection either with revenue or general administration. It was a

question pending decision in a civil suit to which the Government was constructively a party for a limited purpose, and the Collector's power as a party was limited to obtaining information from his subordinates and from such others as were willing to supply it. It was open to him to obtain process from the Court to enforce the attendance of witnesses who might appear from the information before him to be able to prove that the petitioner was not a pauper. The tahsildar was therefore not competent to issue summonses under the Act, and we set aside the convictions of the accused and direct that the fines be refunded if collected.

1889 MARCH 26. — APPELLATE CRIMINAL. — 12 M. 297 = 1 Weir 98.

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12 M. 301 (F.B.).

[301] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker, and Mr. Justice Wilkinson.

AUDATHODAN MOIDIN AND OTHERS (*Plaintiffs*) v. PULLAMBATH MAMALLY AND ANOTHER (*Defendants*).* [5th February, 1889.]

Court Fees Act—Act VII of 1870, *Section* 7, *Clause v*, (*c*), (*e*)—*Paramba in Malabar, valuation of suit for.*

On its appearing that a paramba in Malabar is not subject to land tax, but that a tax is levied on trees of certain kinds which may grow on it:

Held, that a paramba must be regarded for the purpose of the Court Fees Act as a garden or as land which pays no revenue, according to the circumstances of each case.

[D., 61 P.L.R. 1908 = 34 P.W.R. 1908.]

CASE referred for the decision of the High Court by A. F. Cox, Acting District Judge of North Malabar, under Section 617 of the Civil Procedure Code.

The case was stated as follows:—

"One Audathodan Moidin and two others brought suit No. 754 of 1886, in the Tellicherry Munsif's Court, against their karnavan and one Pakrichi (female) for the removal of the karnavan from office, and for cancellation of a mortgage and assignment deed executed by their karnavan in favour of second defendant over three parambas, and for the recovery of the same with mesne profits.

"The District Munsif decided the suit in plaintiffs' favour and ordered the first defendant's removal from the office of karnavan and the surrender of the parambas sued for with all mesne profits.

"Against this decree the second defendant, the mortgagee, appeals.

"The amount of Court fees paid on the appeal memorandum is Rs. 12-12-0, calculated on five times the assessed revenue, *viz.*, Rs. 25 and mesne profits from date of plaint, *viz.*, Rs. 144-15-0. From the introduction of the Court Fees Act down to the time of Mr. Nelson's assuming charge of this Court, this was the practice, [302] I understand, in calculating the stamp duty. But Mr. Nelson, in the case under reference, has ordered that Court fee should be paid on the market value of the parambas in suit, and not on five times the revenue, apparently on the authority of Section 7, Clause (*v*) (*e*) of the

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* Referred Case No. 16 of 1887.

1889 FEB. 5. — FULL BENCH. — 12 M. 301 (F.B.).

Court Fees Act, the parambas being treated as gardens and not mere lands assessed to revenue.

"The appellant objects to this ruling and relies on the principle of the decisions in *Collector of Thana* v. *Dadabhai Bomanji* (1), *Dayachand Nemchand* v. *Hemchand Dharamchand* (2) and on Section 7, Clause viii, Court Fees Act.

"I am informed that the question was not argued before Mr. Nelson in Court, and these decisions were probably not referred to by him. My own opinion is that the contention raised by the appellant is valid. In the first of the cases cited, the plaintiff sought to remove an attachment made by the Collector on a cocoanut oart or garden, and the High Court of Bombay held that the stamp duty should be calculated under Section 7, Clause viii of the Court Fees Act, not on the market value, but on five times the assessed revenue. Mr. Nelson's system of valuation is, I think, inequitable when the valuation of wet lands is considered. . . . I am inclined to think that the term 'garden' in the Act was meant to include only unassessed lands, such as gardens intended for ornament and pleasure, or pepper and sugarcane gardens and the like, which are also unassessed. But Mr. Nelson's decision, together with the ruling of the High Court in their proceedings, No. 956, dated 13th May 1873, on a reference from the District Judge of South Canara, cause me to entertain doubts upon the matter which is of great importance to Government and suitors. I therefore request the favour of an authoritative ruling upon the subject."

The case having come on for disposal on 13th April 1888 before a Divisional Bench (Collins, C.J., Shephard, J.), it was directed, in view of the importance of the question involved, that it should stand over for argument before the Full Bench.

On the first hearing by the Full Bench, their Lordships directed that further information as to the circumstances under which a paramba was held should be furnished by the referring officer.

[303] In compliance with the above direction of the High Court, the Acting District Judge of North Malabar reported as follows :—

"The land used for parambas is not assessed: the assessment is levied only upon cocoanut, jack, and areca trees growing in them. Any other tree, shrub, or vine which may be grown upon the land is free from assessment. It may, and does, therefore, happen that a Malayali ryot has parambas devoted solely to pepper cultivation, for which Government charges no assessment whatever either upon the land or the crop.

"In the revenue accounts parambas are classed as *bhagayat* or garden land. There is generally a house in a paramba, but not always. There is, however, hardly a house that is not situated in a paramba. In parambas are cultivated fruit trees of all sorts, pepper vines, plantains and the like, while immediately round the house, if there is one, there may be a few flowering plants."

The case then came on for re-hearing.

The Acting Government Pleader (*Subramania Ayyar*), for the Crown argued that on the facts disclosed in the reference a paramba came within the ordinary acceptation of the term garden, which, however, is not defined in the Act.

The parties to the suit were not represented.

The Court delivered the following

(1) 1 B. 352. (2) 4 B. 515.

1889 FEB. 5. — FULL BENCH. — 12 M. 301 (F.B.)

JUDGMENT.

This is a case stated under Section 617 of the Civil Procedure Code by the Acting District Judge of North Malabar.

The point on which he entertains doubt, and which he refers for our decision, is whether a paramba is, for the purpose of ascertaining the Court fee payable, to be treated as a garden or as land assessed to revenue.

By Section 7, Act VII of 1870, the amount of fee payable in suit for the possession of land, houses and gardens is to be computed according to the value of the subject-matter; and where the subject-matter is (1) land the revenue of which is permanently settled, the value shall be deemed to be ten times the revenue payable ; (2) land the revenue of which is settled but not permanently,—five times the revenue ; (3) land paying no revenue,—either fifteen times the net profits if any, or the amount of which the Court shall estimate the land with reference to the value of similar land in the neighbourhood ; (4) and where the subject-[304]matter is a house or garden, according to the market value of the house or garden.

The Acting District Judge is of opinion that a paramba should be regarded as land the revenue of which is settled but not permanently. But he himself admits that the owners of parambas pay no land revenue. In Malabar the assessment is levied upon the cocoanut, areca or jack trees which grow in the parambas. If a paramba contains no cocoanut, areca or jack trees, no assessment is charged. In fact in Malabar a tree tax is substituted for the land assessment, and whether, or not a paramba is assessed depends on the nature of the trees grown therein. It is therefore evident that parambas should either be classed as land paying no revenue or as gardens. The word "garden" is nowhere defined in Act VII of 1870, but from its occurring in connection with the word houses, we are of opinion that the term refers primarily to a garden in the English sense,—ornamental or pleasure or vegetable,—and that parambas do not ordinarily come under that category. We do not, however, wish it to be understood that in no case should a paramba be treated as a garden for the purpose of the Court Fees Act. Whether or not the paramba sued for is to be regarded as a garden or as land which pays no revenue, is a question of fact which must be decided in each case. The Acting District Judge will be informed that in the case of parambas the amount of fee payable under Act VII of 1870 is to be computed either under sub-clause (*c*) or (*e*) of Section 7, Clause v, according to the circumstances of each case.

1889
FEB. 18.

APPELLATE CIVIL.

12 M. 305.

12 M. 305.

[305] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

CHEKKUTTI AND OTHERS (*Plaintiffs*), *Appellants v.* PAKKI (*Defendant*), *Respondent.**
[23rd November, 1888, and 18th February, 1889.]

Malabar law—Karnavan, insufficient maintenance of junior members by—Suit by junior members living in a tarwad house apart from the karnavan.

Suit by twelve junior members of a Malabar tarwad against the karnavan for arrears of maintenance. The plaintiffs lived in a tarwad house apart from the karnavan, who did not allege that this arrangement was contrary to his wishes, but pleaded that he provided for them adequately :

Held, that the plaintiffs were entitled to a decree for a reasonable amount by way of maintenance, in computing which allowance should be made for the income of the tarwad property in their possession. *Nallakandiyil Parvadi* v. *Chathu Nambiar* (I.L.R., 4 Mad., 169) followed.

[R., 36 M. 203 (211)=14 Ind. Cas. 383=22 M.L.J. 309 =11 M.L.T. 112=(1912) M.W.N. 109 (115).]

SECOND APPEAL against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 421 of 1885, reversing the decree of V. Gopala Menon, District Munsif of Tellicherry, in original suit No. 163 of 1885.

Suit by twelve junior members of Malabar tarwad, of which defendant No. 1 was karnavan, to recover Rs. 165 as arrears of maintenance due to them from defendant No. 1. Defendant No. 1 pleaded that sufficient provision had been made for the maintenance of the plaintiffs.

The District Munsif found that the plaintiffs were in possession of only one tarwad paramba, and that the income of that paramba was only Rs. 15 *per annum*, and he, passed a decree for Rs. 120, assessing the sum due for maintenance as Rs. 10 for each of the plaintiffs. This decree was reversed on appeal by W. Austin, the District Judge of North Malabar.

The plaintiffs preferred second appeal No. 1267 of 1886 against the decree of the District Judge. The High Court on second appeal remanded the case for a fresh decision "after finding whether [306] the circumstances are such as to make the decision in *Kunhammatha* v. *Kunhi Kutti Ali* (1) applicable."

"The then District Judge on the re-hearing of the appeal held that the decision referred to was applicable to the circumstances of the present case and passed a decree dismissing the plaintiff's suit with cost throughout.

The plaintiffs preferred this second appeal against the last-mentioned decree.

Mr. *Wedderburn* and Mr. *K. Brown*, for appellants.

Sankara Menon, for respondent.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following order made by the High Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) on 23rd November 1888.

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* Second Appeal No. 451 of 1888.

(1) 7 M. 233.

1889
FEB. 18.

APPEL-
LATE
CIVIL.

12 M. 305.

ORDER.

It is not denied that the plaintiffs live in a tarwad house and apart from the karnavan, nor does he allege in his written statement that they live apart from him without his permission or contrary to his wish. On the contrary, the karnavan's defence is that he supplies them with an adequate provision : and it is not denied as found by the District Munsif that the only income they derive from the portion of the tarwad property in their possession is Rs. 15 per annum. That sum is manifestly inadequate for the support of the plaintiffs. The decision in *Kunhammatha* v. *Kunhi Kutti Ali* (1) as already remarked by this Court has no application to the present case. That was a case in which the plaintiffs lived in the tarwad house with the karnavan and the others. The case falls within the principle laid down in *Nallakondiyil Parvadi* v. *Chathu Nambiar* (2); the fact that the maintenance claimed was computed at Rs. 10 per head does not in our opinion disentitle them to a decree for such an amount of maintenance as would be reasonable in the position in which they are placed. We shall therefore ask the Judge to return a finding on the following issue:—

"What is a reasonable provision for the support of the plaintiffs, regard being had to the amount of the *total* tarwad income and to the circumstances in which the plaintiffs are placed?"

In accordance with this order the District Judge returned a finding to the effect that under "the circumstances Rs. 95 is a [307] sufficient provision for the plaintiff's maintenance in addition to the yield of the paramba." On 18th February 1889 the High Court, accepting this finding, decreed that the defendant No. 1 "as karnavan to pay to the appellants Rs. 95 with proportionate costs throughout."

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12 M. 307.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

KANARAN (*Defendant*), *Appellant* v. KUNJAN AND OTHERS (*Plaintiffs*), *Respondents*.*

[27th November, 1888, and 21st February, 1889.]

Malabar Law—Karnavan, blindness a disqualification for the office of.

Suit to remove the defendant from the office of karnavan of a Malabar tarwad. The defendant had become blind after occupying the office of karnavan for some years:

Held, that the defendant was not a fit person to be the karnavan of a tarwad and should be removed from his office.

[R., 13 M. 209; 15 M. 483.]

APPEAL against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in appeal suit No. 604 of 1886, reversing the decree of A. Annasami Ayyar, District Munsif of Pynad, in original suit No. 471 of 1885.

Suit for the removal of the defendant from the post of karnavan of a Malabar tarwad.

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* Second Appeal No. 51 of 1888.

(1) 7 M. 233. (2) 4 M. 169.

1889 FEB. 21. — APPELLATE CIVIL. — 12 M. 307.

The plaint set forth "that plaintiffs and defendant are members of one tarwad, of which first defendant is the karnavan and first plaintiff his successor, that defendant became karnavan in 1044 after the death of Raroo Nair, that defendant became blind some twenty years ago; that first plaintiff has been managing the affairs of the tarwad since 1040;... that defendant instituted for original suits Nos. 106 and 107 of 1884 against tarwad tenants for recovery of certain properties and obtained decrees; that this act is detrimental to the interest of the tarwad; that defendant is not fit to hold the office of karnavan; that he lives in his wife's houses; that he does not manage the tarwad affairs; that the said decrees were obtained to benefit his wife and children; that in the said [308] suits defendant admitted that one Koonhi Kutti Kurup and one Shangaran Nambiar, who are his wife's relations, to be the members of his tarwad, and that he has done many acts injurious to the tarwad and tarwad tenants."

The District Munsif dismissed the suit, observing as to the alleged disqualifications of the defendant. "It is not contended by plaintiffs the defendant's blindness is congenital. It is also admitted by plaintiffs in the plaint the defendant became karnavan in 1044. The circumstance that the defendant became blind after he became karnavan, and also after he had spent about eight years in his karnavan stanam is not, I think, a sufficient reason to remove him from karnavan stanam. Congenital blindness, which would prevent a karnavan from attending to his duties, would possibly disqualify a member of a tarwad from succeeding to its headship. The defendant's blindness is not congenital. He became blind only after he had been karnavan for seven or eight years. From the way the defendant gave his deposition in this case it did not also appear to me that he is unfit to be the karnavan in the tarwad."

On appeal the Subordinate Judge passed a decree in favour of the plaintiff, recording findings as to the facts of the case as summarized in the following order of the High Court.

The defendant preferred this second appeal.

Sankaran Nayar, for appellant.

Sankara Menon, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the order of the Court (COLLINS, C.J., and WILKINSON, J.).

ORDER.

The Subordinate Judge has found that until recently plaintiff No. 1 carried on the management of family affairs, the defendant, the karnavan of the tarwad, having become totally blind in 1877. The Subordinate Judge has also found that the defendant has now put himself in the hands of two pretenders who set up a claim to be members of the tarwad, which claim is disputed by the plaintiff, and that acting under their advice he has done acts detrimental to the interest of the tarwad. Under these circumstances he considered that a case had been made out for defendant's removal from the karnavan stanam. On appeal it is argued that blindness is no bar to the defendant's holding the post of karnavan, and that if it be held to be so, plaintiff [309] No. 1 is not the senior anandravan. We are of opinion that a blind man is not a fit person to be the karnavan of a tarwad, and that to permit a blind man to continue to occupy that post under such circumstances as those disclosed in this case would inevitably tend to the ruin

of the tarwad. We must therefore uphold the decree of the Subordinate Judge on this point. 1889 FEB. 21.

Their Lordships then directed the Subordinate Judge to record a finding as to the truth of the allegation of plaintiff No. 1 that he was senior anandravan of the tarwad. But plaintiff No. 1 having died before the case came on for re-hearing, a decree was passed merely confirming the decree of the Subordinate Judge so far as it decreed the removal of the defendant from the post of karnavan. APPELLATE CIVIL. 12 M. 307.

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12 M. 309=13 Ind. Jur. 292.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RAMANADAN (*Defendant*), *Appellant v.* RAJAGOPALA AND OTHERS (*Plaintiffs*), *Respondents.** [7th and 21st January, 1889.]

Hindu law—Money decree against father—Attachment of ancestral estate.

In execution of a money decree ancestral property of the joint family of the judgment-debtor was attached. His sons sued to release their interest from attachment, alleging that the judgment debt had been incurred for immoral purposes, which was denied by the decree-holder. It was held by the Lower Courts that nothing more than the father's share was liable to be attached, as the sons were not parties to the decree.

Held, that the nature of the debt should be determined, since the creditor's power to attach and sell depends on the father's power to sell, which again depends on the nature of the debt.

Mussamut Nanomi Babuasin v. *Modun Mohun* (L.R., 13 I.A., 1; S C. I.L.R., 13 Cal., 21) discussed and followed.

SECOND APPEAL against the decree of T. Kanagasabai Mudaliar, Subordinate Judge of Tanjore, in appeal suit No. 41 of 1886, affirming the decree of S. Subbayya, District Munsif of Negapatam, in original suit No. 267 of 1884.

[310] Suit by the members of a joint Hindu family to release the attachment of their interest in certain family property attached in execution of a money decree obtained against their father by the defendant in original suit No. 35 of 1883.

The plaintiffs, who were not parties to the suit of 1883, alleged that the decree debt had been incurred by their father "not for family purposes, but borrowed by him and his brother for immoral purposes." The defendant pleaded that the decree was binding on the plaintiffs and their share of the family property.

The District Munsif passed a decree in favour of the plaintiffs, and it was affirmed on appeal by the Subordinate Judge, who based his decision on the ground "that the decree for which the disputed property had been attached was but a simple decree against the father alone."

The defendant preferred the second appeal.

Mr *Norton*, for appellant.

Subramanya Ayyar, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

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* Second Appeal No. 405 of 1887.

1889
JAN. 21.

APPELLATE CIVIL.

12 M. 309 = 13 Ind. Jur 292.

JUDGMENT.

The question for decision in this second appeal is whether, in the execution of a money decree against a Hindu father, ancestral property, in which he and his sons are jointly interested as co-parceners, is liable to be attached. In original suit No. 35 of 1883 the appellant obtained a decree for a sum of money against the respondents' father and his brothers, and attached their joint family property. Thereupon the respondents resisted the attachment on the ground that they were not parties to the decree, and that their interest in the family property was not liable to be proceeded against. But their claim petition was rejected without an inquiry as presented too late, and the respondents then instituted this suit to obtain a release of their three-quarters share from attachment. The appellant's case was that the decree debt was a family debt, that the bond sued upon was executed not only by the respondents' father, but also by his brothers, the adult male members of the family at the time, and that, at the date of the bond, the respondents Nos. 2 and 3 had not been born. The respondents contended that the debt was contracted by their father for immoral purposes, and the issue recorded for decision was whether the property attached was liable for [311] the decree debt. But both the Lower Courts held that, in execution of a money decree against the father, nothing more than the father's share in ancestral property was liable to be attached if the sons were not made parties to the decree, and that it was unnecessary to enter upon an inquiry upon the nature of the debt or to consider the other questions raised by the appellant. Though the respondents' claim was rejected, the appellant's pleader admits that the execution-creditor has not yet brought the property to sale. It is argued before us that the Lower Courts were in error in considering that the execution-creditor could only bring to sale the father's share in joint family property and that the fact of the sale not having yet taken place makes no difference.

We are of opinion that the decrees of the Courts below must be reversed, and that the case remanded to the Court of first instance for disposal on the merits. The decision of the Privy Council in *Mussamut Nanomi Babuasin* v. *Modun Mohun* (1), followed and explained by this Court in *Kunhali Beari* v. *Keshava Shanbaga* (2), is conclusive on the point. Those decisions show that, if the execution-creditor actually brought to sale the entire family estate and bargained and paid for it, the entire estate would pass by the Court sale, unless the son impugning it showed that the debt was immoral or vicious, and was therefore one for the payment of which the father had no power to sell it. The principle underlying the decision is that, if the entire ancestral estate was actually sold in execution of a money decree against the father to which the son was not a party, the interest that passed by the Court sale was one which the father had power to sell with reference to the nature of the decree debt that, if the son showed that it was vicious or immoral, nothing more than the father's interest passed, and that if the debt was a family debt or an antecedent personal debt of the father for the payment of which the father was entitled to sell the son's interest also, the whole estate passed by the sale. Thus the creditor's power to attach and sell depends on the father's power to sell, which again depends on the nature of the debt. If the debt was one binding on the joint family as alleged by the defendant, he would be entitled to attach and sell the whole ancestral estate, but if, on the other

(1) 13 I.A. 1 = 13 C. 21.

(2) 11 M. 64 (75).

hand, the debt was vicious or immoral as alleged by the [312] plaintiffs, their interest would not be liable to be attached and sold. The fact of the sale having either taken place or not taken place before the sons instituted the suit cannot affect the father's power to sell, or, therefore, the execution-creditor's power to attach in view to bring the property to sale. We set aside the decrees of the Courts below and remand the case to the Court of first instance for disposal on the merits. Costs incurred hitherto will be provided for in the revised decree.

1889 JAN. 21.

APPELLATE CIVIL.

12 M. 309 = 13 Ind. Jur. 292.

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12 M. 312.

APPELLATE CIVIL.

Before Mr. Justice Parker and M. Justice Shephard.

RAMALIMGAM (*Plaintiff*), *Appellant v.* THIRUGNANA SAMMANDHA (*Defendant*), *Respondent.** [8th and 13th March, 1889.]

Res judicata.

Certain land was attached and sold in execution of a decree against the dharmakarta of a devasthanam. One claiming to be the lawful successor in office of the judgment-debtor now sued the purchaser for a declaration that the sale was invalid:

Held, the suit should not be dismissed on proof that the plaintiff had failed to obtain a declaration of his right to the dharmakartaship against another claimant to the office, in a suit to which the present defendant was not a party.

APPEAL against the decree of S. Gopalacharyar, Subordinate Judge of Madura (East), in original suit No. 21 of 1887.

Suit (1) to declare that a sale of certain properties (consisting of a mutt in Ramnad, a mutt in Rameswaram and an adjoining tope) in execution of a decree passed in original suit No. 5 of 1882 is not binding on the interest of the plaintiff, (2) to restrain the defendant from interfering with the properties in question.

The plaint set out that the plaintiff was the duly appointed head of the Rameswaram mutt, and that the properties in question "are properties "which everybody who becomes the head of the mutt should always live "upon; but they cannot be alienated. They are not liable for the debts of any "kind incurred by the heads of the mutt." It was further alleged that in execution of the decree passed in original suit No. 5 of 1882 against one [313] Sethu Ramanadha Pandarasannadhi, the plaintiff's predecessor in office, on a private debt the properties in question had been attached, and that the present defendant purchased them at the execution-sale.

The defendant, who was manager of the Rameswaram Devasthanam, appointed under Act XX of 1863, denied all the above allegations, except as appears from the following paragraph of the written statement:—

"The properties in suit are the private properties of the pandarams "who have been dharmakartas of the Rameswaram Devasthanam. They "are such as can be sold or otherwise alienated by them or rendered liable "for their private debts. They lastly belonged to Saminadha Pillai *alias* "Sethu Ramanadha Pandaram, who was first defendant in original suit "No. 5 of 1882, and were in his possession. For the decree debt due by "him to the Rameswaram Devasthanam they were attached on 17th and

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* Appeal No. 40 of 1888.

1889 MARCH 13. — APPELLATE CIVIL. — 12 M. 312.

"26th June 1885, and in the sale, the defendant purchased them for the "devasthanam."

The Subordinate Judge said:—

"The plaintiff practically concedes the identity of the head of the mutt "with the dharmakarta of the devasthanam . . . . In my opinion "the plaintiff will not become the head of the so-called mutt, unless and "until he becomes, or is recognized by competent authority as the "dharmakarta of the Rameswaram Devasthanam. From the evidence in "the case I am inclined to think that the plaintiff, if not in actual posses-"sion, has at least some control over the properties in dispute; but I "cannot say that he is in possession as head of the mutt. It may be that "he is in possession by reason of his appointment by the late dharma-"karta under Exhibit D, though, as a matter of fact, he seems to have "acquired his control only a few months after the appointment. But "he having failed as yet to establish the validity of his appointment "(it will be remembered that his suit No. 39 of 1885 for the dharma-"kartaship has been dismissed by this Court, and the matter is now before "the High Court in appeal, appeal suit No. 4 of 1887), I cannot recognize "his possession as of right."

In original suit No. 39 of 1885, the present plaintiff had sued to obtain a declaration of his right to the dharmakartaship another claimant to that office being joined as defendant, and the present [314] defendant not being a party. The plaintiff's suit was dismissed in the Court of first instance as appear above, and his appeal to the High Court was unsuccessful.

The Subordinate Judge passed a decree dismissing the suit against which the plaintiff preferred this appeal.

Subramanya Ayyar, for appellant.

Bhashyam Ayyangar, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgments of the Court (PARKER and SHEPHARD, JJ.).

JUDGMENTS.

PARKER, J.—The plaintiff, alleging himself to be the duly appointed head of a mutt, sues to have it declared that the Court auction sale of certain properties in execution of a decree passed against his predecessor in the mutt is invalid against his right. He alleges that the properties belong to the head of the mutt for the time being and are inalienable. The plaintiff bases his title to the mutt upon a deed executed by his predecessor (Exhibit D) on 30th January 1884. The Court sale took place on 22nd March 1886, and this suit was brought on 21st March 1887. The defendant is the auction-purchaser, and is the manager of the Rameswaram Devesthanam, appointed under Section 5, Act XX of 1863.

For a long series of years the head of the mutt has been the dharmakarta of the Rameswaram Davasthanam for the time being, the only occasions on which it can be shown that any separation has occurred being when the management of the devasthanam has been committed to the charge of a special officer by the District Court. The last dharmakarta and head of the mutt was Sethu Ramanadha Pandaram, who was removed from the dharmakartaship by decree of the District Court, dated 2nd March 1883, which decree was confirmed by the High Court on appeal. On 30th January 1884 he executed the deed of appointment in plaintiff's favour, on which plaintiff's present rights are based. Plaintiff

sued upon that deed in original suit No. 39 of 1885 in the Subordinate Court of Madura to establish his claim to the dharmakartaship, from which Sethu Ramanadha Pandaram had been deposed. The present defendant was not a party to that suit which was brought against another claimant to the dharmakartaship. The plaintiff's claim was dismissed on 4th September 1886, the Subordinate Judge holding the appointment invalid, and that decision has been since confirmed by the High Court.

[315] The Subordinate Judge has not in this suit considered the validity of plaintiff's appointment by his predecessor, and the matter is not *res judicata* as between the present parties, but he has held that there is no independent institution called the Rameswaram mutt; that the mutt is in fact the residence, and the properties attached thereto are enjoyed by the dharmakarta of the Rameswaram Devasthanam for the time being. He declined to consider whether the properties were alienable or not, since he held that plaintiff having failed in original suit No. 39 of 1885 to establish his claim to the dharmakartaship could not maintain a suit to establish his rights to the properties of the mutt.

The Subordinate Judge has, therefore, decided the suit on a point not raised by the parties, since it was not part of defendant's plea that the properties were not alienable, or that the defendant acting for the devasthanam had purchased the devasthanam's own properties in satisfaction of a personal decree against the dismissed dharmakarta.

The High Court in appeal suit No. 4 of 1887 has overruled the contention that the dharmakartaship is an incident of the right of succession to the mutt. The Subordinate Judge's view is the converse of this, *viz.*, that the right to the mutt is an incident of the right of succession to the dharmakartaship.

The plaintiff's right to sue depends upon the validity of Exhibit D, upon which, between the present parties, there has been no adjudication. Should that document be held valid in plaintiff's favour, the further questions would arise whether the right to the mutt was an incident of the right to the dharmakartaship, or whether the dismissal of the late dharmakarta has effected a statutory severance of the two offices.

I would reverse the decree and remand the suit for re-hearing. Costs to follow the result.

SHEPHARD, J.—I agree in thinking that the plaintiff is entitled to have a re-trial of this case. The plaintiff sues in his character of head of the mutt in virtue of the appointment made by his predecessor on the 30th January 1884, and the main question to be considered is whether that appointment was valid in the sense that Sethu Ramanadha Pandaram, the late dharmakarta of the devasthanam, was competent to make such appointment and invest a successor with the property, which he, as head of the mutt, had previously enjoyed. That question the Subordinate Judge cannot **[316]** be said to have properly tried. Indeed, he seems to have thought that the plaintiff's failure in another suit to which the defendant was no party precluded the recognition of the right claimed by the plaintiff in the present case. In this the Subordinate Judge was clearly mistaken, as the decision in the previous suit could not make the plaintiff's present claim against another defendant *res judicata*.

I think that the plaintiff is justified in his contention that there has been no decision on the principal question raised in the suit, and that, although some of the findings recorded by the Subordinate Judge may indicate what his conclusion on that question is likely to be, the case ought to be remanded.

1889
FEB. 22.

APPELLATE CIVIL.

12 M. 316= 13 Ind. Jur. 255.

12 M. 316=13 Ind. Jur. 255.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

MUTHU (*Plaintiff*), *Appellant v.* KAMBALINGA AND ANOTHER (*Representatives of Defendant No. 4*), *Respondents.**
[8th and 22nd February, 1889.]

Limitation Act, 1877, *Schedule II, Article* 134—*Suit to redeem by assignee of equity of redemption—Title purchased at execution sale.*

Suit, in 1885, by the assignee of the equity of redemption to redeem a mortgage of 1826. The mortgagees were put into possession under the mortgage and no interest was paid. In 1855, the mortgage premises were sold at a Court sale in execution of a decree against the mortgagees as if they formed part of their family property, and the defendant derived title from the execution purchaser who had dealt with it as absolute owner :

Held, that the suit was barred under Limitation Act, 1877, Schedule II, Article 134.

[**Overruled**, 25 M. 99=11 M.L.J. 323 ; **N.F.**, 33 M. 56=5 Ind Cas. 1=20 M.L.J. 41 (46)=7 M.L.T. 282 ; **F.**, 9 M.L.J. 93 (95) ; **R.**, 23 B. 614 ; 24 M. 471 (485) ; 6 M.L.J. 260 ; 8 O.C. 233 ; 30 P.R. 1908=102 P.L.R. 1908=35 P.W.R. 1908.]

SECOND APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in Appeal Suit No. 115 of 1887, affirming the decree of G. Ramasami Ayyar, District Munsif of Kumbakonam, in Original Suit No. 245 of 1885.

Suit filed in 1885 to redeem a mortgage, dated 22nd February 1826, and executed to one Kichu Chetti, who was father of defendants Nos. 1 and 2 and grandfather of defendant No. 3. The [317] plaintiff sued as purchaser under a registered sale deed from the mortgagor's grandson.

It was alleged that possession of the mortgaged property was delivered to the mortgagees in lieu of interest. It appeared that the property was attached as the family property of defendants Nos. 1 and 2 and sold to Ramadu Chetti in 1855 in execution of a decree obtained against them in original suit No. 327 of 1836, and that it was subsequently sold at a sale held in execution of a decree obtained in original suit No. 12 of 1881 against the widow of Ramadu Chetti and purchased by defendant No. 4.

Defendants Nos. 1, 2 and 3 did not appear.

Defendant No. 4 pleaded, *inter alia*, that the suit was barred under the Limitation Act, Schedule II, Article 134, as being "a suit to recover "possession of immovable property . . . mortgaged and afterwards "purchased from the . . . mortgagee for a valuable consideration."

The District Munsif dismissed the suit, and his decree was affirmed by the District Judge, who said :—

"The property said to have been originally mortgaged in 1826 was bought in a Court sale from the mortgagee on the 20th September 1885, for valuable consideration as per Exhibit X. The plaintiff had therefore only 12 years' time from that date to sue, whereas this suit was brought in 1885, or 30 years afterwards.

The plaintiff preferred this second appeal.

Rama Rau and *Bhashyam Ayyangar*, for appellant.

Subramanya Ayyar, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following

* Second Appeal No. 257 of 1888.

1889 Feb. 22. — Appellate Civil. — 12 M. 316 = 13 Ind. Jur. 255.

JUDGMENTS.

MUTTUSAMI AYYAR, J.—This was a suit brought by the appellant to redeem a house which, he alleged, was mortgaged in February 1826, to the ancestor of respondents Nos. 1—3. The house has since been the subject of two Court sales. The first was held in 1855 in execution of the decree in original suit No. 327 of 1836, which was passed against the first and second defendants, and one Ramadu became purchaser. The second sale was held in execution of the decree in original suit No. 12 of 1881 which was instituted against Ramadu's widow, and respondent No 4 was the purchaser at that sale. Respondent No. 4 pleaded, *inter alias*, limitation in bar of the claim and relied on Act XV of 1877, **[318]** Schedule II, Article 134. The Judge upheld the contention on appeal, and it is urged in second appeal that the suit is governed by the sixty years' rule. It is urged (i) that Article 134 does not apply to Court sales and (ii) that respondent No. 4 ought to show that what he actually purchased was the absolute title to the house and that he instituted due inquiry as to the title of the judgment-debtors which was put up to sale. Article 134 describes the suit to which it is to apply as a suit to recover possession of immoveable property conveyed or bequeathed in trust or *mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration* and it then prescribes 12 years from the date of the purchase as the period of limitation. This ought to be read together with Article 148 which prescribes 60 years for a suit against a mortgagee to redeem or recover possession of immoveable property mortgaged, and, when so read, it is clear that the purchase contemplated in Article 134 is that of the absolute title to or property in the subject of the mortgage. A mere assignment of the mortgage is not within the purview of the article, for the assignee will only stand then in the shoes of the mortgagee and cannot be regarded as purchaser of the property under mortgage. This view is in accordance with the decision of the Privy Council with reference to Act XIV of 1859, Section 5, in *Juggernath Sahoo* v. *Syud Shah Mahomed Hossein*(1). There is also no doubt that the party relying on Article 134 which cuts down the mortgagor's right to sue from 60 years to 12 years is bound to show that he purchased the absolute title and that he paid value for it. As to the contention that the article does not apply to Court sales, we do not think that it can be supported. Though, in a Court sale, the sale is not the act of the mortgagee, but the act of the Court executing the decree, yet the purchase is of the property under mortgage by reason of the exercise by the Court of the power of sale vested in the mortgagee. We can see no distinction between it and a voluntary sale, when the purchaser bargained for and bought the absolute title and when he had no means of information showing that the position of the judgment-debtors was really that of mortgagees in regard to the property purchased. If an honest mistake made in connection with a purchase for value at a voluntary sale is protected after 12 years' adverse possession, we do not see why **[319]** a similar mistake made in connection with a Court sale should not be likewise protected. The same view was taken by the High Court at Allahabad in *Bhagwan Sahai* v. *Bhagwan Din* (2). In the case before us, the sale certificate issued to Ramadu described the house as the property of defendants Nos. 1 and 2. Several documents show that Ramadu dealt with it as absolute owner ever since 1855. I am of opinion that the decision of the Judge that the suit is barred

(1) 2 I. A. 48. (2) 9 A. 97.

1889 FEB. 22. — APPELLATE CIVIL. — 12 M. 316= 13 Ind. Jur. 255.

by Article 134 is right, and I would dismiss this second appeal with costs.

WILKINSON, J.—The plaintiff as the purchaser in January 1885 of the equity of redemption sues to redeem a mortgage alleged to have been granted in 1826 by Peddu Chetty Viranna Chetty, the ancestor of plaintiff's vendor to Kichu, the ancestor of defendants Nos. 1—3. Defendant No. 4 purchased a portion of the property in Court sale in execution of the decree obtained in Original Suit No. 12 of 1881, against the heirs and representatives of one Ramadu Chetty, who had himself purchased the property in execution of a portion of a decree in Original Suit No. 327 of 1836 obtained against defendants Nos. 1 and 2. The Lower Appellate Court held that the suit was barred by Article 134, Schedule II of the Limitation Act and dismissed the plaintiff's suit without going into the merits. On appeal, it is argued that what defendant No. 4 purchased was not an absolute title, but a mortgage. By Article 134 the right of a mortgagor to recover possession of immoveable property mortgaged and afterwards purchased from the mortgagee for valuable consideration is limited to 12 years from the date of purchase. In the case of *Radanath Doss* v. *Gisborne* (1) the Privy Council laid down what in their view was the meaning of the word "purchaser" in Section 5, Act XIV of 1859, which corresponded to Article 134. They held that the word must mean some person who purchases that which in fact is a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title. And reading together Articles 134 and 148 it is evident that the purchase referred to in Article 134, must be a purchase of the absolute title. It is therefore incumbent upon the purchaser whether in a Court sale or in a private sale—for I see no reason why any distinction should be drawn between them—to show that he purchased the absolute title in the full belief [320] that it was the absolute title he was purchasing. No reason can be assigned why the same protection which is afforded to a purchaser for valuable consideration at a private sale should not be extended to a purchaser at Court auction. It is a question of fact in each case what passed by the sale, an absolute title, or only the right of the mortgagees. There is evidence in this case to show that Ramadu purchased in the full belief that he was purchasing an absolute title, and that he always dealt with the property as if he had acquired an absolute estate. The decree of the Lower Court is therefore right, and this second appeal must be dismissed with costs.

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12 M. 320.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KUNHAMMED (*Defendant No.* 2), *Appellant v.* NARAYANAN MUSSAD (*Plaintiff*), *Respondent.**

[6th September, 1888 and 11th February, 1889.]

Landlord and tenant—Malabar kanam—Change in character of land—Passive acquiescence of landlord—Estoppel—Compensation for improvements by tenant.

Land was demised on kanam for wet cultivation. The demisee changed the character of the holding, by making various improvements which were held to be inconsistant with the purpose for which the land was demised. On a finding

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* Second Appeal No. 1151 of 1888.

(1) 14 M. I. A. 1.

that the landlord had stood by while the character of the holding was being changed and had thereby caused a belief that the change had his approval: 1889 FEB. 11.

Held, on second appeal, that the demisee was entitled to compensation for his improvements on redemption of the kanam. *Ramsden* v. *Dyson* (L.R., 1 H. L., 129) followed. APPEL-LATE

[R., 20 B. 1 (7); 27 C. 570 (585); D., 22 M. 39 (46).] CIVIL.

SECOND APPEAL against the decree of F. H. Wilkinson, District Judge of South Malabar, in Appeal Suit No. 496 of 1887 modifying the decree of O. Chandu Menon, Acting District Munsif of Shernad, in Original Suit No. 457 of 1886. 12 M. 320.

This was a suit by the plaintiff to evict the defendant from certain land demised by him on kanam to the defendant's father on 17th November 1888.

The plaint stated that the land demised was a "palliyal or two crop paddy land" and the kanam deed provided for the use by [321] the demisee of "water from a *chola* for 11 Indian hours daily." It was alleged that the defendant had converted a portion of this land into paramba or garden land, planting cocoanut and areca-nut trees thereon, and that this alteration in the character of the land was calculated to injure the plaintiff. The prayers of the plaint were that the plaintiff be put into possession, and that the defendant pay to him Rs. 50, being the cost of restoring the land to its former condition, and arrears of rent on payment of the kanam amount.

The defendant admitted the tenancy and the arrears of rent and the change in the character of the holding, but claimed compensation for improvements.

The District Munsif held that the plaintiff had acquiesced in the change effected in the character of the holding, and passed a decree to the effect that the plaintiff should pay to the defendant the value of the improvements as valued by a Commissioner before recovering possession of the land demised.

On appeal, the District Judge, without recording any finding on the question of acquiescence by the landlord, reversed that part of the District Munsif's decree which related to compensation to the tenant, and decreed that the tenant should pay the cost of restoring the land to its former condition on the ground that the improvements in question were "unsuitable to the holding and inconsistent with the purpose for which it was let."

The defendant preferred this second appeal.

Narayana Rau, for appellant.

Sankaran Nayar, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

JUDGMENT.

In 1868 the respondent demised a palliyal to the appellant on kanam for wet cultivation. Exhibit A which evidences the demise provided for its being irrigated from a *chola* for 11 Indian hours a day and for payment of rent in paddy. It provided also for the surrender of the land within 12 years if the rent should be in arrear. There is nothing in the document to show that any improvement unsuited to the holding and inconsistent with the purpose for which the land was demised was in the contemplation for the parties. It is found by the Judge that the appellant converted a large portion of the wet land into paramba,

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planting jack, cocoanut and areca-nut trees. There was, however, [322] evidence to show that the respondent lived within three miles, that he had means of obtaining knowledge of the conversion of the land into a paramba, and that he raised no objection. There is no doubt upon the facts found that the appellant's claim to compensation is not referable either to the kanam document or to any subsequent express arrangement made with the respondent or to any overt act on his part which is inconsistent with his present contention. Nor is there any ground for doubting the correctness of the finding that the so-called improvement is unsuited to the nature of the holding and inconsistent with the purpose for which the land was demised. In this state of facts, the Judge held that the appellant was entitled to no compensation ; but that, on the other hand, he was liable to pay the respondent the cost of restoring the land to its former condition. It is urged that the passive acquiescence of the landlord was sufficient to sustain the appellant's claim to compensation and reliance is placed on the authority of *Shibdas Bandapadhya* v. *Bamandas Mukhàpadhya* (1). On the other hand, the respondent's pleader draws our attention to the decision of this Court in *Ravi Varmah* v. *Mathissen* (2) and to the cases cited therein, *Pilling* v. *Armitage* (3) and *Ramsden* v. *Dyson* (4). There is really no conflict in the principle on which the cases cited were decided. The general rule was laid down in *Ramsden* v. *Dyson* in these terms. "When money is laid out by a tenant in the hope or expectation of an "extended term or an allowance for expenditure, the tenant has no claim "which a Court of law or equity can enforce if such hope or expectation "has not been created or encouraged by the landlord." Our decision must then depend not so much on the suitability of the improvements to the nature of the holding as on the fact of the landlord having by conduct or otherwise raised an expectation that the outlay had his approval, and that the tenant would be reimbursed when he was called on to vacate possession, and the special equity raised by such conduct. Again, in *De Bussche* v. *Alt* (5) "it was observed that if bare acquiescence "is a valid defence, it must be an acquiescence while the act acquies-"ced in is in progress and not after it has been completed." The Lord Justices said "If a person having a right and seeing another "person about to commit, or in the course of committing an act "infringing upon that right, stands by in such a manner as really [323] "to induce the person committing the act, and who might have "otherwise abstained from it, to believe that he assents to its being com-"mitted, he cannot afterwards be heard to complain of the act. Mere "submission to an act when it is once completed without any knowledge "or assent upon the part of the person whose right is infringed upon is "only a submission to an injury, and it cannot take away the right "infringed upon when such submission is for any time short of the period "of limitation." In the case before us the Judge appears to have decided against the tenant mainly on the ground that the improvements made were unsuited to the holding. But it is also necessary to ascertain before we dispose of this appeal whether the landlord did not stand by when the land was being converted into a garden and thereby cause a belief that such conversion had his approval. We shall ask the present District Judge to return a finding upon the record and upon any further evidence on the

(1) 8 B.L.R. 237.

(2) Second Appeal No. 296 of 1884 *unreported* ; see Note at end of this report. (12 M. 323 N.

(3) 12 Ves. Jun. 78. (4) L. R. 1. H. L. 129. (5) L.R. 8 Ch. D. 286.

question mentioned above within six weeks from the date of the receipt of this order, when ten days will be allowed for filing objections.

In compliance with the above order the District Judge returned a finding to the effect that the landlord stood by when the lands in question were being converted into a garden, and thereby caused a belief that such conversion had his approval.

This second appeal having come on for re-hearing, the Court delivered judgment, modifying the decree of the District Judge and restoring that of the District Munsif.

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12 M. 323. N.

NOTE.

RAVI VARMAH v. MATHISSEN.*—This case came before the High Court on appeal from the District Court of North Malabar. The appellant, who was the Raja of Cherakkal, had sued to eject the respondents from certain items of property. It appeared that the respondents were in possession of that portion of the property which is in question in the following extract from the judgment, as assignees of one Bappen Chinnan under a document described as a "deed of surrender" dated 10th March 1855. Bappen Chinnan's title rested on Exhibit E—a lease, dated 20th July 1849, granted to him by the appellant's kovilagam—in which it was provided "that Bappen Chinnan should plant the paramba with four "kinds of trees, and that as soon as they come into bearing he should receive "the value of [324] the improvements and surrender the land." The respondents, who were members of a German Mission, had erected certain buildings and made various improvements on the land, and pleaded that the plaintiff was not entitled to eject them without paying full compensation for their expenditure.

On the question of compensation the High Court (MUTTUSAMI AYYAR, and BRANDT, JJ.) said :—

"As to the valuation of improvements, the appellant complains that it is excessive. But we consider that it is reasonable and in accordance with the principles laid down in second appeal No. 762 of 1884. It is no doubt true, as contended for the respondents, that several of the improvements made by them are excluded from those for which compensation is considered to be due. But we cannot say that those improvements are suitable to the purpose for which the paramba was originally let to Bappen Chinnan, or within the terms of Exhibit E. We do not consider that it is competent to us to enhance the compensation either on the ground that subsequently to 1855 there was a doubt about the appellant's jenm title, or that the appellant stood by when the buildings were raised. According to the finding, the respondents got into possession as assignees of Bappen Chinnan, who was the appellant's tenant, and it was not open to him or to them to question the landlord's title. Moreover there was an express contract E as to the nature of the improvements to be made, and there is no evidence to show that the appellant since did anything which could have reasonably led the respondents to believe that he would go beyond his agreement and compensate them for other improvements. We are aware of no authority for holding that upon principles of general equity a tenant or his assignee is entitled to compensation or relief for expenditure incurred by him under the observation of the landlord, unless he can show that it was incurred with reference to some agreement. On the other hand *Pilling* v. *Armitage* (1)

* S. A. No. 296 of 1884.—[ED.]

(1) 12 Ves. Jun. 78.

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is an authority to the contrary. And the learned Judges, who, in *Ramsden* v. *Dyson* (1), were not unanimous in respect of the findings of the facts, were agreed as to the general rule that when money is laid out by a tenant 'in the hope or expectation of an extended term or an allowance for expend-'iture, the tenant has no claim which a Court of law or equity can 'enforce, if such hope or expectation has not been created or encouraged 'by the landlord.' But the present case does not fall either within that proposition or within the proposition in respect of an omission, whereby one person has intentionally caused or permitted another to believe a thing not [325] true and to act upon such belief. It was not indeed contended in express terms that the appellant is estopped by reason of his conduct, and we cannot hold that by reason of the improvements in this case having been made within a short distance of the residence of the landlord, and on land belonging to him which he must have frequently passed, any other or further relief can be afforded to the respondents than they are entitled to under the terms of the agreement under which they held the land and by the custom of the country.

"At the same time, we cannot refrain from saying that this appears to be a very hard case, and we consider ourselves justified in the peculiar circumstances in directing that the decree do provide that the respondents be at liberty to remove within six months all the improvements made by them, for which no compensation has been allowed."

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12 M. 325.

APPELLATE CIVIL.

Before Mr. Justice Kernan, and Mr. Justice Wilkinson.

SATHUVAYYAN (*Defendant No.* 7), *Appellant v.* MUTHUSAMI (*Plaintiff*), *Respondent.** [9th August and 27th September, 1888.]

Hindu law—Personal decree against managing member of joint family not impleaded as such—Effect of sale in execution of such decree—Transfer of Property Act—Act IV of 1882, *Section* 99*—Sale of mortgage property in execution of decree on a money bond for interest due on the mortgage.*

The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family, to secure a debt incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money bond, and having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person :

Held, that the sale did not convey the interest of another undivided brother who was not a party to the decree :

Held, further per *Kernan, J.*, that the sale in execution was invalid under Transfer of Property Act, Section 99.

[Diss,, 35 C. 61=6 C.L.J. 320 (331)=11 C.W.N. 1011 ; R., 18 A. 325 ; 34 B. 128 (133) =11 Bom. L.R. 1315=4 Ind. Cas. 595 ; 14 M. 74 ; 22 M. 372 ; 10 C.P.L.R. 67 ; 16 C.P.L.R. 19.]

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in Appeal Suit No. 814 of 1886, modifying the decree of T. Audinarayana Chetti, District Munsif of Shiyali, in Original Suit No. 22 of 1885.

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* Second Appeal No. 1264 of 1887.

(1) L.R. 1 H.L. 129.

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[326] This was a suit for the division and separate possession of a one-third share of certain land which was alleged to be the property of an undivided Hindu family of which the plaintiff and defendants Nos. 1 to 5 were members; defendant No. 6 represented the interest of the mortgagee of part of the land in question under a mortgage, dated 10th August 1878, and executed by the defendant No. 1, the plaintiff's brother, as manager of his family for family purposes. Defendant No. 7 had purchased the land in question at a sale held on 28th January 1885 in execution of a decree obtained by the mortgagee upon a money bond executed on 24th August 1881 by both of the plaintiff's brothers, *viz.*, defendants Nos. 1 and 2, for a sum of money then due as interest on the above mortgage. The suit on the bond was original suit No. 130 of 1882, to which the plaintiff was not a party, and in which the defendants were (as was admitted in the present case) "not impleaded either as the managing members or as representatives of the family."

The District Munsif decided that the plaintiff was not entitled to any relief against defendant No. 7, but on appeal the Subordinate Judge held the sale in execution of the decree in Original Suit No. 130 of 1882 invalid as against plaintiff.

Defendant No. 7 preferred this second appeal.

Desikacharyar, for appellant.

Ramachandra Ayyar, for respondent.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following

JUDGMENTS.

KERNAN, J.—The plaintiff claims, in this suit, to be entitled to a one-third share in all the items of property Nos. 1 to 61 mentioned in the plaint, which property, he states, is the undivided family property of himself and his brothers, defendants Nos. 1 and 2, and the defendants Nos. 3 to 5.

The following facts have been found by both the Courts, *viz.*, first, that defendant No. 1 was manager of the undivided family, and that he, on the 10th of August 1878, executed a mortgage to Palaniappa Chetty, agent of Arunachellum, the father of defendant No. 6, for Rs. 2,500, borrowed for the payment of debts and other necessities of the family including the purchase of the plaint lands items 50 to 61; second, that interest being due on that mortgage, defendants Nos. 1 and 2 on the 24th of August [327] 1881 executed a mere money bond to Palaniappa Chetty for Rs. 700; and third, that the amount of that bond was given on account of the said interest.

Original suit No. 130 of 1882 was filed by Arunachellum Chetty, father of defendant No. 6, against the defendants Nos. 1 and 2 and Palaniappa Chetty on that bond, and a decree was obtained against defendants Nos. 1 and 2 on the 21st of September 1882. Under that decree, the plaint items Nos. 1 to 31 and 34 to 48 were attached and were, on the 28th day of January 1885, sold by auction, and defendant No. 7 bought them for Rs. 135, and obtained a certificate on the 17th of June 1885, which certifies that defendant No. 7 bought the lands set up for sale and not merely the shares of the defendants in execution.

In the plaint in this suit it is stated, and the fact is, as appears on the record, that the plaintiff was not made party to the Suit No. 130 of 1882. Therefore, he contends, he is not bound thereby or by the sale.

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He alleges that there was collusion between defendant No. 6 and defendants Nos. 1 and 2, but he states that he was absent from the village when the suit was filed. The collusion has been negatived by both Courts. The District Munsif decided that the plaintiff is bound by the decree and the sale, although he was not party thereto, inasmuch as the debt, for which the decree was obtained, was incurred for family necessity and contracted by the manager of the undivided family, and inasmuch as the plaintiff, who lives with defendants Nos. 1 and 2, was, as the Munsif believed, set up in this action to defraud defendant No. 6 of his interest in a portion of the lands mortgaged. The Munsif disallowed the plaintiff's claim to share in the lands purchased by defendant No. 7 and allowed plaintiff a one-fourth share in the plaint items, *viz.*, 32, 33, 49 to 61.

On appeal the Subordinate Judge, by a decree, dated 12th August 1887, allowed the plaintiff's claim to a one-fourth share in all the plaint items, on the grounds that the plaintiff was not a party to the suit No. 130 of 1882, and is not bound thereby or by the sale, and that the decree was personal against defendants Nos. 1 and 2, the plaintiff's brothers, and all that passed under the sale was the estate and interest of defendants Nos. 1 and 2.

The plaintiff, by permission of the Subordinate Judge, argued, as a ground of appeal, not put forward in the first instance, that as the decree in Suit No. 130 of 1882 was obtained by the mort- **[328]** gagee after the coming into force of the Transfer of Property Act, 1882, the sale was contrary to Section 99 of that Act. The Subordinate Judge overruled that contention, holding that only the parties to the suit could raise it.

This last mentioned ruling was erroneous. There is no limitation contained in Section 99 or elsewhere confining the application of that section to the parties to the suit. This suit is an instance where the provisions of Section 99 might properly be applied as the plaintiff has an interest in the property. The plaintiff no doubt did not admit his liability as a member of the family to the payment of the mortgage of 10th August 1878, but when the Courts decided that the mortgage bound him, he was entitled to take the objection under Section 99 that the sale in Suit No. 130 of 1882 was invalid. The fact that the sale took place before this suit was filed cannot give validity to the sale, if it was contrary to the provisions of Section 99. The plaintiff in Suit No. 130 of 1882 was a mortgagee within the meaning of Section 99, although the mortgage was in the name of his agent, the third defendant in that suit, who admitted the right of his principal. To treat the plaintiff in suit No. 130 of 1882 as not being the mortgagee, he being the principal, and to treat the agent, the third defendant as the mortgagee, because the mortgage was in his name, would be to evade the provisions of Section 99. For then the person beneficially entitled to the amount of the mortgage and interest should be held not to be the mortgagee, but that his agent who held the mortgage only as agent was the mortgagee. The plaintiff in that suit No. 130 of 1882 was entitled to file a suit to foreclose the mortgage or sell the property, making his agent a party.

We do not agree with the judgment of the Lower Appellate Court on this point and are of opinion that the sale was invalid under the Transfer of Property Act.

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The next question is whether the decree in Suit No. 130 of 1882 obtained against the defendants Nos 1 and 2 binds the plaintiff, their brother, on the ground that he was liable with them to the debt for which the suit was brought, although he was not party-defendant in that suit. That suit was on a money bond by the defendants Nos. 1 and 2; the bond did not refer to either of them as manager of the family or to the mortgage in any way. The decree was a mere money decree against the defendants. Though the plaintiff may be bound by the debt for which the [329] bond was given, he was not party to, or represented by either of, the defendants Nos. 1 and 2 in Suit No. 130 of 1882. A sale in execution of that decree could be legally made of the shares of defendants Nos. 1 and 2, but not of the plaintiff's share. That share was not the property of the defendants Nos. 1 and 2 or either of them. No doubt, under a money decree against a father on foot of a debt which bound the sons, the whole interest and all the shares of the sons could be legally sold and conveyed, although the sons were not parties to the suit. The principle of such decision is that the father is entitled by his own act, without the assent of his sons, to sell the whole estate for payment of such debts as bind the sons. But that principle has not been extended, so far as I know, to the case of any manager of a family except a father. The course of decisions in this presidency is that, in the case of adult co-parcener, a brother, who is manager, but is not sued as such, does not represent in a suit or proceedings affecting the family estate the co-parcener who is not made party to the suit, and that a decree in such suit and execution thereon would not bind him—*Viraragavamma* v. *Samudrala* (1). That was the case of a debt binding on both brothers, and for which a money decree only was had; but the manager was not sued in his character as manager—*Guruvappa* v. *Thimma* (2).

The case of *Daulat Ram* v. *Mehr Chand* (3) in the Privy Council was a case where a managing member granted a mortgage of the family property, and was sued on it and there was a sale. Other brothers of the joint family filed a suit to set aside the sale on the ground that they were not parties to the suit and they declined to go into evidence as to the nature of the debt, or whether it was of a nature to bind them, and it appeared that they got part of the produce of the purchase money of the sale. The Court held they were bound. But that was the case of a decree in a suit on foot of a mortgage, and the decree was for sale of the property mortgaged and the defendants refused to meet the case, on the ground that they had received a portion of the purchase money. Although the plaintiff in this case and his interest in the property may be bound by the mortgage created by his brothers and for the debt on the bond, that does not interfere with his right to have the sale made in Suit No. 130 of 1882 set aside.

[330] WILKINSON, J.—I am of the same opinion. The only question for determination in this appeal is whether the plaintiff's share in the joint family property passed to appellant, the auction purchaser. The plaintiff's brothers, defendants Nos. 1 and 2, executed a bond to defendant No. 6 for Rs. 600. Upon that bond, defendant No. 6 brought a suit, obtained a decree, and, in execution, brought the joint family property to sale; defendant No. 7, appellant, purchased it. It has been held that a money decree against one brother, who was not impleaded as the managing co-parcener or representative of the family, does not bind the other brothers and that

(1) 8 M. 208. (2) 10 M. 316. (3) 15 C. 70.

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no more than the judgment-debtor's share is liable to be attached and sold in execution—*Viraragavamma* v. *Samudrala* (1). This was followed in *Guruvappa* v. *Thimma* (2).

The case relied on by appellant's pleader—*Daulat Ram* v. *Mehr Chand* (3) is not applicable, as that was a case of a mortgage effected by the managing members. It is admitted that, in Original Suit No. 130 of 1882, defendants Nos. 1 and 2 were not impleaded either as the managing members or as representatives of the family, and the decree obtained was, therefore, a personal decree and one by which the present plaintiff was in no way concluded.

The decree of the Subordinate Judge, therefore, so far as it held that the plaintiff's rights did not pass by the sale in execution, is right.

The decree of the Lower Appellate Court is confirmed and this appeal dismissed with costs.

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12 M. 361.

[331] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

GOPI REDDI AND ANOTHER (*Plaintiffs*) *v.* MAHANANDI REDDI AND ANOTHER (*Defendants*).* [1st April, 1889.]

Civil Procedure Code, Section 525—Loss of award, procedure on.

When an award has been lost, a Court, acting under Section 525 of the Code of Civil Procedure, cannot take secondary evidence of its provisions and pass a decree accordingly.

[D., 1 S.L.R. 167.]

CASE referred for the opinion of the High Court by H. H. O'Farrel, Acting District Judge of Kurnool, under Section 617 of the Code of Civil Procedure.

The case was stated as follows :—

"In this suit the plaintiffs originally prayed that an award may be filed under Section 525 of the Code of Civil Procedure. The award produced by the plaintiffs is a copy of the original award which was given to them by the arbitrators, and signed only by four out of five arbitrators, the fifth admittedly refusing to sign.

"The defendants, on the other hand, deny that they ever submitted to the arbitration and that the so-called arbitrators passed an award.

"It is found that the original award and all the papers relating to the arbitration are not forthcoming owing to the dishonest conduct of Nagumutha Mudelliar, one of the arbitrators. On my suggestion the plaint was amended by inserting the words 'copy of the award' for the word 'award.'

"On the merits of the case I have found that as a matter of fact the defendants did submit to arbitration and an award was passed by the arbitrators. But I entertain great doubts as to whether in the absence of the original award the suit is maintainable.

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* Referred Case No. 2 of 1889.

(1) 8 M. 208. (2) 10 M. 316 (3) 15 C. 70.

1889 APRIL 1. — APPELLATE CIVIL. — 12 M. 331.

"As the matter is of considerable importance and no appeal lies against my decision, I resolve to refer this point of law to the High [332] Court under Section 617, Civil Procedure Code, on the following grounds:—

"(i). Under Section 525, Code of Civil Procedure, a Court is required to file the award and found a decree thereon. In the absence of the original award, is a Court acting under this section at liberty to take secondary evidence of the award and decree accordingly? I think not. The whole procedure in Section 525 is an extraordinary procedure, whereby a private document is made to have the force of a decision of a judicial tribunal. It may have been, and in my judgment was, the intention of the Legislature that such jurisdiction should not be exercised except under certain safeguards against its abuse, one of these being that the document itself should be filed in Court. I am strengthened in this conclusion by the fact that there is no appeal. If a Court is at liberty to go into the question of what the award was and take secondary evidence of its disputed contents, why should the Legislature have precluded the decision of the Court from being appealed against? Such a course would be a premium on the manufacture by plaintiffs who had no case whatever of bogus awards. If the only matters contemplated by the Legislature as under dispute under the provisions of Section 525 are such matters as are referred to in Section 521, there is an intelligible ground for refusing an appeal. The parties having selected their own arbitrators it is not deemed advisable to give them increased facilities for disputing their decision. Where the whole matter of the arbitration is in dispute this reason does not prevail.

"(ii). It may be said that it has been laid down in *Micharaya Guruvu* v. *Sadasiva Parama Guruvu* (1) that the power to file an award includes the power to determine whether there has been a submission to arbitration, and that the reasoning above given would be equally applicable as against that decision. No doubt that would seem to be so, and on the precise point laid down by that decision I am of course bound, but with the utmost respect I would say that I do not understand the principle of that decision. Their Lordships merely affirmed the proposition without assigning any grounds for it. The proposition of law has been dissented from in later cases, which have not come under their Lordships' notice as yet, in the Bombay and the Calcutta [333] High Courts—*Samal Nathu* v. *Jaishankar Dalsukram* (2) *Bijadhur Bhugut* v. *Monohur Bhugut* (3), *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhri* (4), *Hurronath Chowdhry* v. *Nistarini Chowdhrani* (5). I am, of course, bound by the Madras decision on the particular point, but I think I should not be justified, especially seeing that the grounds on which it apparently rests have been denied by other High Courts, in going beyond that judgment and extending its supposed principle to matters that are merely analogous.

"(iii). I would also draw a distinction between the filing of documents which are merely evidence of a fact, and the filing of documents which are not merely evidence, but part of the procedure laid down by the law as necessary for obtaining a decree. In the former case secondary evidence can of course be taken under the ordinary provisions of the law

(1) 4 M. 319. (2) 9 B. 254. (3) 10 C. 11.
(4) 9 C. 557. (5) 10 C. 74.

1889 April 1. — Appellate Civil. — 2 M. 331.

of evidence. In the latter case this can only be done by express enactment. As an example of the latter case I would take the instance of a will. Under Section 244, Act X of 1865, probate of a will is to be sought for by petition with the will annexed. If the will is lost then probate may be granted of a copy or on proof of the contents by oral evidence under the provisions of Sections 208 and 209. If secondary evidence could be given of the will under the ordinary rules relating to documents, why was it necessary for the Legislature to enact these special sections permitting this to be done? This seems to me to show that where the filing of a document is in itself a matter of procedure, and not merely of evidence, secondary evidence cannot be admitted without express enactment. This is precisely the case here. Section 525 says the award shall be filed. There is no provision enabling the Court to file a copy of the award, or to take secondary evidence of the contents of the award.

"The question is whether in the absence of the original award is a Court, acting under Section 525, Code of Civil Procedure, at liberty to take secondary evidence of the award and decree accordingly?"

Ramachandra Rau Saheb, for plaintiffs.

Visvanadha Ayyar, for defendants.

The Court (COLLINS, C.J. and PARKER, J.) delivered the following

JUDGMENT.

[334] We are of opinion that where the award cannot be produced and therefore cannot be filed, the special procedure, by which a decree can issue upon the award filed in Court becomes impossible, and the plaintiffs must, therefore, be referred to a regular suit to enforce the terms of the award.

We make no order as to the costs of this reference.

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12 M. 334=13 Ind. Jur. 293=13 Ind. Jur. 414.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

IMAM (*Plaintiff*), *Appellant v.* BALAMMA (*Defendant No.* 3), *Respondent.** [22nd and 27th February, 1889.]

Hindu Law—Notice by possession of widow of her rights to maintenance—Sale of family property to discharge previous mortgage.

Immoveable property of a joint Hindu family was sold by a member of the family and his two sons to the plaintiff, and the purchase money was expended in redeeming a mortgage. The character of the mortgage debt was not shown.

In a suit by the plaintiff for possession it appeared that the property in question had been in the exclusive possession of another member of the family, and after his death in that of his widow, for more than 26 years; and that neither of them had concurred in the sale to the plaintiff; it was also found that the widow was entitled to possession on account of maintenance:

Held that the separate possession of the widow was notice to the plaintiff of her interest in the land, and that he was not entitled to defeat it.

[F., 18 B. 679.]

SECOND appeal against the decree of J. W. Best, District Judge of South Canara, in appeal suit No. 378 of 1887, reversing the decree of

* Second Appeal No. 1369 of 1888.

1889 FEB. 27. — APPELLATE CIVIL. — 12 M. 334 = 13 Ind. Jur. 293 = 13 Ind. Jur. 414.

K. Krishna Rau, District Munsif of Udipi, in original suit No. 67 of 1887.

This was a suit instituted in 1887 for possession of certain land. The land was the property of a joint Hindu family to which the defendant belonged. Defendants Nos. 1 and 2 were the sons of one Ramappa (deceased), and defendant No. 3 was the widow of Ramappa's brother Bhadru. The dates when Ramappa and Bhadru died did not appear from the record of the second appeal.

[335] The plaintiff claimed the land under exhibit A—a sale-deed, dated 1879, which reserved a right of re-purchase by the vendors till 29th October 1882—executed to him by defendants Nos. 1 and 2 and their late father. He also alleged a oral demise by him to defendants Nos. 1 and 2, which, however, he failed to establish.

Defendants Nos. 1 and 2 were *ex parte*.

Defendant No. 3 denied all knowledge of the sale and the oral lease set up. She contended that the northern moiety of the property was her husband's self-acquisition, and that the southern moiety was given to her for defraying the expenses of family ceremonies. She also pleaded that the suit was barred by the law of limitation; and further claimed to be entitled to retain possession on account of her maintenance.

The Munsif found that the plea of self-acquisition and reservation for family ceremonies was not made out, and held that there was no limitation bar inasmuch as the possession was never adverse. As to the sale he said that it had taken place without the co-operation of either Bhadru or his widow, and that "though the plaintiff showed that the purchase "money was paid in discharge of a mortgage of 1873—Exhibit B—there "was nothing to show that the debt received by the mortgagee was of such a "nature as to be binding on defendant No. 3." Moreover, no issue was framed as to the nature of the debt. On the above findings, and on the authority of *Venkatammal* v. *Andyappa* (1), the Munsif decreed that, subject to the third defendant's right to the possession, during her life, of the plaint house and other buildings, the plaintiff do recover possession of the immoveable property, and that upon the death of defendant No. 3 the plaintiff shall be entitled to take possession of the buildings.

On appeal by the defendant No. 3 the District Judge expressed his concurrence in the findings of the Munsif on the questions of the letting and self-acquisition; but being of opinion on a consideration of the whole evidence that the plaint property had been in the exclusive possession of Bhadru after his death and defendant No. 3 for 26 years, and finding that there was no evidence on the record which showed that the husband of defendant No. 3 had left any property sufficient for the maintenance of defendant No. 3, he reversed the Munsif's decision and dismissed the plaintiff's suit.

[336] The plaintiff preferred this second appeal.

K. Narayana Rau, for appellant.

Neither the possession of Bhadru nor of defendant No. 3 was adverse to the plaintiff. So long as no partition is come to, the possession of one member is permissive as far as all the other members of the joint family are concerned. In the case of exclusive possession the continuing consent of the other co-sharers is implied. Exclusive possession is one thing and

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(1) 6 M. 130. As to this case see *Ramanadan* v. *Rangammal*, (12 M. 260) (Reporter's Note).

1889 FEB. 27. — APPELLATE CIVIL. — 12 M. 334 = 13 Ind. Jur. 293 = 13 Ind. Jur. 414.

adverse possession another. *Sheo Pershad Sing* v. *Leelah Singh* (1), *Shurfunnissa Bibee Chowdhrain* v. *Kylash Chunder Gungopadhya*(2).

The District Judge ought to have recorded a finding as to whether the debt discharged by the sale in plaintiff's favour was binding on defendant No. 3; and should also have ascertained whether the plaintiff had notice of her charge for maintenance at the time of sale.

Subba Rau, for respondent.

The further facts of the case and the further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.).

JUDGMENT.

The first and second defendants are brothers, and the third defendant is the widow of their father's brother Bhadru. The property in dispute consists of a garden and a house and a well, and it is found by the Judge to have been in the exclusive possession of Bhadru and after his death of the third defendant for upwards of 26 years. The three defendants constituted together a joint Hindu family governed by the Mitakshara law. On 29th October 1879 the first and second defendants and their father sold the property in dispute to the plaintiff, reserving, however, a right of re-purchase till 29th October 1882, but as they failed to re-purchase the garden within the stipulated time, the sale in favour of the plaintiff became absolute. He brought the present suit to recover possession of the garden and the house, alleging his purchase and also an oral letting to the first and second defendants. Both the Courts below have found that the oral letting has not been proved and we dismiss it, therefore, from our consideration. The third defendant, who alone resisted the claim, contended that the northern moiety of the garden was self-acquisition and that [337] the southern moiety, though joint family property, was allotted to her husband for defraying the expenses of certain family ceremonies. Both Courts found that these allegations were not proved. The third defendant claimed to be entitled to retain possession of the property on account of her maintenance as the widow of Bhadru, and the Judge upheld the contention, observing that there was no evidence on the part of the plaintiff that there was any other property of the third defendant's husband sufficient for her maintenance. On this ground and on the ground that the third defendant and her late husband had had exclusive possession for nearly 30 years, the District Judge dismissed the suit with costs. It is contended that the Judge has recorded no finding as to whether the debt discharged by the sale in plaintiff's favour was binding on the third defendant, that neither the possession of Bhadru nor that of the third defendant was adverse to the plaintiff, and that the Judge has not ascertained if the plaintiff had notice of the third defendant's charge for maintenance at the time of the sale.

It is true that the Judge does not state explicitly that the debt evidenced by Exhibit B is not binding on the third defendant, but we have no doubt that he intended to adopt the Munsif's finding. He observes that the Munsif is doubtless correct in his finding that the first defendant is in collusion with the plaintiff with a view to dispossessing the third defendant, and that the alleged oral lease, even if proved, must be taken to be a sham. He has also found that the first and second defendants have not lived in commensality with the third defendant or her husband for

(1) 20 W.R. 160. (2) 25 W. R. 53.

nearly 30 years. Though the possession of the third defendant or of her husband is not necessarily adverse to the plaintiff's vendors, yet the separate possession of family property by a widow of a joint Hindu family is notice that she has some interest therein, and if the plaintiff had enquired he would have acquired a knowledge of her possession in her right of maintenance. The finding that there was collusion negatives the contention that the purchase was *bona fide* and without notice. As the suit is in ejectment and the title to present possession is not made out, the decision of the District Judge is right, but this of course will not preclude the plaintiff from suing to recover possession on determination of the life estate.

We dismiss this second appeal with costs.

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12 M. 338 = 1 Weir 760.

[338] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

QUEEN-EMPRESS *v.* NARASIMMAYYA.* [10th April, 1889.]

Forest Act (Madras)—Act V of 1882, *Sections* 4, 7, *and* 21.

A claim put forward to part of certain land notified for reservation under the Madras Forest Act originally rejected, was held to be valid by the District Court on appeal. The High Court set aside the decision of the District Court and directed that the appeal be reheard. Pending the rehearing, a lessee of the claimant felled trees on the land and was charged under Section 21 (*a*) with the offence of making a fresh clearing prohibited by Section 7 of the Act. The Magistrate acquitted him on the ground that there was no order in writing served on him by the Forest Department prohibiting him from felling trees pending the rehearing:

Held, that the acquittal was wrong.

CASE referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by H. M. Winterbotham, District Magistrate of North Malabar.

The case was stated as follows :—

" The accused was charged, with having some time in April and May 1888, committed an offence under Section 21 (*a*) of the Madras Forest Act by making a fresh clearing in the Pambara Forest which had been notified, under Section 7 of the Act, for reservation. The forest was notified for reservation in October 1884. One Pudhadi Kettilamma put forward a claim to a portion of it. The Forest Settlement officer rejected the claim on 30th September 1886. Appeal was made by the claimant to the District Court of South Malabar. The District Judge heard the appeal *ex parte* and reversed the Forest Settlement officer's decision on 6th October 1887. Government applied to the High Court to have the *ex parte* order set aside. The High Court set aside the order and directed a rehearing of the appeal on 9th March 1888.

" The effect of the High Court's order of 9th March directing a rehearing of the appeal is to leave the Forest Settlement officer's [339] judgment temporarily in full force and effect. The felling complained of admittedly took place in April and May 1888. The appeal was not reheard

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* Criminal Revision Case No. 76 of 1889.

1889 APRIL 10. — APPELLATE CRIMINAL. — 12 M. 338 = 1 Weir 760

and determined till 24th August 1888. It appears perfectly clear that between the months of March and August 1888, the accused, as lessee of the claimant Pudhadi Kettilamma, had not the least excuse for trespassing upon the forest, and the Sub-Magistrate's remark that he ought to have been prohibited by an order in writing is utterly unsound.

"During the said period it cannot even be pleaded that any decision of a Court existed in Pudhadi Kettilamma's favour. The Forest Settlement Officer found that the Government were in possession and that the claimant had no title to the property, and it was this finding that was in force at the time that the felling complained of took place.

"I learn that the lessee, encouraged by the Sub-Magistrate's judgment, has recommenced felling, and I therefore think it proper to bring the illegal acquittal of the accused to the High Court's notice for such action as may be deemed proper. I think a re-trial should be ordered.

"Although the Government are undisputedly in present possession of the forest and have a large stock of timber lying in it, no steps have been taken to work the forest, and it seems only fair that Government should be accorded such protection as the law warrants against the illegal felling of the opposite party pending the final disposal of the dispute."

Section 21 of the Madras Forest Act (Act V of 1882) renders it penal for any person "to make a fresh clearing prohibited by Section 7" *; it provides, however, as follows :—

"Nothing in this section shall be deemed to prohibit . . . (*inter alia*) . . . the exercise of any right continued under Section 12 or **[340]** created by a grant or contract in the manner described in Section 18." Section 12 relates to the case where a right to forest produce is admitted by the Forest Settlement Officer. The terms of Section 18 are given in the foot-note† : those of Sections 4 and 6 which provide for notice to occupiers, &c., of an intended reservation of forest appear *ante* p. 204 ‡ ; those of Section 16 as to "notifications declaring forest reserved" appear *ante* p. 226.§

The *Acting Government Pleader* (*Subramanya Ayyar*), for the Crown.

The Court (COLLINS, C.J., and WILKINSON, J.) delivered the following

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* Section 7. During the interval between the publication of such proclamation and the date fixed by the notification under Section 16 no right shall be acquired in or over the land included in such proclamation, except under a grant or contract in writing made, or entered into by, or on behalf of, the Government, or by, or on behalf of, some person in whom such right, or power to create the same, was vested when the proclamation was published, or by succession from such person, and no fresh clearings for cultivation or for any other purpose shall be made on such land. No patta shall, without the previous sanction of the Governor in Council, be granted on behalf of Government in such land, and every patta granted without such sanction shall be null and void.

Nothing in this section shall be deemed to prohibit any act done with the permission in writing of the Forest Settlement Officer.

† Section 18. No right of any description shall be acquired in or over a reserved forest, except under a grant or contract in writing made by, or on behalf of, the Government, or by, or on behalf of, some person in whom such right, or the power to create such right, was vested, when the notification under Section 16 was published, or by succession from such person :

Provided that no patta shall, without the previous sanction of the Governor in Council, be granted on behalf of Government for any land included within a reserved forest, and every patta granted without such sanction shall be null and void.

‡ 12 M. 204—ED.

§ 12 M. 226—ED.

JUDGMENT.

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APPELLATE CRIMINAL.

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The ground on which the Sub-Magistrate acquitted the accused, *viz.*, that there was no order in writing served on the defendant by the Forest Department prohibiting him from felling trees during the pendency of the second hearing of the appeal before the District Court is clearly erroneous. Between the date of the notification under Section 4 and the date of the notification under Section 16 any fresh clearing is clearly rendered illegal by Section 7, and the only question therefore was whether the accused had effected a clearing between those dates. We set aside the acquittal and direct the casê to be reheard.

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12 M. 341.

[341] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

PAPAMMA (*Defendant*), *Petitioner* v. THE COLLECTOR OF GODAVARI (*Petitioner*), *Respondent.**
[20th February and 21st March, 1889.]

Civil Procedure Code, Section 622 - *Act XIX of* 1841, *Sections* 2, 3, 5, 15 —*Regulation V of* 1804 (*Madras*).

On a petition presented by the Agent of the Court of Wards a District Court made an order which purported to have been made under Act XIX of 1841, Section 5. The conditions prescribed by Sections 3 and 4 were not shown to exist:

Held, the order of the District Court was illegal, and was subject to revision under Section 622 of the Code of Civil Procedure.

[F., 2 N.L.R. 72; R., 17 Ind. Cas. 429 (430) = 23 M.L.J. 537 (538) = 12 M.L.T. 497 = (1912) M.W.N. 1164 (1165); 65 P.L.R. 1911.]

PETITION under Section 622 of the Code of Civil Procedure praying the High Court to revise the order of A. L. Lister, District Judge of Godavari, made on civil miscellaneous petition No. 106 of 1888, dated 17th March 1888.

The above petition was presented by the Collector of Godavari and Agent to the Court of Wards, and prayed that the Head Assistant Collector should be appointed Curator under Act XIX of 1841, Section 5, in respect of the property of a deceased zamindar, and the order of the District Judge granted the prayer of the petition.

The present petitioner was the adoptive mother of the late zamindar, and claimed to be rightfully in possession of the property concerned. This petition, which was preferred under Section 622 of the Code of Civil Procedure, proceeded on the grounds that the District Judge had no authority to pass the above order under the Act referred to; that he had acted illegally and with material irregularity in appointing a Curator without proper inquiry and without issuing notice to him, and on other grounds.

The *Acting Advocate-General* (Hon. Mr. *Spring Branson*), *Bhashyam Ayyangar* and *Subba Rau* for petitioner, relied on the provisions of Act XIX of 1841, Sections 1, 2, 3, 5 and 15. The provisions of Sections 5

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* Civil Revision Petition No. 95 of 1888.

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and 15 are given in the judgment of the Court. Those of Sections 1, 2 and 3 are as follows:—

[342] 1. It is hereby enacted that whenever a person dies leaving property, moveable or immoveable, it shall be lawful for any person claiming a right by succession thereto, or to any portion thereof, to make application to the Judge of the Court of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

2. It shall be lawful for any agent, relative, or near friend, or for the Court of Wards, in cases within their cognizance, in the event of any minor disqualified or absent person being entitled by succession to such property as aforesaid, to make the like application for relief.

3. The Judge, to whom such application shall be made, shall, in the first place, inquire, by the solemn declaration of the complainant, and by witnesses and documents at his discretion, whether there be strong reasons for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and that the application is made *bona fide*.

Mr. *Michell* and *Subramanya Ayyar*, for respondent.

The arguments adduced on this petition appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

JUDGMENT.

This is an application for the revision of an order made by the District Court of Godavari. The order in question was passed under Act XIX of 1841, Section 5, and it purports to appoint the Head Assistant Collector of the Godavari District as Curator to take possession of the property belonging to the Nidadavole, Baharzalli, and Ambarupeta Estates, the records, personal property, accounts, and other documents appertaining thereto and of all the other personal property belonging to the deceased proprietor Venkata Ramaya Appa Rao Bahadur.

The question for decision is whether, in the circumstances under which the order was made, it is bad for want of jurisdiction.

The facts of the case are shortly these. From 1827 to 1864 Narayya Appa Rao had been the proprietor of the estates mentioned above, and upon his death in 1864, they devolved on his [343] two widows, Sri Raja Papamma Rao the petitioner before us, and Sri Raja Chinnama Rao. The junior widow died since, and the petitioner was left in sole possession. On 19th June 1885, Papamma Rao, in the exercise of authority conferred upon her by her husband, adopted Raja Venkata Ramanuja Appa Rao Bahadur, Zamindar of Medur Pergauna, and had the estates registered in his name, alleging that the ownership therein vested in him by virtue of the adoption. The adopted son died on 1st January 1888 leaving him surviving an only son named Narayya Appa Rao, an infant aged 10 months, a widow named Sri Raja Venkata Raja Gopala Venkayamma Rao, and his adoptive mother, the petitioner in this Court. On the 1st March 1888, the Government authorized the Court of Wards to assume management of the estates on behalf of the minor under Regulation V of 1804, and

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when the Collector of the district, as Agent of the Court, proceeded to take possession, the petitioner refused to allow him to do so, or to have access to estate records. She contended that she had managed the estates subsequently to the adoption, and that she was entitled to be left in possession and management during her life; firstly, because it was subject to that condition she made the adoption in 1885; and secondly, because the deceased proprietor appointed her by his will, dated 1st January 1888, to manage all the affairs, and to keep all the property in her possession until his minor son attained his age. On 17th March 1888, the Collector, as the Agent of the Court of Wards, applied, under Act XIX of 1841, Section 2, to be put in possession of the estates of Nidadavole, Baharzalli, and Ambarupeta, and all the personal property of the deceased proprietor, Venkata Ramaya Appa Rao. The petition prayed also that pending the decision of the summary suit, the Head Assistant Collector of the Godavari District might be appointed Curator under Act XIX of 1841, Section 5. On the same day the District Judge made the order which the petitioner now impeaches for want of jurisdiction. It does not appear that beyond the statements contained in the Collector's petition, there was any other evidence before the District Judge when he made the order. The petition first set forth the adoption of the deceased proprietor, the registry of the estates in his name at the request of Papamma Rao, the subsequent collection of all Government dues from him, and stated that the property therein was vested in him. It next referred to his death, to the minority of [344] the son left by him and the decision of the Government that the Court of Wards should assume management under Regulation V of 1804. It went on to state that the petitioner refused to allow the Collector to take possession or to have access to the estate records, and then to ask to be put in possession and for the appointment of the Head Assistant Collector as Curator pending decision of the summary suit. Three objections are in the main taken to this order, *viz.*, (1) that the Act was put into force against the petitioner contrary to the provisions of Section 3 and Section 5; (2) that the order was made without ascertaining first whether the conditions under which alone it could lawfully be made under Section 5 really existed, and (3) that the order could not be extended to the accumulations of income derived whilst petitioner was in possession in her own right prior to the adoption in 1885.

The order of the 17th March only authorizes the Curator to take possession of the property of the deceased proprietor, and it does not relate to any property which may belong to the petitioner in her own right. If any property in her possession is really a saving out of the income derived in her own right, it is a matter which she is at liberty to urge and prove before the Judge, and, until she does so, and the Judge makes an order in regard to it, there is no ground for our interference.

As regards the omission to comply with the procedure prescribed by Section 3, it is certainly a material error of procedure having a bearing on the *interim* order which we are asked to revise. It is not denied that the Judge has under the Act general jurisdiction over the property of the deceased proprietor. Nor is there any doubt that Sections 3 and 4 impose an obligation on the Judge to satisfy himself by some inquiry, before citing the party complained against, that there are strong reasons for believing that the party in possession has no lawful title and that the party suing is likely to be materially prejudiced if left to a regular suit. The scheme of the Act is that the finding of the Judge on the two points mentioned in Section 3 is a condition precedent to the Act being put in

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force; for, Section 4 enacts that in case the Judge is satisfied of the existence of such strong ground of belief, but not otherwise, he shall cite the party complained of. No witnesses were apparently examined nor documents produced in this case before the Judge made his order. Though the application is verified, neither the Collector nor any one acquainted [345] with material facts was examined. Nor does the application embody any information in regard to the claim set up by the petitioner when she refused to allow the Collector to take possession or in regard to the grounds on which that claim was considered untenable. As the inquiry directed by Section 3 ought to be held prior to the citation of the petitioner, the party applying under the Act was bound to show, and, if he did not, it was incumbent on the Judge to call upon him to show, in the language of Section 3, strong reasons for the belief that the party in possession had no lawful title and that the minor was likely to be materially prejudiced if the Court of Wards was left to the ordinary remedy of a regular suit. It is no doubt in the Judge's discretion to call for witnesses or documents if the solemn declaration of the complainant affords sufficient information and enables him to form an opinion as directed by Section 3. The omission to follow the procedure has in this case deprived the petitioner of the protection to which she was entitled under the Act before she could be cited. In this sense the irregularity was material.

Again, Section 5 under which the order now before us was made runs as follows:—

"In case it shall further appear upon such application and examination as aforesaid that danger is to be apprehended of the misappropriation or waste of the property before the summary suit can be determined, and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided that he be the lawful owner, it shall be lawful for the Judge to appoint one or more Curators with the powers hereinafter next mentioned, whose authority shall continue according to the terms of his or their respective appointments, and in no case beyond the determination of the summary suit and the confirmation or delivery of possession in consequence thereof; provided always that in the case of land the Judge may delegate to the Collector or to his officer the powers of a Curator, and also that every appointment of a Curator in respect of any property be duly published."

It will thus be observed that the conditions subject to which a Curator is to be appointed are (1) that there must be an application and an examination as aforesaid, (that is to say as directed in Section 3), (2) that the Judge must be in a position to say upon such application and examination that danger is to be apprehended of [346] misappropriation or waste of the property before the summary suit can be determined, and (3) that the delay in obtaining security from the party in possession or its insufficiency is likely to expose the party out of possession to considerable risk. On referring to the Collector's application of 17th March 1888 we find no averment showing that any of these conditions existed and when the Judge made his order he had no other evidence before him. We must come to the conclusion that, at the time the order before us was made, the Judge overlooked the conditions subject to which alone he was authorized to appoint a Curator.

As regards the statement that the deceased had given directions by his will for the possession of the estate during the minority of his son and that the Judge had no power to put the Act into force in opposition to

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such directions, Section 15 shows that it is a matter to be established by the petitioner during the trial. Section 15 is in these terms—"And it is hereby enacted that the Act shall not be put in force to contravene any public Act of settlement. Neither in cases in which the deceased proprietor shall have given legal directions for the possession of his property after his decease in the event of minority or otherwise, in opposition to such directions, but in every such case so soon as the Judge having jurisdiction over the property of a deceased person shall be satisfied *of the existence of such directions*, he shall give effect thereto." The proper construction is that, if it is shown that the deceased proprietor had given lawful directions as to the possession of his property after his decease and during the minority of his son, the Judge having jurisdiction is bound to give effect to them and not to put the Act into force so as to contravene them. The section appears to us rather to provide a rule of decision for the guidance of the Judge in dealing with the summary suit on the merits than to interdict the exercise of jurisdiction under the Act.

The order of the 17th March 1888 is therefore open to objection in that the Judge failed to satisfy himself that the special condition prescribed by Sections 3 and 4 as necessary to his exercising jurisdiction existed in the case, and he also failed to see that the conditions prescribed by Section 5 as necessary to interfering with the party claiming to be in possession by the appointment of a Curator existed. The Judge appears to have considered that an application from the Collector on behalf of the Court of **[347]** Wards was all that was needed and overlooked the provisions of the Act, first in regard to the special limitation subject to which the jurisdiction vesting in him under the Act ought to be exercised, and next in regard to the conditions which limit his power to appoint a Curator. These omissions or errors of procedure clearly amount to material irregularity in the investigation of a matter on which his jurisdiction depended within the meaning of Section 622 of the Code of Civil Procedure.

We therefore set aside the order appointing the Head Assistant Collector a Curator under Section 5.

The summary suit which has been fixed must be heard and disposed of by the Judge in accordance with the provisions of the Act, regard being had to the very special circumstances to which the Act was designed to apply and subject to the limitations to which we have referred above.

We do not think it necessary in this order to refer to the affidavit and other documents which have been filed in this Court, as they were not before the Judge at the time of making the order we are asked to revise.

The counter-petitioner (the Collector) must pay the costs in this Court, and the costs in the Court below will abide and follow the result of the summary suit.

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MARCH 12.

APPEL-
LATE
CIVIL.

12 M. 347.

12 M. 347.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Shephard.

RAMANAMMA (*Plaintiff*), *Appellant v.* SAMBAYYA AND OTHERS (*Defendants*), *Respondents.** [12th March, 1889.]

Maintenance—Limitation—Limitation Act XIV of 1859, *Section* 1, *Clause* 13—*Refusal of persons liable to maintain—Cause action.*

In a suit for maintenance brought in 1887 by a Hindu widow against the undivided family of her deceased husband, who had died about 24 years before suit, it appeared that her maintenance had not been made a charge on specific property :

Held, that time began to run against the plaintiff's claim under the Limitation Act of 1859, only from the date of refusal on the defendants' part to maintain her. *Narayana Rao Ramachandra Pant* v. *Ramabai* (I.L.R. 3 Bom. 415) followed.

[348] SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Cocanada, in appeal suit No. 124 of 1887, confirming the decree of Y. Janakiramayya, District Munsif of Cocanada, in original suit No. 236 of 1887.

Suit by a Hindu widow against the undivided brother and nephews of her late husband, to establish her right to maintenance, to constitute it a charge on the family lands and to recover a certain sum by way of arrears of maintenance.

Her husband died in or about 1853. In 1863 she executed a kararnama which was relied on by the defendants as amounting to a release of her claim to maintenance.

The District Munsif dismissed the suit. He adopted the defendants' construction of the kararnama; and also, finding the plaintiff's allegation that she had been maintained by the defendants until 1885 to be false, he held that her suit would in any case have been barred under the Limitation Act. Upon the latter point he said :—

"It is evident that the plaintiff's claim for maintenance was governed "by the Limitation Act XIV of 1859, as her husband died in 1853 ; and "as she never received any maintenance from the defendants, her claim "for the same was barred, under Act XIV of 1859, Section 1, Clause 13, "before the year 1866, *Abbakku* v. *Ammu Shettati* (1) ; as the remedy was "extinguished long before the Limitation Act of 1871 came into force, "the more indulgent provisions in the later enactments cannot help the "plaintiff and revive a claim once barred, I find this issue in defendants' "favor and against the plaintiff."

On appeal the Subordinate Judge affirmed the decree of the District Munsif.

The plaintiff preferred this second appeal.

Subba Rau, for appellant.

Desikacharyar, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and SHEPHARD, J.).

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* Second Appeal No. 1170 of 1888.

(1) 4 M.H.C.R. 137.

JUDGMENT.

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Two points arise in the case. In holding that the suit is barred by limitation, the Courts below have followed the decision in *Abbakku* v. *Ammu Shettati* (1) and held that Section 1, **[349]** Clause 13 of the Act of 1859 is applicable to the case. But the judgment of the Privy Council in *Narayna Rao Ramchandra Pant* v. *Ramabai* (2) makes it clear that that sub-section does not apply unless the maintenance has been made a charge on specific property. That is not the case here, and, therefore, time began to run against the plaintiff only from the date of refusal on the defendant's part to maintain her, when the cause of action arose. With regard to the release, we are also of opinion that it has been misconstrued. The release was given at a time when no claim for maintenance was under discussion, and there is nothing to show that it related to maintenance. We must reverse the decree of the Lower Appellate Court and remand the appeal for disposal on the merits. Costs to be provided for in the revised decree.

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12 M. 349.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

SRINIVASA AND OTHERS (*Plaintiffs*), *Appellants v.* SIVAKOLUNDU (*Defendant*), *Respondent.** [25th March, 1889.]

Provincial Small Cause Court Act (Act IX of 1887), Schedule II, Article 41—Civil Procedure Code, Section 586—Suit for contribution—Joint property.

Lands of which part belonged to the plaintiffs and part to the defendant were comprised in a patta which ran in the names of the plaintiffs and another. The defendant's share of the assessment fell into arrear and was collected from the plaintiffs who now sued to recover Rs. 200, being the amount so paid together with interest:

Held, the suit was of a nature cognizable by a Court of Small Causes, and so no second appeal lay. *Krishno Kamini Chowdhrani* v. *Gopi Mohun Ghose Hazra* (I.L.R., 15 Cal. 652) followed.

[D., 8 M.L.J. 149.]

SECOND APPEAL against the decree of G. D. Irvine, District Judge of Coimbatore, in appeal suit No. 19 of 1888, reversing the decree of T. Dorasami Pillai, District Munsif of Erode, in original suit No. 739 of 1885.

Suit for Rs. 200. The plaint was summarized by the District Munsif as follows:—

[350] "Plaint states that patta No. 1 comprising 60 fields in Pudu-"pariyur Karai, Satyamangalam taluk, runs in the names of plaintiff and "Pattabiramien (deceased) the half-brother of second and third plaintiffs; "that of those 60 fields, three, *viz.*, 354, 355-A and 356, appertain to "defendant's enjoyment, and the others to plaintiffs and the said Patta-"biramien's enjoyment; that assessment, road-cess, &c., due under the "patta No. 1 for Fusli 1292 amounted to Rs. 1,998-12-10, of which plain-"tiffs' share was Rs. 1,323-3-11. Pattabiramien's share was Rs. 468-10-5, "and defendant's share for the said three fields was Rs. 206-9-6; that

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* Second Appeal No. 1646 of 1888.

(1) 4 M.H.C.R 137.

(2) 3 B. 415.

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"Pattabiramien paid his, that defendant having left Rs. 155-9-4 in arrears, it was collected from plaintiffs, together with their own share from "13th November 1882 to 16th April 1883, on the ground that plaintiffs "were pattadars. Hence the claim as under:—

	Rs.	A.	P.
Amount paid for defendant	155	9	4
Compensation thereon at 1 per cent. per mensem from 17th April to 11th November 1885 ...	48	12	0
Total ...	204	5	4
Amount relinquished	4	5	4
Balance...	200	0	0"

The District Munsif passed a decree in favour of plaintiffs for Rs. 155, but this decree was reversed on appeal by the District Judge who dismissed the suit.

The plaintiffs preferred this second appeal.

Pattabhiramayyar for respondent objected under Section 586 of the Code of Civil Procedure that no second appeal lay. A suit for contribution is cognizable in a Small Cause Court—*Krishno Kamini Chowdhrani* v. *Gopi Mohun Ghose Hazra* (1), *Nath Prasad* v. *Baij Nath* (2).

Bhashyam Ayyangar, for appellants.

The case is governed by the Provincial Small Cause Court Act, Act IX of 1887, which was in force when the second appeal was filed. Schedule II, Article 41 of that Act exempts from the cognizance of a Court of Small Causes:—"a suit for contribution [351] by a "sharer in joint property in respect of a payment made by him of money "due from a co-sharer or by a manager of joint property, or a member of "an undivided family, in respect of a payment made by him on account "of the property or family."

The question is in what sense is the term "joint property" used; in the present case the assessment is joint.

The Court (Collins, C.J., and Wilkinson, J.) delivered the following

JUDGMENT.

The pleader for the defendant (respondent) raises the preliminary objection that the suit being one of a Small Cause nature, and the value being only Rs. 200, no second appeal lies. It was held by a Full Bench of the Calcutta High Court in *Krishno Kamini Chowdhrani* v. *Gopi Mohun Ghose Hazra* (1) that cases falling within the provisions of Section 69 of the Contract Act are cognizable by a Court of Small Causes under Section 6, Act XI of 1865. It is argued, on the other side, that the present suit, which is one for contribution, is expressly excluded by the present Small Cause Court Act IX of 1887, Schedule II, Article 41. But we are unable to accede to this contention. That article refers to a suit for contribution by a sharer in joint property. We cannot hold that because the patta for the lands held by the appellants stands in the name of the plaintiffs and another, the property is joint property. The lands, the assessment of which has been paid by plaintiffs, are in the exclusive enjoyment of the defendant, and the plaintiffs have no right to them. This second appeal therefore fails, and is dismissed with costs.

(1) 15 C. 652. (2) 3 A. 66.

12 M. 352=2 Weir 719.

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APPELLATE CRIMINAL.

13 M. 352=1 Weir 719.

[352] APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

In re LUTCHMAKA.* [29th March, 1889.]

Criminal Procedure Code, Section 545—Death caused by rash and negligent act—Compensation to widow of deceased.

An order that the amount of a fine imposed on one convicted of causing death by a rash and negligent act be paid as compensation to the widow of the deceased is illegal.

[**Diss**., 17 P.R. 1898 (Cr.) (**F.B.**); **F**., 21 M. 74=2 Weir 719 (**F.B.**); 16 C.P.L.R. 180 (181); Rat. Unrep. Cr. Cas. 763, (764).]

CASE of which the records were called for by the High Court under Section 435 of the Code of Criminal Procedure in exercise of its powers of revision.

In Criminal Case No. 1 of 1889 in the Court of the District Magistrate and Justice of the Peace, Bangalore, entitled the *Government* v. *Maller*, the accused, described as a British born subject, was convicted under Section 304-A of the Penal Code of the offence of causing the death of one Munusami by a rash and negligent act, and was sentenced to pay a fine of Rs. 50, and it was ordered that "the whole amount of fine, if recovered, be paid to Lutchmaka, the widow of the deceased as compensation."

The records of the case having been sent for by the High Court as above, the Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

The award of compensation to the widow was not legal under Section 545, Criminal Procedure Code, and must be set aside.

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12 M. 353=13 Ind. Jur. 256.

[353] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

SUBBA AND ANOTHER (*Defendants Nos. 1 and 5*), *Appellants v.* NAGAPPA (*Plaintiff*), *Respondent.** [13th November, 1888 and 4th March, 1889.]

Landlord and tenant—Ejectment—Permanent tenancy pleaded—Notice to quit.

Suit to eject defendants from certain land held by them from the plaintiff under a *chalgeni* (yearly) demise of 1869. The defendants pleaded that they were *kattugudi* (permanent) tenants of the land in question; they had set up their title as *kattugudi* tenants previous to the *chalgeni* demise, but it did not appear that they had re-asserted it up to date of suit:

Held, that the issue whether the plaintiff had given a notice to quit, reasonable and in accordance with local usage, should be tried.

Baba v. *Vishvanath Joshi* (I.L.R., 8 Bom. 228) considered.

[**F**., 3 M.L.J. 222; **Appl**., 15 B. 407; **R**., 18 B. 110; 17 M. 218=3 M.L.J. 287; 6 M.L.J. 59; L.B.R. (1893-1900) 36 (37); **D**., 16 M. 97; 1 M.L.J. 218.]

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* Criminal Revision Case No. 68 of 1889. † Second Appeal No. 942 of 1887.

1889 MARCH 4. — APPELLATE CIVIL. — 12 M. 353 = 13 Ind. Jur. 256.

SECOND APPEAL against the decree of J. W. Best, District Judge of South Canara, in Appeal Suit No. 312 of 1885, modifying the decree of J. Lobo, District Munsif of Puttur, in Original Suit No. 211 of 1884.

Suit for the recovery of 24 kulies of land, of which 17 were alleged to be held by the defendants Nos. 1, 2 and 3, on *chalgeni* or yearly tenure from the plaintiff, and the remaining 7 to have been in the wrongful possession of the defendants and their father since 1873. The defendants admitted the plaintiff's title to the land, but claimed to be *kattugudi* or permanent tenants of the land.

Both the Lower Courts found that the *chalgeni* tenure set up was true, and the wrongful possession proved, and passed a decree as sued for with costs.

This second appeal was preferred to the High Court by the defendants principally on the grounds that as the defendants had been in possession of the lands for a long time, the Lower Courts ought to have held that they were not liable to ejectment at will; and that as no notice to quit had been given by the plaintiff, the suit ought to be dismissed.

K. Narayana Rau, for the appellants, relied on *Abdulla Rawutan* v. *Subbarayyar* (1), where the objection as to want of notice to quit was allowed to be taken for the first time in second appeal.

[354]*Ramachandra Rau Saheb*, for respondent, contended that the defendants had forfeited their right to notice by their denial of plaintiff's title. *Baba* v. *Vishvanath Joshi* (2).

K. Narayana Rau in reply quoted *Paidal Kidavu* v. *Parakal Imbichuni Kidavu* (3), *Prannath Shaha* v. *Madhu Khulu* (4), which are in conflict with *Baba* v. *Vishvanath Joshi* (2).

On the first hearing of this second appeal the Court (PARKER and SHEPHARD, JJ.) made the following

ORDER.

The suit is brought to recover lands, parts of which are alleged in the plaint to have been held by the defendants on *chalgeni* tenure and other parts to have been wrongfully occupied by them since 1873. The defendants pleaded limitation as an answer to the whole suit and denying the alleged *chalgeni* lease averred that they held the land comprised in it on permanent tenure. The facts were found by the District Court in the plaintiff's favour, and the only point seriously urged in appeal, relating to the land included in the *chalgeni* lease, was that the defendants as tenants were entitled to reasonable notice, and reference was made to the case of *Abdulla Rawutan* v. *Subbarayyar* (1), where it was held that giving of notice being a necessary part of landlord's title to eject a tenant from year to year, objection on the score of want of notice might be taken even in second appeal. To the contention founded on this authority, it was answered that the defendants had forfeited their right to notice by their denial of the plaintiff's title, and the plaintiff's vakil relied on a Bombay case *Baba* v. *Vishvanath Joshi* (2), in which it was held that the tenant's right to notice was so forfeited by reason of his pleading in the suit a perpetual tenancy.

In so far as this case decides that a disclaimer of the landlord's title made in the suit only suffices to disentitle the tenant to notice, the case is not supported by the English authority on which it professes to be based—see *Vivian* v. *Moat*(5), and is in conflict with decisions of this Court

(1) 2 M. 346. (2) 8 B. 228. (3) 1 M. H. C. R. 13.
(4) 13 C. 96. (5) 16 Ch. D. 730.

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and of the High Court of Bengal (*Paidal Kidavu* v. *Parakal Imbichuni Kidavu* (1), *Prannath Shaha* v. *Madhu Khulu* (2)). In the present case, there is evidence to show that the defendants' father asserted a *kattugudi* tenure in 1852 and again in 1867. But in 1869 they accepted the [355] *chalgeni* lease, Exhibit A, from the plaintiff, and it does not appear that after that date and before the institution of the suit, the defendants repeated their assertion of the *kattugudi* tenure. It is therefore unnecessary to consider the question raised by the conflicting cases decided in Bombay and Calcutta [*Baba* v. *Vishvanath Joshi* (3) and *Kali Krishna Tagore* v. *Golam Ally* (4)]. The present case is similar to that of *Abdulla Rawutan* v. *Subbarayyar* (5), where also it would appear that the permanent tenure was set up by the tenant only in the course of the suit. We therefore remit the case for finding on the two following issues:—

(1) Whether before the institution of this suit the plaintiff gave any, and what, notice to the defendant to quit the premises comprised in the *chalgeni* lease.

(2) Whether such notice, if given, was a reasonable notice and in accordance with local usage.

The finding is to be on the evidence already on record and on any fresh evidence to be taken.

The provisions of the Transfer of Property Act with regard to notice are not applicable, because it is not shown that any notification making the provisions of Chapter V applicable to agriculture leases has been issued —see Section 117.

In compliance with the above order, the District Judge submitted his findings to the effect that notice was given in accordance with the custom of the country, and that it was in the circumstances of this case reasonable and sufficient.

On receipt of the above findings, this second appeal came on for final hearing, and the Court delivered the following

JUDGMENT.

The objections to the finding cannot be maintained.

We accept the findings upon the two issues which are in favour of the plaintiff. The result is that the appeal must be dismissed with costs. The plaintiff is entitled to his costs throughout.

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[356] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SADAGOPACHARI AND OTHERS (*Petitioners*), *Appellants* v. KRISHNAMACHARI AND OTHERS (*Counter-Petitioners*), *Respondents*.*
[25th March and 26th April, 1889.]

Execution of decree determining rights of rival religious sects—Decree, whether executory or declaratory—Limitation—How far a sect bound by decree against some of its members.

In a suit determined in 1840, in which various members of the Vadagalai sect residing in a certain village were plaintiffs and various members of the

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* Appeal against Order No. 160 of 1888.

(1) 1 M.H.C.R. 13. (2) 13 C. 96. (3) 8 B. 228.
(4) 13 C. 248. (5) 2 M. 346.

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Tengalai sect residing in the same village were defendants, it was held that an image of a priest revered by the latter sect was not entitled to a place in a certain temple of the village, or to public worship in a certain street, or to procession in the streets of the village; and it was directed that, if the defendants continued to make the image an object of public worship it should be removed. In 1888 various members of the Vadagalai sect, asserting that the members of the Tengalai sect had acted in contravention of the decree in the above suit, filed an execution-petition therein, praying that various members of the Tengalai sect be arrested, and "that the image of their priest, which they attempt to worship publicly, be removed until they obey the terms of the decree." It appeared that, in 1868, the District Magistrate had granted an application to restrain the Tengalais from acting contrary to the above decree. The execution-petition was dismissed by the District Court :

Held, the petition was rightly dismissed, since the execution of the decree was barred by limitation, and the decree, if it was capable of execution at all, could not be executed against the parties to the present petition.

[R., 30 M. 185 (P.C.) = 4 A.L.J. 333 = 9 Bom.L.R. 663 = 5 C.L.J. 566 = 11 C.W.N. 585 = 34 I.A. 93 = 17 M.L.J. 240 ; 6 Ind. Cas. 229 = 8 M.L.T. 33 (34); 22 M.L J. 109 (111) = 10 M.L.T. 515 = (1911) 2 M.W.N. 534.]

APPEAL against the order of R. S. Benson, Acting District Judge of South Arcot, dated 10th December 1888.

The order appealed against was made on a petition entitled execution-petition No. 43 of 1888 in civil suit No. 30 of 1828 in the late Court of Adalat in the Chingleput zilla. The prayer of the petition was "that "counter-petitioners, Tengalai Brahmans of the Tiruvendipuram village, "may be arrested and imprisoned in execution of the decree in the above "suit, and that the image of their priest, Manavala Mahamuni, which "they attempt to worship publicly, may be removed until they obey the "terms of the decree."

[357] The District Judge dismissed the petition, and the petitioners, who are Brahmans of the Vadagalai sect, preferred this appeal against his order.

The terms of the decree to which the petition related are set out in the following judgment of the High Court, from which the circumstances giving rise to the present case appear sufficiently for the purpose of this report. Exhibit D, which is referred to in the judgment, is an order, dated 5th September 1868, made by the District Magistrate of South Arcot under Section 62 of the Code of Criminal Procedure, granting an application made by some of the Vadagalai sect that the members of the Tengalai sect be restrained from proceeding with the construction of a temple, &c., on the ground that its construction, &c., was "contrary to both the letter and spirit" of the decree referred to above.

Subramanya Ayyar, Bhashyam Ayyangar, Sundara Ayyar and *Desikacharyar*, for appellants. The decree now sought to be executed was, in fact, an injunction. The suit in which it was passed was a suit between the sects, and the decree is capable of execution against the present defendants, whose interests were represented by the defendants joined in that suit—*Srikhanti Narayanappa* v. *Indupuram Ramalingam* (1). The whole body of the community to which the defendants belonged was bound, as where in England a few parishioners appear on an indictment against all the inhabitants of a parish for non-repair of a highway. It was so held in *Regina* v. *The Inhabitants of Haughton* (2) ; compare also *Jenkins* v. *Robertson* (3) ; *Commissioners of Sewers of the City of London*

(1) 3 M. H. C. R. 226. (2) 1. E. & B. 501. (3) L.R. 1 App. Ca. 117.

v. *Gellatly* (1), a suit for an injunction in which rights of common were in question was decided on the same view of the law; *Anandrav Bhikaji Phadke* v. *Shankar Daji Charaya* (2) is also an authority in favour of the appellants; and see *Parthasaradi* v. *Chinnakrishna* (3).

As to the question of limitation, the application for execution is not barred because the case would be governed by Article 178 of the Limitation Act—*Raghubans Gir* v. *Sheosaran Gir* (4), *Basant Lal* v. *Batul Bibi* (5), *Thakur Das* v. *Shadi Lal* (6).

Mr. *Johnstone* and *Mahadeva Ayyar*, for respondents. The counter-petitioners were not represented in the suit, only some of [358] them are the descendants of the parties to it; in any view they have not been made representatives to the persons then on the record under Sections 234 and 235 of the Code of Civil Procedure. If they are representatives, obligations can only be enforced against them as such with regard to property. But here they are sought to be made liable to the decree for themselves and not as representatives. In *Parthasaradi* v. *Chinnakrishna* (3) it was a question of a real and not, as here, of a personal right. Moreover the application is barred under the Limitation Act.

Bhashyam Ayyangar, in reply. Certain properties are not to be used for certain purposes, that is the decision.

The further facts and arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

JUDGMENT.

The parties to this appeal are Vaishnava Brahmans of the Vadagalai and Tengalai sects residing in the village of Tiruvendipuram in the district of South Arcot. There is a temple in that village dedicated to the deity called Daivanayakaswami, and the image of Vedanta Desikar, the saint or religious preceptor of the Vadagalai sect, is consecrated therein and affiliated to it. The Vadagalai ritual and creed in connection with questions of sectarian interest dominated in the institution from time immemorial, and the Tengalais endeavoured so early as 1807 to change that state of things, but failed. The latter then instituted original suit No. 190 of 1807 in the late Zilla Court of Virddhachalam to recover from certain Vadagalai Brahmans 500 pagodas or Rs. 1,750 as damages for having prevented them from placing in the temple the image of their religious teacher and saint called Manavala Mahamuni and singing their hymn in his honor known by its initial words *Sri Saila Dayapatram*, and from celebrating monthly the annual feasts on his account as part of their worship. The suit was dismissed by the Zilla Judge in April 1810, and the Provincial Court confirmed his decision in April 1815, the *ratio decidendi* being that the claim advanced by the Tengalais was contrary to custom or the usage of the institution. The second attempt made against the Vadagalai influence in the temple consisted in the Tengalais setting up in it the idol of their priest and worshipping it in accordance with their ritual in 1808. [359] This led to a counter-move on the part of Vadagalai Brahmans after the disposal of the suit of 1807, and in April 1816 they moved the Zilla Court for the removal of the image of Manavala Mahamuni from the temple. The idol was accordingly removed from the temple and secured in the Tahsildar's

(1) L. R. 3 Ch. D. 610. (2) 7 B. 323. (3) 5 M. 304.
(4) 5 A. 243. (5) 6 A. 23. (6) 8 A 56.

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office under process of Court. The third attempt made by the Tengalai Brahmans was in 1828, and it consisted in making a new image of their priest in substitution for the one secured in the Tahsildar's office, in setting it up in the house of a Tengalai Brahman in the village, in celebrating a festival as a form of worship for ten days in the same way in which similar festivals are performed by Vadagalais in honour of their saints and religious teachers, and in carrying the idol in procession on the night of the tenth or last day of the festival through the "Dikhandana streets included in the Navasandi," which were said by Vadagalai Vaishnavas to be attached to the temple of Daivanayakaswami in the village. This attempt differed from the attempt of 1808 in that the house of a Tengalai Brahman was selected as a place of worship, but resembled it in the worship being public. A ten days' festival, in which every Tengalai Brahman might take part, was adopted as the form of worship, and it closed with a street procession accompanied with recitation of hymns in accordance with Tengalai ritual, and the assertion of the rival sect that all the streets in which the idol of Daivanayakaswami was carried in procession were attached to the said temple was disregarded. The Vadagalai Vaishnavas of the village resented this step, and after the usual preliminary controversy before the magisterial authorities of the district, instituted original suit 30 of 1828. The relief prayed for in that suit consisted of the recovery as damages of Rs. 1,050, which they alleged to have spent in connection with their applications to Magistrates for interference, of a direction that the worship and the ceremonies performed to the idol of Manavala Mahamuni newly made and set up in the house of the then first defendant situated in the Dikhandana Navasandi streets of Daivanayakaswami temple and the performance of ten days' festival on its account be discontinued, and of an order for the removal of the newly set up idol. The ground of claim was that the worship of Manavala Mahamuni, either in a house in the Dikhandana street attached to Daivanayakaswami temple or in the streets known as [360] Navasandi, was contrary to usage, and that those streets were attached to that temple. In that suit 10 Vadagalai Brahmans of the village appeared as plaintiffs and included 13 Tengalai Brahmans residing in the village as defendants. The Tengalais denied that the streets were attached to the pagoda and that the usage was against them. In December 1829 the Court of First Instance, the then Zilla Court of Chingleput, decreed "that the practice of the defendants assembling in a private "house and there performing ceremonies to an idol of their priest and "public worship and carrying it in procession through the streets of the "village be discontinued, and that should they continue to make the idol "the subject of the cause" an object of worship, the same be removed and that the damages sued for be paid. On appeal the Provincial Court confirmed the decree in June 1837, and in second appeal the late Court of Sadr Adalat, in October 1840, modified the decision in the following terms:—

"The Sadr Adalat consider the Tengalais to have entirely failed in "proving that their public worship or their publicly carrying in procession through the streets of the said village of any image of the said "saint is established by immemorial custom. On the contrary, they deem "both unauthorized innovations. But there is nothing to prevent the "inmates alone of any Tengalai family resident therein from worshipping "within their own respective dwellings in a private manner the household image of their said saint set up for family worship which in size

"is invariably different from what is fixed in pagodas or carried in procession, provided all but the inmates of such house are excluded "from such worship so as to distinguish such family from public "worship."

Thus the result of the sectarian litigation which extended from 1807 to 1840 was a judicial determination, that the image of Manavala Mahamuni was not entitled to a place in the Daivanayakaswami temple, or to public worship as contradistinguished from family worship in any private house in the Dikhandana street, or to procession in the streets of the village. It is noteworthy in connection with the suit of 1828 that the plaintiffs and defendants were not formally described as representatives of the rival sects, but that the matter litigated and determined was professedly what concerned those sects, and that no decretal order [361] was drawn up formally and separately as is the practice at present, but a direction was embodied in the judgment of the Zillah Court as modified by that of the Court of Sadr Adalat.

It appears from Exhibit D that between 1840 and 1868, the Tengalai Brahmans attempted from time to time on different occasions to evade the decree, but that such attempts were suppressed by the magistracy. In 1868 they endeavoured to build a new temple within the limits of Tiruvendipuram agraharam and to set up in it the image of Pillalokachary, the priest of their saint Manavala Mahamuni, and thereby to evade the decree passed in the suit of 1828 and revive the public worship of the image of their priest by giving it the name of Pillalokachary instead of Manavala Mahamuni. The Vadagalai Brahmans asked the then District Magistrate to restrain their rivals from proceeding with the construction of the new temple and to prohibit them from assembling for public worship within such temple contrary to the spirit of the decree of the Sadr Court, as such proceedings on the part of Tengalai Brahmans were calculated to lead to a breach of the peace. These admitted that the building then under construction was intended for public worship, but contended that the decree of a Civil Court could only be enforced by a Civil Court, that the interference of the Magistrate was illegal, that the idol set up in the building under construction was not that of their saint, and that the principle of religious freedom which obtained in 1868 was not understood in 1828, and that there was no likelihood of any breach of the peace by allowing them the freedom of worship which they desired to secure. By consent the then Collector's Sheristadar was deputed as Commissioner to compare the original idol taken from the Tengalais in 1839 in consequence of the decree of the Civil Court and deposited in the taluk cutcherry with the idol set up in the new building then being erected, and to report whether the object of worship was substantially the same though different in name. On the Commissioner's evidence that it was substantially the same, the District Magistrate granted the injunction applied for under Section 62 of the Code of Criminal Procedure then in force, observing that "the erection of the new building and the "setting up of the idol of Manavala Mahamuni within that building as an "object of public worship were acts opposed to the decree of the highest "judicial tribunal and calculated to lead to serious disturbances and a [362] "breach of the peace." As far as we can gather from the papers to which our attention is drawn nothing more transpired up to 1887. In 1888 the counter-petitioners, who are Tengalai Brahmans at Tiruvendipuram, jointly purchased a house in one of the car streets near the temple, set up the idol of Manavala Mahamuni, and began to revive the public worship of their priest, alleging that they were not bound by the decree

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of 1840, that that decree was illegal and barred by limitation, that it was further incapable of execution, and that at the best it could only form a ground for Vadagalai Brahmans to claim damages. Thereupon the Vadagalai Brahmans applied to the District Court of South Arcot for execution of the decree in original suit No. 30 of 1828 by the arrest and imprisonment of the counter-petitioners until they obeyed the terms of that decree and by the removal of the image of their priest Manavala Mahamuni newly set up in the fourth counter-petitioner's house. The Judge dismissed the petition with costs on the ground that the counter-petitioners could not be regarded as parties to the suit of 1828 by reason merely of their being descendants of defendants in that suit, and that Section 234, which provides for the execution of a decree against the legal respresentative of a deceased judgment-debtor, relates only to the execution of decrees for property. The Judge also observed that the decision in *Srikhanti Narayanappa* v. *Indupuram Ramalingam* (1) had no application in this case and referred to *Parthasaradhi* v. *Chinnakrishna* (2) as showing that the opinion of Hindu pandits on which the decree in the suit of 1828 was based was opposed to the law of India under the British administration. From this order petitioners have preferred this appeal. The questions which we have to decide in this appeal are whether the decree in original suit No. 30 of 1828 is capable of execution, if so, whether it may be executed against counter-petitioners and whether its execution is barred by limitation. The Tengalai Brahmans are apparently endeavouring to revive a sectarian quarrel which was after protracted litigation set at rest by the late Sadr Court in 1840 and which the Magistrates since prevented from reviving by interfering to preserve the public peace. This view of the facts might be material for the purpose of dealing with an application, whereby a Magistrate is asked to maintain the existing state of things against **[363]** those who seek to change it so as to risk a disturbance of the peace and otherwise than under the sanction of a fresh decree, whether the existing decree which recognized it would or would not be upheld if the sectarian question were again litigated. As to the decision in *Parthasaradhi* v. *Chinnakrishna* (2), to which the Judge refers, it must be remembered that it expressly recognizes the competency of the Magistrate to give such directions as he may consider necessary to prevent a breach of the peace, and that it also points out that a special right having a legal origin may at times co-exist with the right of the general public to use particular streets as thoroughfares and detract from it. During the progress of original suit No. 30 of 1828, it was asserted by the Vadagalai Brahmans, though it was denied by the Tengalai Vaishnavas, that the streets included in what is called the Navasandi of Daivanayakaswami's temple in the village were attached to that temple. Although the decree in that suit proceeded on the ground that what the Tengalais attempted to do was an innovation, and that it was not authorized by Hindu law as explained by the pandits, and although the law applicable to the use of thoroughfares under the British administration as expounded by later decisions might be different, yet it is necessary to note that a plea might possibly be set up, if any future litigation were to arise, that a special right derogating from the public right existed in this case. With these observations, which we make in view to prevent any misapprehension as to the effect of our order, we proceed to deal with the specific questions, upon the decision of which the appeal before us must stand or fall, *viz.*, (i) whether the decree in the

(1) 3 M.H.C.R. 226. (2) 5 M. 304.

suit of 1828 is capable of being executed, (ii) whether its execution is barred by limitation, and (iii) whether it can be executed as against the counter-petitioners, if it can be executed at all. On each of those questions we consider that this appeal cannot be supported. As to the first question, the judgment in the suit of 1828 contains no doubt the observation that the then defendants should discontinue public worship of the image of their priest Manavala Mahamuni as contradistinguished from family worship in which the inmates of a particular family alone take part and from which the general public are excluded, and that they should not take the idol in procession through the streets of the village. But the observation [364] is followed by the direction that should they continue to make the idol an object of public worship, the idol be removed. This direction had reference to the particular idol set up in the then first defendant's house, and so far as that idol is concerned, it appears that the direction has either been carried out or complied with. This being so, the further question arises whether the observation might be taken to have done more than declare the obligation of the Tengalai Brahmans as to what they ought not to do in relation to their personal worship of their saint as introductory to the direction in the nature of consequential relief, that if they continued to persist in what they were bound not to do, the idol they set up be removed. We are now pressed with the contention that the observation has the force of a perpetual injunction and that it has reference not only to the idol then set up by the then defendants, but also to any similar idol which may be set up for a similar purpose at any future time by the descendants of those defendants and other residents in the village of the Tengalai sect. Judging from the conduct of the Vadagalai Brahmans since 1840, they have themselves treated this part of the decree as merely declaratory of their right. It is then urged that no occasion arose since for its execution; but this statement is clearly inconsistent with Exhibit D, which shows that the Tengalais set up a new idol in 1868 under a different name, and that they from time to time attempted to act in breach of their obligation subsequent to 1840. The Vadagalais never applied to the District Court for executing the portion of the decree now under consideration, but asked for Magisterial interference in the interests of public peace. This appears to indicate that the observation in the decree was regarded by them not as a perpetual injunction, but as a declaration of right ancillary to the specific relief then decreed, *viz.*, the removal of the obnoxious idol and the award of damages. Even assuming that the observation was equivalent to a perpetual injunction, the execution of the decree is clearly barred by limitaation. The right to apply for such execution arose not only more than three but also more than twelve years prior to this application, at all events in September 1868, when the Vadagalai Brahmans applied to District Magistrate for the issue of an injunction under the Code of Criminal Procedure. We cannot regard applications made to Magistrates for interference in order to maintain the public peace as steps taken in aid of execution in view to save limitation. [365] Again, none of the counter-petitioners were parties to the suit of 1828, and it is alleged on their behalf that some of them were strangers to that suit. The contention that a few may represent many in a suit when the matter litigated is of common interest might support a fresh suit instituted to bring those not named in a writ of injunction within its scope, but cannot in our judgment be extended to commitment for contempt consequent on the breach of the injunction in the case of those who are not named in the writ and who are not then in existence, unless and until

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the injunction is revived against them. Nor are we prepared to adopt the suggestion of the appellants' pleader as to the constructive extension of parties to a decree for purposes of execution so as to bring under its operation every member of a sect, not only as the sect existed when the decree was made, but also as it might exist at any time thereafter and for all time to come inclusive of persons since born and since settled in the village.

We do not think that such a theory has the sanction either of general principle or of the Code of Civil Procedure when the subject-matter of the decree is neither the incident of a legal relation arising from contract nor that of a declaration of title to specific property, but is the incident of personal worship in a particular village where two rival sects live together. The general rule is that no one who is not expressly named in the writ of injunction is liable to be committed for its breach, and Section 234 has, as pointed out by the Judge, no application to this case. The proper remedy consists in the revival of the injunction by suit against those not named on the record, before an application can be made for their commitment by way of execution.

For these reasons, we are of opinion that this appeal must fail, and we dismiss it with costs.

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12 M. 366.

[366] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

PONDURANGA AND OTHERS (*Plaintiffs*), *Appellants v.* NAGAPPA AND OTHERS (*Defendants*), *Respondents.**
[23rd and 24th January and 4th February, 1889.]

Religious Endowments Act—Act XX of 1863, *Sections* 3, 4, 11, 12—*Suit by members of a temple committee, burden of proof—Form of decree.*

Suit by the members of a temple committee appointed under Act XX of 1863 against one claiming to be the hereditary trustee of a Hindu temple for possession of certain temple property, for a declaration of their right to receive certain annual dues and for a perpetual injunction restraining defendant from interfering with those dues:

Held, the burden of proving that the temple was of the class mentioned in Section 3 of Act XX of 1863 lay on the plaintiffs.

On its appearing that the defendants' ancestor was not the founder of the temple but was appointed trustee by the Government, as also were his successors in the office of trustee, of whom all were not members of his family:

Held, (1) the plaintiffs were entitled to a decree declaring the temple in dispute to be of the class mentioned in Act XX of 1863, Section 3, and as such, subject to their jurisdiction;

(2) the plaintiffs were not entitled under Act XX of 1863, Sections 4, 11, and 12, to be put in possession of the property of the temple or in receipt of its income.

[R., 40 C. 323 (333) = 17 C.L.J. 183 = 16 Ind.Cas. 908 ; 31 M. 111 = 3 M.L.T. 241 ; 34 M. 333 (336) = 8 Ind. Cas. 483 = 20 M.L.J. 885 = 8 M.L.T. 341 = (1911) 1 M.W.N. 12 ; 14 Ind.Cas. 520 = 23 M.L.J. 278 (281) = 12 M.L.T. 155 ; 6 M.L.J. 14 ; 15 M.L.J. 185 (189).]

APPEAL against the decree of K. R. Krishna Menon, Subordinate Judge of Tinnevelly, in original suit No. 59 of 1884.

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* Appeal No. 99 of 1887.

The plaintiffs represented the Vishnu Temple Committee appointed in 1864 under the Religious Endowments Act—Act XX of 1863, and claimed the management and control of the Ramasami temple at Palamcottah under Section 3 of that Act; the plaint prayed (1) for possession of the temple properties; (2) that the Court should establish the plaintiffs' right to receive certain annual dues; (3) for an injunction restraining the defendants from interfering with these dues; (4) for further relief.

The defendants' case was that the temple in question was not of the class referred to in Section 3 of the Religious Endowments Act, but was governed by Section 4, and that the trusteeship of the temple was hereditary in his family.

[367] The Subordinate Judge dismissed the suit. The plaintiffs preferred this appeal.

The further facts of the case and the arguments adduced on the appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

Mr. *Subramanyam* and *Kalianaramayyar*, for appellants.

Rama Rau and *Sankaran Nayar*, for respondents.

JUDGMENT.

This is an appeal from the decree of the Subordinate Judge of Tinnevelly, who dismissed the appellants' suit with costs. The appellants are members of a Devastanam Committee appointed under Act XX of 1863, and the minor respondent is the son of one Vengu Mudali, the late trustee of Kodanda Ramasami temple at Palamcottah, in the district of Tinnevelly. On Vengu's death in 1882, a dispute arose between the parties to this appeal as to whether the *tasdik* allowance payable to the temple ought to be paid to the trustee whom the Committee might appoint, or to the respondent as hereditary trustee. In January 1883 the Collector of Tinnevelly ordered that the payment be postponed for six months, that the appellants might meanwhile sue to establish their right to the temple; hence this litigation.

The contest in the suit was whether the temple was of the class mentioned in Section 3 or 4 of Act XX of 1863, and whether the suit was barred by limitation as alleged by the respondent. Further, the plaint prayed for a decree (1) for possession of the temple and its properties, (2) for a declaration of the appellants' right to reserve the *tasdik* payable to the temple, (3) for a perpetual injunction restraining the respondent from interfering with the collection of the *tasdik* and other allowances due to the institution, and (4) for such other relief as might seem proper to the Court in the circumstances of the case. The Subordinate Judge was of opinion that the temple in question was not of the class mentioned in Section 3 of Act XX of 1863, that it was not necessary to decide the second question, and that, even if the institution came under Section 3, the appellants were not entitled to recover possession either of the temple or its properties. There can be no doubt, nor is it denied, that the *onus* of proof is on the appellants. We agree with the Subordinate Judge that the appellants would not be entitled to possession of the temple and its properties even if it were found to be subject to their jurisdiction. It is provided by Section 11 of Act XX of 1863, that **[368]** no member of a Committee shall be capable of being or shall act as the trustee of a temple for the management of which such Committee shall have been appointed, and as it is the lawful trustee or manager of the temple for the

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12 M. 366.

time being that is entitled to possession of its properties and to the receipt of its income, the appellants are not at liberty to claim to be put in his place. As regards the injunction prayed for in the plaint, we do not consider that this is a proper case for a perpetual injunction under Section 54 of Act I of 1877. The appellant's counsel draws our attention in this connection to Section 12 of Act XX of 1863, but it appears to us to be limited to such property as was actually in the possession of the Board of Revenue when the Act was passed. Under that enactment the Committee has, subject to the restrictions imposed by Section 4, the same powers that the Board of Revenue had under Regulation VII of 1817, but those powers were primarily powers of supervision and control designed to ensure due appropriation by the existing trustees of temple endowments to the purposes for which they were destined. We may therefore observe that the only relief which it would be proper to award if appellants established their claim is a declaration that the temple in question falls under Section 3 of the Act and is subject to their supervision and control. The substantial question, however, for decision in this appeal is whether the finding of the Subordinate Judge, that the temple is not shown to come under Section 3 is, as argued by appellants' counsel, contrary to the weight of evidence on the record.

The evidence on which the Subordinate Judge rests his decision is mainly documentary, and he refers further to the evidence of the plaintiffs' tenth witness and of the defendants' first and second witnesses. The main point to be kept in view in coming to a finding upon the evidence is whether at the time of the passing of Act XX of 1863 the nomination of the trustee of the temple was vested in, or exercised by, the Government or any public officer, or whether such nomination was subject to the confirmation of the Government or of any public officer. As observed by the High Court in *Sami* v. *Rajagopala* (1) it was certainly not intended that the wrongful assumption of power either by the **[369]** Government or by a public officer to constitute a trustee should place the temple in the category of institutions which it was the intention of the Legislature to transfer to the Committee appointed under the Act. The true construction of Section 3 is that the power of nomination or confirmation must be lawfully vested in the Government or a public officer or lawfully exercised by them ; and it is, therefore, necessary to see whether the actual exercise of such power is referable to a legal origin, either to the exercise of a like power by the former Government or to the terms of the deed of endowment or to the grant of endowment made by the Government or to the power to provide a competent trustee when a religious institution has no competent trustee. It must also be borne in mind that acts of public officers done in the exercise of general supervision and control over trustees under Regulation VII of 1817, should be distinguished from the right to nominate a trustee or to confirm such nomination which alone is constituted as the test of the Committee's jurisdiction. With these general observations, we proceed to consider the evidence in this case.

The temple now under consideration came into existence in 1805. Though it existed during the time of Ranee Mangammal, and it might be regarded as ancient on that ground, yet it ceased to be used as a place of public worship in the last century, when the district passed under the Muhammadan rule. It had no place even in the list of Hindu temples

(1) Second Appeal No. 644 of 1884 (unreported).

prepared by Mr. Lushington in 1803 after the introduction of the British rule. Though it is alleged for the respondents that the ancient temple was demolished by the Muhammadans and the place was used for storing gunpowder, yet such oral evidence, on the point as we are referred to, is merely hearsay and legally inadmissible. On the other hand, there is reliable evidence to show that the stone image was never removed from the place, that both the principal stone and copper images, now in existence, existed also during the period of Hindu rule and that, at least, a portion of the temple, as it exists at present, is ancient. We can only say upon the evidence that the temple was renewed as a place of public worship in 1805, though with a fresh establishment, organization and endowment. It is not pretended that respondents' family had anything to do with the management of the institution at any time prior to that period, his case being that from the time of his great-grandfather [370] who became a trustee in 1805 as shown by Exhibit III, the trusteeship has been hereditary in his family. The first trustee of the temple was one Vengu Mudali, the respondents' great-grandfather, and he was dharmakarta of the institution from 1805 to 1829; Exhibit III which is a copy of the Collector's order issued to the Tahsildar when the temple was revived in 1805 shows that he offered to perform the *kumbabhishegam* and to take up the position of dharmakarta and conduct the puja and other temple charity properly and to organize a new establishment, and that the Collector accepted the offer and arranged for the *padittaram* or daily allowance being paid, created mirassi right in the establishment which was then about to be newly organized by Vengu Mudali and prescribed the order in which consecrated water was to be served to worshippers. The document conveys the impression that the Collector relied on Vengu Mudali's management as likely to prove efficient, accepted his offer to become dharmakarta and render other service, and revived the ancient temple as a place of worship, thereby carrying out the policy of showing consideration to the religious institutions of the country inaugurated on the introduction of the British rule. The document, however, does not state whether the trusteeship was intended to be hereditary in Vengu Mudali's family or to be a personal recognition of his munificence and piety. Exhibit VI wherein Vengu Mudali's trusteeship was referred to in 1837 states that Vengu Mudali was appointed dharmakarta by the Collector in consideration of the service which he rendered in bringing back the Ramasami idol from Alagia Mannar Covil, locating it in the new devastanam and performing the consecration ceremony at his own expense. It appears from Exhibits IV and VII that the grant for *padittaram* or daily puja, the *tasdik* allowance, and the festival allowance were all made by Government, though Vengu Mudali suggested such grants either as necessary or as beneficial to the institution. Though it is alleged for respondent that Vengu Mudali gave a new site for use as a gunpowder magazine and got the site of the temple in exchange for it and that he re-built the temple, yet there is no reliable evidence in support of such assertions. He may have possibly improved the temple or repaired it, but we are unable to accept the suggestion that he founded the temple anew, and must, on that ground, be regarded as a huckdar or a trustee [371] with inherent heritable interest. We see no sufficient reason for saying that the statement in Exhibit VII, that Vengu Mudali was appointed by the Collector, was incorrect, as alleged for the respondent. The next trustee was Giyanasigamani Mudali, the adopted son of Vengu Mudali. There is no evidence to show whether he became a trustee by

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right of inheritance or whether the Collector appointed him as trustee out of regard for Vengu Mudali's family, and the appellants have not been able to produce any order on the subject from the Collector's record; but Exhibit S shows that in 1833 the Collector treated him as the lawful trustee of the temple. It appears further that in 1834 the Collector suspended him from office for neglect of duty on the ground that his conduct was open to suspicion, and that in 1837 the Collector finally dismissed him from trusteeship (see Exhibits Y, Z and DD). Although it is alleged that this dismissal was an arbitary proceeding on the part of the Collector, there is no evidence to show that such was the case, and that the Collector passed the order otherwise than in the *bona fide* discharge of his duty under Regulation VII of 1817. This shows that even if Giyanasigamani was a hereditary trustee, the hereditary right of the family ceased.

The next trustee was one Arumugam Pillai, and he was appointed by the Collector, when Giyanasigamani was dismissed. The institution was in his charge until 1842, when the Government withdrew from all interference in the management of Hindu temples. Thus, from 1805 to 1842, there were three trustees, and according to the evidence, the first and the third were appointed by the Collector, and the second was dismissed by him for neglect of duty, and the third was in no way connected with the respondents' family.

In 1842 the management of the temple and its properties were made over to three trustees—Giyanasigamani Mudali, Subramaniya Pillai, and Palaniya Pillai (Exhibits A to C). It appears that the three trustees were selected, as was generally the case when there was no hereditary or adinam trustee, with reference to the wishes of the people interested in the institution. Though Giyanasigamani again became a trustee, yet he gained the position as one of three joint trustees, and there is no evidence that he then asserted that the trusteeship was hereditary in his family or that the association of two other trustees with him was incompatible with his hereditary right.

[372] In 1845, Giyanasigamani died, and his son, Vengu Mudali, took his place, and there is no evidence about his appointment. From 1842 to 1864, the management of the institution was vested in three trustees, and although the Subordinate Judge treats the matter as of no importance and observes that the co-trustees were either servants or dependants of Vengu's family, still we consider it material in relation to the claim of hereditary and sole trusteeship now set up for the respondent. We have also to note that there is no satisfactory evidence that the co-trustees were not men of position and independent judgment and that they were selected in 1842 as men of local influence interested in public estimation in the temple.

Of the three trustees, Subramaniya Pillai died in 1863, and Exhibits GG and HH prove that the Collector appointed Periya Tambya Pillai in his stead. Again, it is in evidence that Palania Pillai and Periya Tambya ceased to do their work in 1873, and that, on the suggestion of the respondents' father, the appellants dismissed them. The result of the evidence is that the Collector appointed the first trustee in 1805, suspended and dismissed the second trustee in 1834 and 1837; that he then appointed the third trustee; that he constituted three joint trustees in 1842; and that he appointed a successor to one of them when Act XX of 1863 was about to come into operation. There is not only no public document which contains a recognition that the trusteeship was hereditary in the respondents' family, but the conduct of the respondents' ancestors also

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negatives such belief in his family. It is not likely that Vengu Mudali would have omitted to obtain a sanad of huckdarship if he had desired to secure it for his descendants. Nor is it likely that the Collector would have directed in August 1805 that a stone be fixed on the land granted as inam to the temple with an inscription that such grant had been made by Government for its support if he had not desired to institute a permanent memorial of the fact that the temple owed its endowment to the Government. Nor would Giyanasigamani have failed to set up his huckdarship when the Government severed its connection with religious institutions in 1842. It is also not likely that in 1873 the respondents' father, who had been a trustee from 1845, and who, as such, must have had adequate means of knowledge, would have submitted to the appellants' jurisdiction from 1864 to 1882 and asked them in 1873 to dismiss his co-trustees for neglect **[373]** of duty. The first time there was any mention of hereditary trusteeship was in 1864, when a statement (Exhibit VIII) was filed by Vengu Mudali's agent before the Inam Commissioner. In this Vengu Mudali was described as huckdar, but there is no evidence to prove, as alleged for the respondents, that it was brought to appellants' notice. The next time when the respondents' father claimed huckdarship was in 1872, when he signed an account submitted to the appellants as huckdar. The Committee at once repudiated his statement and called upon him to account for claiming a status which he did not possess. Exhibit I shows that the basis on which the respondents' father rested his claim was that the temple had been in ruins for a long time prior to 1805, and that it had been organized at a considerable expense in 1805, by his grandfather. It appears from Exhibit G that the appellants declined to accept the explanation or recognize him as huckdar, and from the accounts and reports which he since submitted that he omitted to sign as huckdar. It is suggested for the appellants that the success of the trustees of two other temples in the district in original suits Nos. 91 of 1867 and 11 of 1871 inspired the respondents' father with a desire to make an attempt to assume a status which he did not possess, and that he abandoned the attempt when the appellants repudiated his claim, and continued to submit to their jurisdiction until his death. The suggestion derives support from Exhibits XII to XIV, the attempt made by the respondents' father in 1872, the correspondence which then ensued, and the abandonment of that attempt as evidenced by the numerous accounts and reports since submitted by him to the appellants ending with Exhibit MM 3, dated December 1880.

We are unable to adopt the finding of the Subordinate Judge for several reasons. In the first place, he treats Vengu Mudali of 1805 as if he was the founder of the institution, while all that could be fairly claimed by him was that he rendered important service in connection with its revival. At all events, there is no conclusive indication that his family acquired any inherent interest in the temple as a reward for his munificence. The Subordinate Judge does not give due effect to Exhibits III, IV, and VII, and overlooks the fact that the temple owes all its endowments to the Government, and that the Collector appointed Vengu Mudali. He assumes again without any evidence that Giyanasigamani was arbitrarily removed by the Collector, and fails to consider that the **[374]** hereditary right, if any, there by ceased. He fails further to notice that the constitution of three trustees as a managing body was incompatible with the alleged existence of a competent hereditary trustee in 1842. He fails also to notice the conduct of the family from 1834 to 1880 which

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discloses no trace of hereditary trusteeship, while there is positive evidence showing that the Collector nominated trustees once in 1805, again in 1837, and again in 1863, besides constituting three trustees in 1842. He does not also attach weight to the fact that the temple owed all its endowments to the Government, and that there is not a single public document which contains a recognition of hereditary trusteeship, and that the Collector's interference in nomination is referable to a legal origin.

We set aside the decree of the Subordinate Judge, declare that the temple in dispute is of the class mentioned in Section 3 of Act XX of 1863, and is as such subject to the jurisdiction of the appellants, and direct that the appellants' claim to other reliefs be disallowed, and that the appeal be allowed to the extent indicated above with costs throughout to be paid out of the respondents' estate.

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12 M. 374 = 13 Ind. Jur. 334.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

VENKATA NARASIMHA (*Plaintiff*), *Appellant v.* KOTAYYA AND OTHERS (*Defendants Nos.* 2 *to* 5), *Respondents.** [17th and 25th April, 1889.]

Defamation—Privilege—Petition to Revenue officer—Presumptions as to malice.

Certain raiyats in a zamindari village addressed a petition to the Tahsildar praying that the Village Munsif might be retained in office notwithstanding the Zamindar's application for his removal. The petition imputed criminal acts to the Zamindar, who now sued the petitioners for damages on the ground that the petition contained a false and malicious libel. It was found that in fact the communication was made *bona fide*, aud that there was some ground for some of the imputations:

Held, the petition was a privileged communication and the alleged libel was not actionable.

The question when malice may be presumed, discussed.

[R., 17 C.L.J. 105 (113) = 17 C.W.N. 555 (561); 16 Ind. Cas. 736 (739) = 24 M.L.J. 8 = 12 M.L.T. 377.]

[375] SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 373 of 1887, reversing the decree of Venkata Ranga Ayyar, Subordinate Judge of Ellore, in original suit No. 5 of 1886.

The plaint alleged that the defendants had presented to the Tahsildar of Bezvada a petition containing a malicious libel on the plaintiff, and prayed for damages.

The plaintiff was the Zamindar of Vallur, defendant No. 1 was Munsif of one of the zamindari villages, defendants Nos. 2 to 6 were raiyats of the village. The plaintiff had applied to the District Revenue officers for the removal of defendant No. 1 from his office, and the defendants together with other persons presented a petition to the Tahsildar, filed in the suit as Exhibit A, praying that defendant No. 1 might be retained in his office.

In this petition occurred the following passages, which were the libel complained of:—

"Subsequently the Collector appointed the present Munsif, Ganna "Gangauna. The Stree Zamindar being at enmity with him (Ganganna)

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* Second Appeal No. 1725 of 1888.

"revenged him in many ways and still intends to do so. Since he came, "we, the people, are not put to much trouble by the Zamindar's people. "In case they have recourse to evil deeds, the Munsif represents the same "to the officers like yourself. For that reason the Zamindar's people "bear a grudge. Owing to the ill-will, the Zamindar was preferring many "charges against him through his servants and others. The officers like "yourself rendered justice and dismissed them. Now with the intent of "getting him removed anyhow from the office of Village Munsif and con- "ferring the office of Village Munsif upon the late Munsif or upon any "one at his pleasure, Zamindar continues to cause the like deed to be "perpetrated.

"(The Zamindar) has caused several arzees to be presented to the "effect that the present Munsif is unfit and a bad man. The Zamindar "continues to present mahazar arzees in the names of the people like our- "selves, forging our signatures and marks without our knowledge. One of "them was a mahazar arzee, under date the 28th April 1883, presented "to the Head Assistant Collector through post. It was referred to "the Tahsildar, who summoned some of those who signed or set marks to "it. Then they gave a kyfeat stating we did not present the arzee. "We do not know its contents. The signatures were not ours. Those "**[376]** who are at enmity with the Village Munsif have signed it. We "do not know that arzee contains the signature of Chirugupaty Tirupaty- "rayudu who is a mark man and cannot sign. Thereupon Arni Nara- "yanarow Puntulu Garu, the then Tahsildar, intimated to the Head "Assistant Collector by an arzee No. 2815, dated 2nd July 1882, to the "effect that owing to the ill-feeling against the Village Munsif (Zamindar) "continues to present arzees forging signatures. This will be evident "from a reference to the arzee which is on the record.

"Many similar false arzees are being fabricated by Palaparty "Nagabhushanam and others who have signed the arzee now under "enquiry. Of all these matters all of the former Tahsildars and Mr. "J. F. Fydian, the Head Assistant Collector, were already aware. "The Head Assistant Collector passed upon the petition an order No. "134, under date the 23rd November 1881, to the effect that the Zamin- "dar causes perpetration of such illegal deeds and that he wrote to the "Zamindar to say that he should not commit such illegal acts."

Presentation of the petition was admitted, but the defendants pleaded that the statements contained in it were made *bona fide* and without malice.

The Subordinate Judge passed a decree for the plaintiff for Rs. 1,000; but this decree was reversed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar, for appellant.

Ramasami Mudaliar, for respondents.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.).

JUDGMENT.

The appellant before us is the Zamindar of Pungidigudem Vallur, in the Kistna District, and the respondents are raiyats of the zamindari village of Thoutla Vallur. The first defendant, Ganganna, who is not a party to this appeal, is the Munsif of that village, and on 8th June

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1885, the respondents, in conjunction with fifty other raiyats, addressed a petition or mahazar to the Tahsildar of Bezvada praying that Ganganna might be retained in his office notwithstanding the appellant's application for his removal. That document contained several statements [377] reflecting upon the appellant's character, and so far as they are material for the purposes of this appeal, they are set forth in paragraph 3 of the judgment of the Subordinate Judge. The appellant, alleging that they were false and malicious, brought the present suit to recover from respondents and Ganganna Rs. 2,800 as compensation for the libel. The Subordinate Judge considered that indictable offences were imputed from malice and decreed the claim, reducing however the amount of damages to Rs. 1,000. From this decision Ganganna preferred no appeal, but the respondents appealed to the District Court. The Judge set aside the decree on the ground that the communication was privileged, that prior occurrences in the zamindari justified the communication, that the respondents acted *bona fide*, that the language employed by them should not be too strictly scrutinized, and that it was not reasonable to expect them to distinguish between the Zamindar and his servants. Hence this second appeal.

It is first contended that Exhibit A is not a privileged communication. The removal of a Village Munsif is a matter in which the respondents' interest as raiyats and residents of the village in which Ganganna had jurisdiction as Village Magistrate and Munsif were concerned. They addressed the communication to the Tahsildar in whose jurisdiction they lived when he was considering an application for the removal of the Munsif and in view to protect their interests. We entertain no doubt that the occasion of the publication confers a privilege. The principle is that a communication made *bona fide* upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without the privilege, would be slanderous and actionable; *Harrison* v. *Bush* (1). The rule of public policy on which it is based is that honest transactions of business and of social intercourse would otherwise be deprived of the protection which they should enjoy. Another contention is that the reasons assigned by the Judge for setting aside the decision of the Subordinate Judge cannot be sustained in law. In this connection our attention is drawn to the following remark of the Judge; "Taking a "wider view of this question (of privilege), I consider that it is not "[378] desirable to scrutinize too strictly the language of petitions in this "country. It is very usual for petitioners in villages to express their "grievances in an exaggerated emphasis. An officer of any experience "deducts these exaggerations from a petition which he reads and usually "the opponent does not take any notice of these exaggerations. If petitioners are obliged to draft their petitions with the expectation that "they will be called on to prove every expression and every fact alluded to, "they will probably think it safest not to write petitions at all." These observations in the form in which they are made are too general and liable to misconception and there is no distinction, as far as we are aware, in the general principles on which an action of libel is to be dealt with in this country and in England. In both countries malice is a necessary ingredient in every action of libel. When a defamatory communication is unauthorized,

(1) 5 El. and Bl. 344.

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malice is presumed; but when the communication is privileged by the occasion on which it is made, the ordinary presumption is repelled and a special presumption takes its place, *viz.*, that the communication is made not with intent to defame but in furtherance of the lawful purpose for which the privilege is recognized to exist. This special presumption may again be displaced in its turn by actual proof that the communication is not fairly and honestly made but that it is made with a malicious spirit or from some indirect motive. The material question always is as to the state of mind with which the imputation is made. If the imputation is made with the knowledge that it is false, there is an end of the privilege. If it is made in a reckless and inconsiderate manner, if means of correct information are available and they are wilfully overlooked and no inquiry is made, there arises a presumption that there can be no honest belief where there is no honest effort to arrive at the truth. But the intrinsic and the extrinsic evidence produced in cases of this kind may suggest several intermediate views of acutal facts in regard to malice. The expressions used, motives attributed, the relevancy of the statements made, their total or partial falsehood, the antecedent conduct of the parties in relation to the matter under inquiry, and the state of feeling between them at the time of the libel are all evidence which the Judge or jury may consider in coming to a finding, but the weight due to them depends on the circumstances of each case. The expressions used may be stronger than the exigency of the occasion warrants, the [379] imputation may be partly untrue, and the matter imputed may be criminatory, and yet the Judge or jury may say that though when taken alone they may be somewhat in excess of the privilege, the libel is not malicious, regard being had to the communication as a whole, and reasonable allowance being made for the imperfect education and social condition of the defendants and the feeling under the influence of which the communication is made. Within this limit the observations of the Judge are perfectly legitimate, and we see no reason for saying that they have been misapplied in the present case.

Another point urged upon us is that the Judge is in error in saying that previous occurrences in the zamindari either justify the communication or prove that it was made in good faith. The Judge observes that 7 or 8 years ago there was discord between the zamindar and some of his raiyats, that there were numerous cases in the Courts, some of which were thrown out, but in one case the Sessions Court convicted one of the zamindari officials of forging a paper purporting to be an agreement by raiyats to cultivate, and that the first defendant, Ganganna, was concerned in some of the cases in Court. Having regard to the antecedent state of things found by the Judge, we cannot say that there was no apparent ground for several of the imputations, as to the Village Munsif being obnoxious to the Zamindar, and as to his desire to get rid of him. The imputation that the Zamindar caused false charges to be brought against the Village Munsif and caused mahazars to be presented with forged signatures are the worst of the accusations. As regards even these, the respondents refer to specific occurrences, and the facts they mention afford some ground, though the expressions used are strong and some of the statements are probably not accurate. We cannot say there was no ground at all for any of the imputations and that actual malice must be inferred as a matter of law. As to the Zamindar's connection with the acts imputed to his men, Exhibit A refers to a prior conviction for forgery committed in the interests of the Zamindar and to a report made on inquiry that some of the signatures to

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a mahazar presented against the Village Munsif were not genuine. As to the oral evidence in the case it was conflicting. We are unable to hold under all the circumstances of the case that there are sufficient grounds for interference in second appeal. We dismiss it with costs.

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12 M. 380.

[380] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KHATIJA AND OTHERS (*Defendants Nos.* 3, 8, *and* 9), *Appellants v.* ISMAIL AND OTHERS (*Plaintiffs and Defendants Nos.* 1 *to* 7 *and* 10) *Respondents.** [10th and 12th April, 1889.]

Jurisdiction—Withdrawal of part of claim—Canarese Navayats—Common management of family property—Muhammadan Law—Sale of an undivided share—Limitation—Burden of proving validity of sale by a gosha woman.

Suit for partition and possession of an undivided share of property sold to plaintiff by an aged gosha lady of the class of Canarese Muhammadans called Navayats. The property sold was the vendor's share as heiress of her father, brother and sister who died in 1856, 1866 and 1871, respectively: but it appeared that the property of the family had been in the possession of one managing member since 1856. The plaintiff during the suit withdrew his claim against that part of the immoveable property in suit which was within the local limits of the jurisdiction of the Court, having compromised with the defendants who had it in their possession, and pursued his claim against the other immoveable property and obtained a decree. On appeal:

Held, (1) that the suit was not barred by limitation;

(2) that the withdrawal of the claim with regard to the property situated within the local limits of the jurisdiction of the Court (the compromise not having been shown to be otherwise than *bona fide*) did not operate to take away the jurisdiction of the Court to adjudicate on the plaintiff's suit:

(3) that the plaintiff having discharged the burden of proving that the conveyance to him was voluntarily executed and that the transaction evidenced by it was real and *bona fide*, the conveyance was operative.

[R., 16 A. 359; 30 A. 560 = 5 A.L.J. 647 = A.W.N. (1908) 235 = 4 M.L.T. 392; 15 M. 57; 12 C.L.J. 115 (122) = 3 Ind. Cas 330; 12 C.L.J. 357 (365) = 7 Ind. Cas. 167; 15 Ind. Cas. 140 = 115 P.R. 1912 = 6 P.L.R Supp. 1912 = 191 P.W.R. 1912.]

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of South Canara, in original suit No. 18 of 1887.

The plaintiff claimed under a registered sale-deed, dated 10th March 1879, and filed as Exhibit A executed to him by one Fatima Bibi, an aged gosha lady. This document recited that she was entitled by inheritance "under the law of our caste" (Navayat) to a share in certain property and acknowledged the receipt of Rs. 2,000 from the plaintiff, and proceeded:—"I have sold to you for Rs. 2,000 on account of urgency all my right "and [381] Swamithva (right of ownership) on the $\frac{75}{640}$ share to which "I am entitled out of the whole immoveable and moveable property herein "mentioned." The plaint prayed for the partition and delivery of possession of the above share. Part of the immoveable property was at Mangalore, which is within the local limits of the jurisdiction of the Subordinate Court, and part at Bhatkal which is beyond them. The plaintiff withdrew his claim in respect of the land at Mangalore, having compromised with the defendants in whose possession they were; but he pursued the rest of his claim and obtained a decree in respect of it.

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Some of the defendants raised a plea of limitation as to which the Subordinate Judge said :—"As to the second issue, it has to be remembered that, though these people are Muhammadans by religion, they "conform to Hindu customs and manners to a very great extent. They "belong to a class called 'Navayats' or newcomers, being the descendants "of a party of Arab merchants, who migrated to Bhatkal near Goa some "770 years ago and took for their wives converts from the Hindu Konkanis "of the place. Konkani is still the home-language of these people, and it "is clear from the evidence of several witnesses that, like their Konkani "neighbours, they are not overfond of division. Though Sayyed Mahomed "Sahib, the common ancestor, died in 1856, his estate was never divided "among his heirs, but managed quite in the Hindu fashion by his "eldest son Sayyed Mohiden Sahib till his death in 1866 and since by "the first defendant. That such management was for the benefit of all "the heirs of Sayyed Mahomed Sahib is indeed clear from the admission "of the parties, and there is no evidence whatever on record that the "character of the management has ever since changed or that the first "defendant's management had ever become hostile to her till her death. "First defendant himself admits that his management has always been on "behalf of Bibi Fatima and all other heirs of his father, and does not plead "limitation in respect of the plaintiff's claim, and the defendants Nos. 3, "8 and 9, who now raise the plea, do not contend that they are in "exclusive possession of any portion of the ancestral estate. If their defence "holds good, first defendant's possession of that estate has been as hostile "to them as to deceased Bibi Fatima, because they were all living apart "from that defendant and not allowed any regular allowances out of the "common property, and, though Bibi Fatima and other female heirs were "**[382]** permanently residing in their husband's houses since Sayyed "Mohidin's death, they are also shown to have often been living in the "family-house with the first defendant. Since the first defendant's "management of the family-estate admittedly commenced in 1866, in "succession to his deceased brother, as manager or agent for all the heirs "of their father, Sayyed Mahomed Sahib, the presumption of the continuation of such management on their behalf must necessarily prevail till "the contrary is shown, and, as no hostile possession against Bibi Fatimas' "interests has been proved for the last twelve years preceding the institution of this suit, I would find the second issue for plaintiff."

Defendants Nos. 3, 8 and 9 preferred this appeal against the decree of the Subordinate Judge.

The further facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Bhashyam Ayyangar and *Narayana Rau*, for appellants.

No effect could be given to Exhibit A simply because it was signed by Fatima and registered. In the case of a document obtained from a pardah nashin lady the burden lies on the person claiming under it to show that there was consideration. *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (1), *Ashgar Ali* v. *Delross Banoo Begum* (2), *Kalian Bibi* v. *Safdar Husain Khan* (3), *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (4).

In any view of the evidence the suit is in part barred by limitation. For Sayyed Mahomed Sahib, the father of the plaintiff's vendor, died in 1856; Sayyed Mohidin, her brother, died in 1866, and her sister died in

(1) 1 I. A. 192. (2) 3 C. 324. (3) 8 A. 265. (4) 11 M.I.A. 551.

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1871; her claim was therefore barred at least in part under Section 1, Clause 13, of Act XIV of 1859, according to which limitation runs from the date of the death of the person whose property is claimed, or from the date of the last payment on account of the share; and there was no payment on account of the share. If the right is barred under that Act, then it could not revive under the later Act. Under Act XV of 1877, article 123, "for distributive share of the property of an intestate," the time runs from the date when "the share becomes deliverable."

[*Muttusami Ayyar, J.*—Article 127 applies in the case of joint family property.]

[383] The presumption of Hindu Law as to joint property is not applicable here although the family may have lived in commensality. *Hakim Khan* v. *Gool Khan* (1).

The Acting Advocate-General (Hon. Mr. *Spring Branson*) and *Ramachandra Rau Saheb* for respondents Nos. 1, 3 and 8.

Ambrose, for respondent No. 2.

Sankaran Nayar, for respondents Nos. 6 and 7.

The further arguments adduced on this appeal appear sufficiently for the purpose of this report from the following

JUDGMENT.

This was a suit to recover from the defendants the distributive share of a Muhammadan lady named Bibi Fatima, upon a sale-deed executed by her in the plaintiff's favour for Rs. 2,000 on 10th March 1879. The parties to this appeal belong to that class of Muhammadans on the West Coast who are descendants of Arab merchants that settled several centuries ago at Bhatkal in North Canara and who are designated by the people in that part of the country "Navayats" or new-comers. In course of time the settlers appear to have adopted Konkani, the language of the people, as the language of their home together, as appears from the evidence in this case, with some of the incidents of the family system obtaining among them. The subject of the sale in suit consists of the shares to which the plaintiff's vendor was entitled under Muhammadan Law in the property of her father, Sayyed Mahomed Sahib, who died in 1856, of her elder brother, Sayyed Mohidin, who died in 1866, and of her sister, Bibi Sha, who died in 1871 or 1872. The plaintiff's case was that the property, part of which he purchased, was that of the family to which his vendor belonged; that, though its devolution and distribution were regulated by the rules of Muhammadan Law, the Hindu system of managing joint family property by a male co-parcener was in vogue amongst Navayats; that according to that usage the property now in litigation was managed from 1856 to 1866 by Sayyed Mohidin, then by Sayyed Abdul *alias* Babu Sahib, and afterwards by the defendant No. 1; and that the several managing members were his vendor's brothers, and that their management was avowedly on behalf of themselves and their co-heirs under Muhammadan Law. Sayyed Mahomed Sahib, the common ancestor, left three sons and four daughters, and their names and those of their **[384]** survivors and their connection with the defendants are mentioned in the pedigree set out in the original judgment. After the institution of this suit, the plaintiff entered into a compromise with defendants Nos. 4 to 7 and withdrew his claim in respect of properties specified by the Subordinate Judge in paragraph 8 of his judgment, and the claim therefore that remained to be adjudicated upon by the Court below was as between

(1) 8 C. 826.

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the plaintiff and defendants Nos. 3, 8 and 9, and in reference to properties at Bhatkal, items 17 to 35 in Schedule A and Nos. 1 to 30 and 40 to 49 in Schedule B attached to the plaint. The Subordinate Judge disallowed part of the claim and decreed the remainder. From his decision defendants Nos. 3, 8 and 9 appeal so far as it is against them, and the plaintiff objects to it under Section 561 so far as it disallows his claim to a share in items of land 15 and 16 and his costs.

Upon the evidence in the case, we see no reason to doubt that Bibi Fatima executed Exhibit A with full knowledge of its contents. Three witnesses deposed to its execution and it was registered after the Sub-Registrar examined her in her house. She survived its execution for about three years and the appellants who lived at Bhatkal did not impugn it during her life. The terms on which she lived with the plaintiff and his children raise a presumption in favour of its voluntary execution. Though the appellants alleged fraud and undue influence, there is no evidence worth the name in support of their plea. It is true that several witnesses cited by the appellants stated that Bibi Fatima was imbecile, paralytic and of unsound mind, but their evidence, as observed by the Subordinate Judge, is vague and general, and the weight due to it appears to be small when regard is had to their means of knowledge and the probabilities of the case. Considerable stress is laid by the appellants' pleader upon Bibi Fatima's position as an aged gosha lady and he also dwells at great length on the law as to *onus* of proof as laid down in *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan*(1), *Ashgar Ali* v. *Delroos Banoo Begum* (2), *Kalian Bibi* v. *Safdar Husain Khan* (3), *Moonshee Buzloor Ruheem* v. *Shumsoonnisa Begum* (4). There is of course no doubt that it lies on the plaintiff to show that Exhibit A was voluntarily **[385]** executed and that the transaction which it evidences was real and concluded *bona fide*. But there is no reason for the suggestion that the Subordinate Judge has cast the burden of proof on the wrong party. As to the question, whether the burden has been sufficiently discharged by the party on whom it rests, the answer to it must depend on the circumstances of each case. Having regard to the subsequent conduct of the appellants and of several other members of the family concerned in this litigation and to the nature of the evidence on both sides, we are of opinion that the Subordinate Judge rightly came to the conclusion that the plaintiff has sufficiently discharged himself of the burden resting upon him.

It is urged for the appellants that the transaction was not a real sale, but only a semblance of it designed to disguise what was really an invalid gift under Muhammadan Law. It is contended, on the other hand, by the learned Advocate-General, that the transaction was in reality a sale and that the suggestion now made is an after-thought. There was no averment that a gift was disguised as a sale in the written statement nor at the time when issues were settled, though there was an assertion in a general way that the sale was fraudulent. Turning to the mode in which the appellants attempted to establish their case, this view appears to us to receive some corroboration. Their witnesses suggested that Exhibit A was concocted in Fatima Bibi's name and advantage was taken of her unsound mind. Though they also deposed that the plaintiff was possessed of land which yielded but 23 muras of paddy and 500 cocoanuts, yet there was evidence that the plaintiff's son who took part in this transaction and the plaintiff's brother were men of means and in a position to lend

(1) 1 I.A. 192. (2) 3 C. 324. (3) 8 A. 265. (4) 11 M.I.A. 551.

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comparatively large sums of money. We also observe that the plaintiff produced evidence to prove the payment of purchase-money. His first witness stated that he saw the money paid, and his second and third witnesses deposed that Fatima Bibi acknowledged receipt of the purchase-money, and their evidence is corroborated by a similar acknowledgment endorsed by the Sub-Registrar in Exhibit A. Though there is no distinct evidence on the record as to whence plaintiff obtained the specific sum which he paid to Fatima Bibi, or as to what Fatima Bibi did with it after it was paid to her, yet we are not prepared to press this circumstance against the plaintiff as we should be disposed to do if the specific form of fraud now [386] suggested were suggested in the Court below and the attention of the parties was directed to it before they went into evidence. There is thus positive evidence as to payment of the purchase money; there is the fact that the plaintiff's son and brother were in a position to advance it; there is also the natural presumption that if as alleged it was then known that a gift would be invalid, the parties concerned would avoid a fraudulent contrivance rather than resort to it, and there is further the presumption arising from the appellants' conduct in not impeaching the transaction during the life-time of Bibi Fatima. Again, the appellants falsely imputed to her unsoundness of mind and alleged coercion and undue influence, and did not set up collusion between her and the plaintiff in the Court below. The Subordinate Judge who had the attesting witnesses before him believed them, and we are unable to say that their evidence is unworthy of credit. As regards the pleas of limitation and self-acquisition, the evidence against them which is sufficiently set out by the Subordinate Judge is documentary and appears to us to be conclusive. We have no hesitation in holding that they were properly disallowed. As to the plea to the jurisdiction of the Subordinate Court, it was raised for the first time in appeal. It is not denied that the Subordinate Judge had jurisdiction over the suit when it was filed. As originally framed, it embodied a claim to a share of immoveable property situated partly in Mangalore and partly in Bhatkal. The subsequent withdrawal of the claim in regard to the property at Mangalore on the ground that there was a compromise entered into with the defendants who had it in their possession, could not in the absence of a positive rule of law, operate to take away the jurisdiction which had once vested, unless the compromise was shown to have been otherwise than *bona fide* and a mere contrivance to defeat or a fraud upon the policy of the rule of procedure as to local jurisdiction. For these reasons we consider that the appeal cannot be supported and we dismiss it with costs.

12 M. 387=13 Ind. Jur. 331.

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[387] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

SUPPAMMAL (*Plaintiff*), *Appellant* v. THE COLLECTOR OF TANJORE AND OTHERS (*Defendants*), *Respondents*.*
[8th and 15th, March, 1889.]

Charitable endowment—Trust property sold in execution—Rights of heirs of the creator of the trust against execution purchaser

A trust-deed of certain property executed by a member of a Hindu family provided that neither he nor his heirs should incumber or alienate it, but that in case of necessity his heirs might maintain themselves out of the income while administering the trusts of a certain charity. The provisions of the trust were not proved to have been observed by the settlor or his family, and the settlor on one occasion disclaimed the trust. The trust property was attached and sold in execution of personal decrees passed against the settlor and another member of his family. The widow of the latter after the death of the settlor, sued to recover the land from the execution purchaser as heir to the settlor.

Held, the plaintiff was not entitled to recover the land. *Rupa Jagshet* v. *Krishnaji Govind* (I.L.R. 9 Bom., 169) distinguished.

[R., 30 A. 111=5 A L.J. 23=A.W.N. (1908) 34; D., 13 M. 402.]

APPEAL against the decree of Y. Ramasami Aiyangar, Subordinate Judge of Negapatam, in original suit No. 43 of 1885.

Suit by the plaintiff, who was the widow of one Subramanya Chetti, to recover from the execution purchasers certain land which had been sold in execution of decrees obtained against her late husband and one Ponnusami, who was a member of a Hindu family together with him. The land in question was the property comprised in the following instrument, filed as Exhibit A:—

"Deed of charity, executed on 12th December 1861, corresponding to 29th Karthigai, Thunmathi year, of Savasti Sri Salivahan Era, 1784, by one Ponnusami Chettiar, son of Subramanya Chettiar, residing at Nagore, Negapatam taluk.

"The garden belonging to me by ancestral right, containing many trees, and worth Rs. 1,500 in Kottam, attached to the said Nagore, lies to the west of road, to the east of Thangachi Thiruvasal garden, to the south of lane leading to the said [388] Thangachi Thiruvasal, to the north of Sivanthilinga Chettiar's garden, and is situated within these. For the Chuttram, worth Rs. 5,000, built (on it), I have left permanently for the chuttram charities (the following):— . . . . Therefore, with the income of the above-mentioned three kinds of lands, the Brahmans who are allowed to reside in the said chuttram should be given food throughout the year, and Brahman travellers who come daily should be given food; giving meals in the woods and other kinds of giving meals should be conducted. Besides, I and, after me, my descendants, in order of seniority, should conduct the repairs of the said chuttram, and tanks, steps, and bridges, belonging to it, and the expenses for the salaries of agent and officers appointed for it. The said charity should be conducted as long as the sun and moon last. Neither I, nor my heirs, have any right to mortgage, hypothecate, sell, &c., the said properties. But, if it sometimes happens that lands can be got which yield greater income than the above-mentioned

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nunjai, punjai, &c., lands, I only shall have authority to use the present lands as I like, after I buy them (the late lands) and (leave) permanently for the said charity. If an opportunity sometimes happens when my heirs are to live upon the income of the said charity (they) can maintain themselves in addition to conducting the said charity. If any of my heirs do not conduct the said charity properly, and are careless, the Government which has charitable mind, has a duty to make them to conduct the charities properly and to be careful."

(Signed) PONNUSAMI CHETTIAR.
(„) SUBRAMANAYA CHETTIAR (son of said person's elder brother).

Ponnusami, the executant of the above instrument, died before suit, and the plaintiff sued as his heir.

The plaint alleged that the charities at Nagore which had been instituted many years previously, were kept up in accordance with the above instrument until 1873, when the land in question was attached and sold as above. The plaint prayed "for a decree adjudging that she may "be put in possession of the said charity properties on finding that "according to the provisions of the aforesaid deed of charity plaintiff "alone is entitled to maintain the charities."

[389] In 1874, Ponnusami disclaimed the trust in a petition to the Sub-Collector of Negapatam.

In 1881, the Collector of Tanjore, as Agent of the Board of Revenue, acting under Regulation VII of 1817 (Madras) instituted a suit for the appointment of a proper trustee of the charities and for the delivery to such trustee of the charity lands:—Subramanya Chetti, the plaintiff's husband, was joined as a defendant in the suit, and on his death, which occurred during the suit, she was brought on the record as his representative. The suit was terminated by a decree in the terms of a compromise between the Collector and the execution purchasers who agreed to perform the charities.

The plaintiff now alleged that the decree did not affect her interests, as she was no party to the compromise.

The Subordinate Judge having dismissed the suit, the plaintiff preferred this appeal against his decree.

Rama Rau, for appellant.

Subramanya Ayyar and *Ramachandra Rau Saheb*, for repondents.

The further facts of the case and the arguments adduced on appeal appear sufficiently for the purpose of this report from the judgment of the Court (PARKER and SHEPHARD, JJ.).

JUDGMENT.

SHEPHARD, J.—The suit is brought to recover property comprised in an instrument executed in 1861 by one Ponnusami (now deceased), a brother of the plaintiff's late husband. The defendants Nos. 2, 3 and 6 are in possession of this property in virtue of sales held under money decrees obtained against the late Ponnusami and his brother Subramanya. By the instrument of 1861, Ponnusami declared that, with the income of the property certain Brahmans should be supplied with food throughout the year, and certain other charities should be conducted. It was also provided that the said charity should be conducted for ever, and neither Ponnusami nor his heirs should have any right to mortgage, hypothecate or sell the said property. In case of necessity his heirs might live on the

income, maintaining themselves in addition to conducting the said charity. It is clear that neither Ponnusami nor the plaintiff, Subramanya Chetti's widow, could have any right to recover this property from the auction-purchasers except for the fact that it has, by the instrument of 1861, been made the subject of a trust. The only question is whether this [390] circumstance gives the plaintiff as one of Ponnusami's heirs any better right than she would otherwise have had. The plaintiff's case is not based on any complaint that the trusts enjoined by the late Ponnusami have been disregarded; for although the defendants aver and have proved to the satisfaction of the Subordinate Judge that they purchased without any notice of the trust, as a matter of fact they have been since the date of the compromise made in the suit of 1881 and are holding the property as property charged with a charitable trust. The question is therefore not whether the property is still so charged in the defendants' hands, but whether the right of managing it and such right of enjoying the surplus profits as may have been reserved to Ponnusami and his heirs can be recovered by his heir. It is not disputed that Ponnusami, had he been alive, could not have maintained this suit; but it is contended that the plaintiff, though she claims in succession to him, does not claim under him and does not sue as his representative. She was no party, it is argued, to the decrees under which the property was sold, and not being a representative of the judgment-debtors, was not bound to sue to set aside those sales, because the sales did not affect her interest in the property. In support of the argument, our attention was called to the case of *Rupa Jagshet* v. *Krishnaji Govind* (1), where it was held that the plaintiff, although he had been sued as representative of his deceased father and brother, and in execution of the decree passed against him the property sued for had been sold, could nevertheless recover it on the ground that it was property held by himself and his brother on trust for a religious purpose. It was considered that the suit was "not one by a "party to the suit in which the sale was made to set aside the sale but "one by the trustee of the endowment to recover the property." I think the case may be distinguished from the present, because there the plaintiff himself had an actual interest in the property sold, being a co-trustee with his brother, and, as he was not in his own person joined as a party to the suit, that interest was not presented for sale and was not affected by the sale. Having regard to the decision of the Privy Council referred to in the argument (*Chowdry Wahed Ali* v. *Mussamut Jumaee* (2)) and the cases following it in this Court *Arundadhi* v. *Natesha* (3), [391] none of which are mentioned in the judgment, I think the case is one which presents some difficulty; but however that may be, to my mind it is distinguishable by the circumstance I have mentioned. In the present case, at the time when the property was sold, all the persons necessary to be joined in the suit, in order to make the decree binding on the family, were joined as parties, and the plaintiff had then no interest which could entitle her to question the sale. The circumstance that the property had been made the subject of a trust gave certain rights to the persons entitled as beneficiaries, and to that extent restricted the powers of the holder for the time being. Further than that, in my opinion, the trust makes no difference; the property remained partible and alienable, and the inheritance of it was governed by the ordinary rules (see Mayne's Hindu Law, 4th Edition, § 397, and cases cited). I can see no foundation for the proposition put

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12 M. 387 = 13 Ind. Jur. 331.

(1) 9 B. 169. (2) 11 B. L. R. 149. (3) 5 M. 391.

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forwrad on the plaintiff's behalf, *viz.*, that the heirs taking under the disposition made by Ponnusami come in not merely as his heirs but by virtue of an independent title; or, in other words, that an heir to property burdened with a trust is in any better position than an heir to other property. Regarded as a mere heir of Ponnusami, the plaintiff is clearly not entitled to recover lands which since 1873 have been in the possession of purchasers who took in execution of decree against him and his brother. I have assumed that at the time of the sale there was a valid subsisting trust to which the lands were subject, and it was apparently on that assumption that the defendants agreed to the compromise by which the suit between them and the Collector was determined. It is, however, by no means clear that there was any such trust. On the 5th issue, the Subordinate Judge finds that the charities mentioned in Exhibit A were not in fact performed in the manner directed, and the conduct of the parties exhibited in the fact of mortgaging the property in 1871 goes to prove, as the Subordinate Judge observes, that they never intended to give effect to the provisions of the deed. This mortgage was outstanding at the date of the defendants' decree and they were compelled to pay it off. It is true, as argued by the plaintiff's vakil, that neglect of breach of trust on the part of the trustees in acting in accordance with the direction of the founder could not have the effect of annulling a properly constituted trust. But in this case, beyond the fact that Ponnusami executed and had registered the instrument A, the evidence so [392] far from indicating an intention to constitute a trust goes to show that he and his brother treated the property as their own, available in the ordinary way for the payment of their debts. In my opinion, however, even if the interest of the judgment-debtors was when sold to the defendants subject to the trust imposed by the instrument A, the plaintiff's suit must none the less be dismissed. The fact would still remain that such interest as the judgment-debtors had was saleable and was sold, and that the plaintiff, inasmuch as her claim is based on inheritance alone, cannot say that she possessed any independent interest which did not pass by the sale. For this reason, I would dismiss the appeal with costs.

PARKER, J.—The plaintiff's rights as trustee, if any, could only accrue on the death of her husband, and I agree that she could not succeed to greater rights than her husband possessed at his death. It is admitted that he could not have maintained this suit.

Independently of this, however, I am satisfied that Exhibit A was never carried into effect. It was executed by Ponnusami alone and not by plaintiff's husband. Ponnusami disclaimed it in 1874, and there is no evidence that the income of these particular lands has ever been appropriated to the maintenance of the charities and chuttram at Nagore which were in existence long before the execution of Exhibit A.

I do not think the trust was ever carried into effect by Ponnusami, and it may be doubted whether he really intended it should be.

I agree, therefore, in dismissing the appeal with costs.

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[393] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

MANJAMMA AND ANOTHER (*Defendant Nos.* 1 *and* 2), *Appellants* IN S. A. No. 1115 OF 1888 *v.* PADMANABHAYYA AND ANOTHER (*Plaintiffs*), *Respondents.*
KITTI (*Defendant No.* 3), *Appellant* IN S. A. No. 1158 OF 1888 *v.* PADMANABHAYYA AND OTHERS (*Plaintiffs and Defendants Nos.* 1 *and* 2), *Respondents.** [18th, 19th and 29th March, 1889.]

Hindu law—Construction of settlement—Successive interests—Contingent gift to a class —Member of the class in existence on failure of prior interest—Rule in the Tagore case.

A *karar* executed to the father of Sitarama, a minor grandson of the executant, after reciting that the executant had appointed Sitarama to perpetuate his family and had handed over certain property to the father, provided that the property should be delivered to Sitarama on his attaining majority, and proceeded as follows :—

"If the said Sitarama shall have descendants, neither your male descendants "nor any one else shall have any interest in any of the property herein mentioned. "If the said Sitarama happen to be without descendants, the male offspring of my "daughter, Kaveramma, your wife, shall enjoy the property equally, but no "others shall have any interest therein ; such is the *swatantra karar* executed "with my free will and pleasure."

Sitarama attained his majority but died without issue. His elder brother sued for possession of the property under the above clause :

Held, that since the plaintiff was a person capable of taking subject to the life interests, at the time when the gift was made, he was entitled to succeed.

Semble : If the gift to the plaintiff had failed, the property would have reverted to the heirs of the settlor on Sitarama's death without issues. *Ram Lall Sett* v. *Kanai Lall Sett*, (I. L. R. 12 Cal., 663) followed.

[F., 15 B. 652 ; 18 B. 7 (12) ; 32 C. 992=1 C.L.J. 482=9 C.W.N. 749 ; R., 15 B. 326 (334).]

SECOND APPEALS against the decrees of J. W. Best, District Judge of South Canara, in appeal suits Nos. 207 and 213 of 1887, modifying the decree of K. Krishna Rau, District Munsif of Udipi, in original suit No. 219 of 1886.

Suit to recover certain lands to which plaintiff No. 1 claimed [394] title under an instrument, dated 25th October 1868, and described as a *swatantra karar*, filed in the suit as Exbibt A ; plaintiff No. 2 was a demisee of the land in question from plaintiff No. 1.

The relationship of plaintiff No. 1 and the defendants to Subraya, the executant of the *swatantra karar* (translated "deed conferring full rights or independent power") appears from the following genealogy :—

* Second Appeals Nos. 1115 and 1158 of 1888.

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Subraya *m.* Manjamma (defendant No. 1).

Parameswara (deceased) *m.* Padmavati. | Gauramma (deceased). | Satiamma (defendant No. 2). | Kaveramma *m.* Krishnappaiya.

Children of Kaveramma and Krishnappaiya:

Padmanabhayya (plaintiff No. 1). | Sitarama (deceased) *m.* Kitti (defendant No. 3).

Exhibit A was as follows:—

"Swatantra karar executed on 25th October 1868 by (me) Subraya, " son of Parameswara, Sivalli Brahmin, residing at Kannar Kudru Kasba " village. Kouse Magani, Udipi Taluk, to Krishnappaiya, my sister's son, " and husband of my daughter, Kaveramma, son of Puttiana Ramappaiya, " residing at the said Kannar Kudru runs as follows:—

"My son, Parameswara, having died issueless, and, as I am an old " man having no other sons, I have appointed, with my free will, Sitarama, " one of your sons, now aged 7 years, in order to improve (or continue) " my household hereafter, and to perform all the ceremonies that must " take place for me in future, and have this day made over the under- " mentioned property to you with the appointment that until he " (Sitarama) comes of age, yourself, and after he attains majority, the " said Sitarama shall reside in my house carrying on all the charitable " actions in my household which I was hitherto doing, and enjoy the said " land.

"Description of the moveable and immoveable properties made " over:— . . . . , .

"Thus land, buildings, cows, utensils, &c., moveable and immoveable " property of the estimated value aggregating Rs. 597, I have on this date " given and put you in possession. You shall, therefore, enjoy this " real property, have the warg and lavana registry of this real pro- " perty entered in your name in **[395]** the Circar until your said " son Sitarama attains majority, pay the Government assessment from " the ensuing year 1869, and from the produce of this land, pay annual- " ly 2 nijamudis of paddy for Amirtapady offering at the shrine of " Dhurga Parameswari Ammah of Kannar Kudru Mutt, and for Jagara " Samaradane and Arthivadai puja, which take place there in the months " of Ashada Bahula, 12th and Simha months respectively, as I have done " hitherto. You shall also perform mahalia on the 30th of Bahdrapada " Bagula each year in my house from the profits of this land and maintain " me, my wife, and Padmavaty, the widow of my deceased son Parames- " wara, so long as we live, and perform our obsequies after (our death), and " also properly maintain Satiamma, my daughter, who has been dependant " upon this my land for livelihood. You shall henceforward enjoy the " said moveable and immoveable properties as I have done hitherto until " the said Sitarama comes of age, and after the said Sitarama has attain- " ed majority, you should deliver to him without any objection whatever " the aforesaid land, buildings and moveables, and get the warg and lavana " entries of the real property transferred to his name in the Circar. If " the said Sitarama shall have descendants, neither your other male " descendants nor any one else shall have any interest in any of the pro- " perty herein mentioned. If the said Sitarama happen to be without

"descendants, the male offspring of my daughter Kaveramma, your wife, "shall enjoy (the property) equally, but no others shall have any interest therein, such is the swatantra karar executed with my free will and "pleasure."

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Then follow boundaries.

Plaintiff No. 1 claimed possession on the ground that Sitarama having died without issue, the property devolved on him as sole surviving son of Kaveramma. Defendants Nos. 1 and 2 denied the right of plaintiff No. 1 to alienate the land or to dispossess them. For defendant No. 3, it was claimed that Sitarama had been full owner under Exhibit A and had transmitted his right to her.

The District Munsif held that as between plaintiff No. 1 and defendant No. 3 the gift over on the death of Sitarama without issue was good; adding, however, "it is no doubt subject to the charges of maintenance in "favour of defendants Nos. 1 and 2 as **[396]** provided for in the document." He accordingly passed a decree for the plaintiff.

Against this decree defendant No. 3 preferred appeal No. 207 of 1887, and defendants Nos. 1 and 2 preferred appeal No. 213 of 1887 in the District Court, the plaintiff preferring certain objections against the decree which are not material for the purposes of this report.

The District Judge dismissed both appeals, and modified the decree of the District Munsif in accordance with the plaintiffs' objections.

Defendants Nos. 1 and 2 preferred second appeal No. 1115 of 1888, and defendant No. 3 second appeal No. 1158 of 1888.

Ramasami Mudaliar, for appellant in second appeal No. 1115 of 1888.

The provisions of Exhibit A cannot be upheld. Under them Sitarama, on coming of age, would have taken a life-estate, and there is a gift over to his descendants, if any, and failing them to the male offspring of his mother—gifts to an unascertained class and not to individuals. But the interest of Sitarama fails, the gift over being bad both for perpetuity, and also as being inconsistent with Hindu law, *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore* (1), *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (2), *Pearks* v. *Moseley* (3).

See also Transfer of Property Act, Sections 13, 14, 15 and Succession Act, Section 102, which, under the Hindu Wills Act, would apply to a Hindu will.

[Parker, J.—Suppose it is conceded that the gift over to the descendants of Sitarama fails, does that prevent the plaintiff from taking] ?

Yes, under the rule in Transfer of Property Act, Sections 14 and 15, which is applicable when there is no rule of Hindu law to bar its application. In applying this rule regard must be had to possible events. *Ram Lal Sett* v. *Kanai Lal Sett* (4). Here Kaveramma might have had a son many years after Subraya's death.

[Parker, J., referred to *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (5).

[397] COLLINS, C.J., referred to the judgment of Wilson, J., in *Ram Lal Sett* v. *Kanai Sal Sett* (4).]

The judgment of Knight Bruce, L. J., in the *Mullick case* (5), is in my favour, and *Ram Lali Sett* v. *Kanai Lal Sett* (4) does not govern this case, it does not carry the matter any further than *Rai Bishen Chand*

(1) 9 B.L.R. 377=I.A. Sup. Vol. 47. (2) 2 C. 262.
(3) L.R. 5 App. Ca. 714 (722-3). (4) 12 C. 663. (5) 9 M.I.A. 123.

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v. *Mussumat Asmaida Koer* (1), which it follows, and which was decided on facts very different from those of the present appeal. See also *Srimati Bramamayi Dasi* v. *Jages Chandra Dutt* (2) and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (3).

K. Narayana Rau, for appellant in second appeal 1158 of 1888.

As soon as the property vested in Sitarama it became his absolutely, and his interest is not affected by the failure of gift over. It was the intention of Subraya to perpetuate his family and hence the gift to Sitarama. The property became the self-acquisition of Sitarama. It has not been proved that the plaintiff was alive at the time of the gift.

[COLLINS, C. J.—It seems to have been admitted that he was the elder brother.

PARKER, J.—No question arises as to that if the gift over is operative.]

In either view he could not restrain alienations by Sitarama, who took the property absolutely, and on his death it passed to his wife as his heir—*Katama Natchiar* v. *Rajah of Shivagunga* (4), Mayne's Hindu Law, 4th edition, Section 487.

Ramachendra Rau Saheb, for respondents. Both appeals must fail if the gift over is valid. *Soudaminey Dossee* v. *Jogesh Chander Dutt* (5) and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (3) are not at variance with *Ram Lal Sett* v. *Kanai Lal Sett* (6) which is an authority applicable to the present circumstances. That case should be followed as it proceeds on the principle laid down by the Privy Council in *Rai Bishen Chand* v. *Mussumat Asmaida Koer* (1).

The further facts of the case appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.)

JUDGMENT.

[398] The original holder of the plaint property was one Subraya whose only son, Parameswara, predeceased him. On 25th October 1868 Subraya executed a deed called a *swatantra karar* in favour of Sitarama, his younger grandson by his daughter, Kaveramma. The deed is executed to Sitarama's father, Krishnappaiya (Sitarama himself being in 1868 a child of 7 years old), and after providing for the maintenance of Subraya's wife (first defendant), daughter (second defendant) and daughter-in-law Padmavati, enjoins Krishnappaiya to deliver over to Sitarama on his attaining majority the plaint properties. The deed then continues as follows :—

"If the said Sitarama shall have descendants, neither your male "descendants nor any one else shall have any interest in any of the pro- "perty hereinmentioned. If the said Sitarama happen to be without "descendants, the male offspring of my daughter Kaveramma, your wife, "shall enjoy the property equally, but no others shall have any interest "therein, such is the swatantra karar executed with my free will and "pleasure."

Sitarama attained majority, but died in 1885, without issue. The third defendant is his widow, and first plaintiff his elder brother who was therefore alive at the date of the swatantra karar in 1868. No other male

(1) 11 I.A. 164=6 A. 560. (2) 8 B.L.R. 400. (3) 4 C. 455.
(4) 9 M.I.A. 539. (5) 2 C. 262. (6) 12 C. 663.

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children have been born to Kavaremma. The second plaintiff is merely a mulgeni tenant under the first plaintiff.

The question for decision is whether the first plaintiff is under the terms of the karar lawfully entitled to take the property on the death of Sitarama without issue. It was contended (1) that the gift over to first plaintiff was invalid as first plaintiff was only one of a class, and (2) that the property had absolutely vested in Sitarama, and that his widow was his heir to his separate property.

Both the Courts below have held that the gift over in first plaintiff's favour was vaild and decreed the claim. Defendants Nos. 1 and 2 (widow and daughter of Subraya) appeal in second appeal No. 1115, and third defendant (widow of Sitarama) appeals in second appeal No. 1158 of of 1888.

The first point is as to the nature of the interest taken by Sitarama. Having regard to the expression "no others shall have any interest therein" we are of opinion that Sitarama's estate was made defeasible in the event (which has occurred) of the failure of issue living at the time of his death [see *Bhoobun Mohini Debia* **[399]** v. *Hurris Chunder Chowdhry* (1)]. If therefore the gift over in the first plaintiff's favour is invalid, the property would revert to the heirs of the donor (defendants 1 and 2), and the third defendant's appeal (second appeal No. 1158 of 1888) must, therefore, be dismissed with costs.

The next point is whether the gift over to first plaintiff and any future male issue of his mother is wholly invalid even as regards first plaintiff himself who was alive at the date of the deed (October 25th, 1868). The learned pleader for the appellants relies upon the following cases:— *Srimati Bramamayi Dasi* v. *Jages Chandra Dutt* (2), *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore* (3), *Soudaminey Dassee* v. *Jogesh Chunder Dutt* (4), *Kherodemoney Dossee* v. *Doorgamoney Dossee* (5), and upon Section 15 of the Transfer of Property Act and Section 102 of the Indian Succession Act.

As against these we are referred to the more recent decision of the Privy Council in *Rai Bishen Chand* v. *Mussumat Asmaida Koer* (6), and the judgment of Wilson, J., concurred in by Garth, C.J., in *Ram Lal Sett* v. *Kanai Lal Sett* (7).

We do not think that the provisions of the Transfer of Property Act or of the Indian Succession Act will affect the case. In the first place these Acts do not affect any rule of Hindu Law, and, secondly, the sections quoted only cause the interest created for the benefit of a class to fail entirely when such interest fails by reason of any of the rules contained in the two preceding sections (which are identical in the two Acts). The present case does not fall within either of those sections.

It may be conceded that the plaintiff's case must fail if the decisions in the earlier Calcutta cases are to be followed; but the question is how far they have been modified by later decisions, and specially by the Privy Council decision in *Rai Bishen Chand* v. *Mussumat Asmaida Koer* (6). That case differs from the present one in that there was a present gift to a living designated individual capable of taking, followed by actions of a kind which even without a deed might have worked a transfer of property in India. Here, on the other hand, the gift was **[400]** contingent to a class of persons to be ascertained at the death of

(1) 4 C. 23=5 I.A. 138. (2) 8 B.L.R. 400.
(3) 9 B.L.R. 377=I.A. Sup. Vol. 47. (4) 2 C. 262.
(5) 4 C. 455. (6) 11 I.A. 164=6 A. 560. (7) 12 C. 663.

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Sitarama without issue (which might or might not occur)—a gift to such lawful male issue as might be living at the death without issue of Sitarama, who took only a life estate.

As pointed out by Wilson, J., in *Ram Lal Sett* v. *Kanai Lal Sett* (1) such a gift to a class would be valid under English law, and what we have to consider is, whether there is anything in Hindu law which would make such a gift inoperative either wholly or in part. The *Tagore case* (2) which is relied on by appellant's pleader is authority merely for the proposition that under the special rules of Hindu law the persons capable of taking under a will must be such as could take a gift, *inter vivos*, and must, therefore, either in fact or in contemplation of law be in existence at the death of the testator. This principle would not exclude the first plaintiff, who was in existence at the date of the gift. In *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (3) it was held by the Privy Council that there was nothing to prevent a Hindu testator devising self-acquired property upon an event which is to happen on the close of a life in being. This is exactly what has been done in the present case, except that the transfer was a gift and not a bequest. The donor gave the property absolutely on the death of Sitarama either to his issue, if any, or failing issue of Sitarama to his brothers, if any, in equal shares. Both in the *Tagore case* and in *Rai Bishen Chand* v. *Mussumat Asmaida Koer* (4), the Privy Council has laid down the principle that the real intention of the donor is to be ascertained and when ascertained is to be carried out to the extent which the law allows. It is not therefore necessary in our opinion to consider whether or not after-born brothers of the first plaintiff would have been excluded provided that first plaintiff himself was a person capable of taking subject to Sitarama's life-estate, at the time the gift was made. It appears to us that he was such a person and that the gift will therefore enure for his benefit even though the gift over to his possible brothers might have been inoperative.

We dismiss the second appeal No. 1115 of 1888 with costs.

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12 M. 401.

[401] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

THANGAM PILLAI AND ANOTHER (*Defendants*), *Appellants v.* SUPPA PILLAI (*Plaintiff*), *Respondent.** [2nd and 14th August, 1888.]

Hindu Law—Sudras—Illegitimate son—Suit for partition.

Among Sudras an illegitimate son is entitled to maintain a suit for partition of the family property against his father's legitimate sons: and if his interest is endangered by reason of the property being left under the management of the latter, partition can be claimed during his minority.

[R., 19 B. 99; 31 C. 111 (118); 25 M. 519=11 M.L.J. 399; 30 M. 369=17 M.L J. 269; 34 M. 277 (283).]

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* Second Appeal No. 1355 of 1887.

(1) 12 C. 663, (679, 680).

(2) *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore* (I.A. Sup., Vol. 47 =9 B.L.R. 377). [See as to this case and the case next cited, *Kristoromoni Dasi* v. *Narendro Krishna* (in P.C.), 16 C. 383—Reporter's note.]

(3) 9 M.I.A. 123.

(4) 11 I.A. 164=6 A. 560.

1888 AUG. 14. — APPELLATE CIVIL. — 12 M. 401.

SECOND APPEAL against the decree of G. D. Irvine, District Judge of Trichinopoly, in appeal suit No. 42 of 1877, confirming the decree of N. Saminadha Ayyar, Principal District Munsif at Tirchinopoly, in original suit No. 733 of 1885.

The plaint stated that the mother of the minor plaintiff (who sued by his mother and next friend) was the concubine of the late father of the defendants, and that the plaintiff was his son; that the plaintiff and his mother had lived under his protection up to the date of his death, and that on his death the defendants refused to protect them and refused to surrender the share of the family property to which the plaintiff was entitled. The plaint prayed for possession of the plaintiff's one-sixth share in the immoveable property of the family.

The defendants denied that the plaintiff was the son of their father or was entitled to partition. The parties to the suit were Sudras.

The District Munsif found that the plaintiff was entitled to an illegitimate son's share, and passed a decree as prayed, expressing, however, the opinion that the plaintiff might have claimed a one-fifth share.

The District Judge on appeal upheld the decree of the District Munsif, and the defendants preferred this second appeal.

Parthasaradhi Ayyangar, for appellants. A partition suit by a minor cannot be maintained unless malversation is proved **[402]** against the managing members of the family which has not been done here. But in any case a illegitimate son cannot sue for partition; he has not the ordinary rights of a coparcener under Hindu law. *Krishnayyan* v. *Muttusami* (1) *Ranoji* v. *Kandoji* (2), *Parvathi* v. *Thirumalai* (3), *Sadu* v. *Baiza* (4).

Pattabhiramayyar, for respondent. The authorities cited do not preclude the present suit, which is against the legitimate sons and not against the father. The illegitimate son is a coparcener with the other sons and has the rights attaching to such a status. *Jogendro Bhuputi* v. *Nittyanund Man Singh* (5). In order to maintain a suit by a minor for partition, it is not necessary to prove malversation; it is enough to show that partition will be for the good of the minor. *Damoodur Misser* v. *Senabutty Misrain* (6), *Kamakshi Ammal* v. *Chidambara Reddi* (7), and cases cited in Mayne's Hindu law, Section 435, 4th edition.

The further facts of the case appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

JUDGMENT.

The parties to this appeal are Sudras, and the respondent, a minor, claimed partition by his mother and guardian. The plaint stated that he was appellants' illegitimate brother, that the appellants refused to maintain him, and that though partition was demanded on several occasions, yet it was refused. The appellants denied that the respondent was their brother, and contended that his mother was a married woman. It was found by the Courts below that respondent's mother was the continuous concubine of the appellant's father, and that she was not married to another person, and that respondent was entitled to one-fifth share, though he claimed only a sixth share. A decree was accordingly passed in his favour for one-sixth share, and two objections

(1) 7 M. 407. (2) 8 M. 557. (3) 10 M. 334. (4) 4 B. 37.
(5) 11 C. 702. (6) 8 C. 537. (7) 3 M.H.C.R. 94.

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are taken to the decree in second appeal, *viz.*, (1) that an illegitimate son is not entitled to sue for partition, and (2) that no partition can be claimed during his minority without proof of malversation on the part of his legitimate brothers.

[403] The parties to this appeal are governed by the Mitakshara Law. The Smriti of Yajnavalkya directs that "if the father be dead, the brethren should make him (illegitimate son) partaker of the moiety of a share" (1). The author of the Mitakshara, commenting on the Smriti, says: "If there be sons by the wedded wife, let these brothers allow the illegitimate son half an allotment" (2). The other commentaries of authority in the south give a similar direction, and see Vyavahara Mayukha, Chapter IV, Section IV, paragraph 32 (3): Sarasvati-vilasa, sloka 395 (4): Madhaviva, paragraph 33 (5). In *Rajagopala* v. *Dorasami* (6), this Court recognized the right of an illegitimate son to sue for his share, and the contention that he can claim a share only if his legitimate brothers divide, is not only unreasonable, but is also at variance with the Mitakshara. The text states that when the father is alive, he takes a share by his choice, but directs that after the father's death, his illegitimate (sons) brothers *should* give him moiety of a son's share. It is true that in *Ranoji* v. *Kandoji* (7) and *Krishnayya* v. *Muttusami* (8), this Court held that he was not entitled to claim partition of ancestral estate either from his father's brother or the son of such brother. But those decisions proceeded on the view that he had no claim by survivorship against his father's co-parceners by *jus representationis*, and that he was neither a co-heir with his father nor a sapinda in relation to his father's co-parceners. It was also observed in the case of *Kanoji* v. *Randoji* (7), in *Rajagopala* v. *Dorasami* (6), and in *Parvathi* v. *Thirumalai* (9), that the ordinary incident of the *status* of an illegitimate son was a right to be maintained; that among Sudras, a specific share was allotted as a special case on account of the limited importance attached to ceremonial offerings rather than a recognized laxity of marriage tie, and that the inferiority of his *status* in the family was marked by reducing his share and making him a co-heir with the legitimate daughter and her son. It was nowhere held that he was entitled to the share allotted to him only by the choice of his legitimate brother, and that he could not recover that [404] share by insisting on partition. As regards the second objection, there is the averment in the plaint that the respondent was not maintained. The appellants persistently denied in the suit that the respondent was their brother, and that he was the offspring of adulterous intercourse. We cannot say that the respondent's interest in the joint property was not in danger at the date of the suit in being left under the management of the appellants.

We dismiss this second appeal with costs.

(1) Yajnavalkya, Chapter II, paragraphs 133, 134, Mandlik's edition, p. 220.
(2) Mitakshara, Chapter I, Section XII, paragraphs 1 and 2, Colebrooke edition of 1870, pp. 330, 331.
(3) Mandlik, p. 47.
(4) Foulkes' translation, p. 80.
(5) Burnell's translation, p. 24.
(6) Appeal No. 84 of 1885, unreported.
(7) 8 M. 557.
(8) 7 M. 407.
(9) 10 M. 334.

12 M. 404.

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APPEL-LATE CIVIL.

12 M. 404.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

THE COLLECTOR OF SALEM (*Defendant No.* 3), *Appellant v.* RANGAPPA (*Plaintiff*), *Respondent*.* [12th and 22nd March, 1889.]

Jurisdiction—Suit to cancel patta of Government waste issued by Collector—Power of Collector to cancel patta granted by him—Standing Order.

The plaintiff having obtained from the Revenue officers of the district a patta of Government waste, sued for the cancellation of a patta for the same land subsequently granted to other persons by the Collector who considered that the issue of the plaintiff's patta was not in accordance with the darkhast rules:

Held, (1) it was not competent to the Collector to issue the second patta in supersession of that issued to plaintiff.

(2) it was competent to a Civil Court to pass a decree declaring the second patta null and void, and the plaintiff was entitled to such a decree. *Kullappa Naik* v. *Ramanuja Chariyar* (4 M.H.C.R. 429), followed.

[F., 26 M. 268=12 M.L.J. 453; R., 19 M. 324; 29 M. 461=1 M.L.T. 278; 31 M. 264=18 M.L.J. 62=4 M.L.T. 69; 32 M. 300=19 M.L.J. 206 (207)=5 M.L.T. 31; 17 Ind. Cas. 489 (490)=23 M.L.J. 593 (594)=12 M.L.T. 539.]

SECOND APPEAL against the decree of C. W. W. Martin, District Judge of Salem, in appeal suit No. 294 of 1886, affirming the decree of P. Avyavayyar, District Munsif of Namakal, in original suit No. 221 of 1886.

The plaintiff stated that he had obtained from the Collector of Salem, defendant No. 3, a patta for certain land, and sued to cancel a patta granted subsequently by defendant No. 3 to defendants Nos. 1 and 2 for the same land.

[405] Defendants Nos. 1 and 2 pleaded that the Court had no jurisdiction to pass the decree prayed for on the ground that the land in question was Government waste, and that the Collector had full power to dispose of it under the darkhast rules. Defendant No. 3 pleaded that the issue of the patta to the plaintiff was not in accordance with the rules and was the result of a mistake, and that the Government had right to cancel it.

The District Munsif held, on the authority of *Rajagopala Ayyangar* v. *Collector of Chingleput* (1) and *Subbaraya* v. *The Sub-Collector of Chingleput* (2), that the Collector had no power to cancel the patta granted, to plaintiff, and accordingly passed a decree declaring that the patta granted to defendants Nos. 1 and 2 was null and viod. This decree was affirmed on appeal by the District Judge.

Defendant No. 3 preferred this second appeal.

The Acting Government Pleader (*Subramanya Ayyar*), for the appellant.

Thiruvenkata Charyar, for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and SHEPHARD, J.).

JUDGMENT.

Two questions were argued in this appeal, *viz.*, (1) whether it is competent to a Civil Court to make a decree declaring a patta issued by a

* Second Appeal No. 1104 of 1888.

(1) 7 M.H.C.R. 98. (2) 6 M. 303.

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Collector void, and (2) whether it was competent to the Collector to issue a patta to the second defendant in supersession of that issued to the plaintiff. We think the decision in *Kullappa Naik* v. *Ramanuja Chariyar* (1) is a distinct authority with regard to the first question. There the plaintiffs claimed by virtue of their preferential right, as Mirasidars, to the occupancy of waste land, and they prayed for, and obtained, the cancellation of a patta issued by the Collector to third persons. That decree was affirmed on appeal in the High Court. Following this decision we think the first question must be answered in the affirmative. With regard to the other question, it has to be seen how it came to pass that the Collector issued a second patta. The plaintiff obtained a patta in his favour in May 1884. In March of the following year there was an appeal by the second defendant, and [406] the patta was cancelled on the ground that the darkhast had not been properly published in the village. It is not disputed that the plaintiff had taken possession and is in possession under his patta. It is observed by the District Munsif that, according to the rules, no appeal can lie after the issue of a patta, or as the Judge puts it, that a patta can be issued only after the expiration of the time allowed for appeal. This view seems to be borne out by rule 10, printed at page 37 of the Standing Orders (2). It is not pretended that the patta issued to the plaintiff was issued conditionally, or that it was issued by an officer not competent to act in the matter. Nor is it alleged in the written statement that there was any fraud practised by the plaintiff on the defendant or the Collector. The case was simply one of mistake; the Tahsildar would not have issued the patta had he known all the facts. In our opinion allegation and proof of such mistake does not justify the cancelment of a patta issued by a competent officer in favour of one who has come into occupation of the land under it, when once possession has been taken under a patta unconditionally issued by a competent officer the pattadar can, we think, be evicted only under the provisions of the Revenue Act. Under these circumstances as the settlement with the defendant and the granting of a patta to him may have prejudiced the plaintiff's title, he was entitled to maintain the suit and we therefore dismiss the appeal with costs.

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(1) 4 M.H.C.R. 429.

(2) Standing Order of the Board of Revenue No. 32, "Disposal of assessed lands," paragraph 10.—"Applications admitted by the Tahsildar are to be considered only conditionally granted, pending an appeal from any party, either to the Divisional officer, or to the Collector. From the Tahsildar's decision an appeal will lie to the Divisional officer if made within thirty days. As in the case of appeal in a civil suit the days will be reckoned from, and exclusive of, the day on which judgment was pronounced, and also exclusive of such time as may have been requisite for obtaining a copy of the decree appealed against. The date of the decision, the date of application for copy, and the date of copy being ready for delivery, should all be posted up on the back of the copy by the Tahsildar, with a note of the day on which appeal time expires. An appeal may be admitted after the period of limitation in this order prescribed for that purpose when the appellant satisfies the appellate authority that he had sufficient cause for not presenting the appeal within such period, and provided that a patta has not been issued for the land by a competent officer. Any person interested in the matter may appeal. A special appeal will lie from the decision of the Divisional officer to the Collector of the district. The time allowed will be thirty days, with the same provisions. In the case already named, a third appeal to the Board of Revenue will not be allowed; but in cases where a Collector has passed the decision on appeal from a Tahsildar within his own division, a special appeal will lie to the Board if made within forty days, that is to say, if the petition is received at the Board's office within that time, reckoning as aforesaid."

12 M. 407=13 Ind. Jur. 374.

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APPELLATE CIVIL.

12 M. 407= 13 Ind. Jur. 374.

[407] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VENKATAPPAYYA AND OTHERS (*Plaintiffs*), *Appellants v.* THE COLLECTOR OF KISTNA (*Defendant No.* 2), *Respondent.**
[5th March, and 29th April, 1889.]

Act VII of 1865 (*Madras*), *Section* 1—*Water cess—Overflow from Government works—Water supplied or used for purposes of irrigation.*

Surplus water from Government irrigation works flowed on to land of the plaintiffs which they were in the habit of cultivating with dry crops and stagnated there rendering such cultivation impossible. The plaintiffs did not want the water to flow on to their land, but being unable to exclude it, planted paddy as the best crop to cultivate under the above circumstances. Water-cess was levied on the plaintiffs under color of Act VII of 1865:

Held, the water was not supplied or used for purposes of irrigation within the meaning of Act VII of 1865, Section 1, and the plaintiffs were not liable to pay the water-cess.

[F., 19 M. 24; R., 34 M. 21 (23)=6 Ind. Cas 199=20 M.L J. 766=7 M.L.T. 407; 24 M.L.J. 365 (385)=13 M,L.T. 235=(1913) M.W.N. 225.]

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 292 of 1886, reversing the decree of M. B. Sundara Rau, District Munsif of Bapatla, in original suit No. 50 of 1886.

Suit to declare that the plaintiffs were not liable to pay a water-cess, and to recover a sum of money paid by them as water-cess under protest. The circumstances giving rise to this suit appear sufficiently for the purpose of this report from the following Judgment.

The District Munsif passed a decree for the amount sued for and declared that, "so long as the drainage water of its own accord inundates "and stands on the plaintiffs' land without any action on plaintiffs' part "to bring it on to it, they are not liable to be assessed with water-tax."

The District Judge reversed the decree of the District Munsif, holding it to be immaterial "that an individual may be unwilling to take water "and that the water comes to his field against his [408] wish, and that "Government have a legal right to levy wet rates upon every field the "water reaches."

The plaintiffs preferred this second appeal.

Subba Rau, for appellants.

The Acting Government Pleader *Subramanya Ayyar*, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.)

JUDGMENT.

The appellants hold land at Zupudi in the Bapatla Taluk of the Kistna District, and it was formerly cultivated with dry crops. Lately, the villages lying above Zupudi were irrigated from the Krishna canal, and the excess water flowing from them submerged the appellants' land and stagnating upon it, rendered it impossible to raise dry crops. The appellants could not prevent the water from flowing to their land except by erecting

* Second Appeal No. 1148 of 1888.

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a dam at a heavy cost and they did not do so. In Fasli 1294 they showed a species of paddy, called tiruvarangam paddy, and thereby attempted to raise a crop which might not perish from the land being inundated with excess water in the months of October and November. According to the evidence the crop failed that year and yielded no profits owing to the inundation. The Collector levied water-cess at 2 rupees per acre under (Madras) Act VII of 1865, and the appellants paid it under protest and brought the present suit to obtain its refund. The contention for the respondent was that tiruvarangam being a wet crop, the water-tax of Rs. 2 per acre was imposed on the land in accordance with rule and the practice of the district. It was alleged for the Collector that the excess water flowed on to appellants' land, stagnated upon it, that no wet crop could be raised upon it solely with the aid of rain water, and that the appellants cultivated tiruvarangam crop in the expectation that excess water would flow on to their land, and utilized the excess water when it did flow as anticipated. But the appellants denied their intention to depend on drainage water, and the District Munsif found that, although the crop might be planted without the aid of the surplus water, it could not ripen and grow well without such aid. He observed, however, that in Fasli 1294, the appellants sustained loss rather than derived any benefit. On appeal, the Judge concurred in the finding that the rice crop could not have been raised on the land in question by [409] rain water alone. The District Munsif considered that the appellants were not liable for water-cess, but the Judge held that no option was given to cultivators under the Act; that the water was either supplied or used; that Madras Act VII of 1865 only declared the existing revenue practice, and that they were liable for water-cess whenever water was supplied or used. On this ground he was of opinion that it was immaterial that the appellants were unwilling to take the water, and that it came on to their land against their wish, and that the Government had a right to levy wet rates upon every field the water reached, and he dismissed the suit with costs. It is urged in second appeal (1) that no water-cess could be lawfully levied under Madras Act VII of 1865, (2) that water was neither supplied nor used voluntarily, (3) that in the circumstances of this case, the levy of water-cess was not in accordance with revenue practice or custom, and (4) that it was competent to the Civil Courts to take cognizance of the suit.

The water-cess in question was levied under Madras Act VII of 1865, and it is therefore competent to the Civil Courts to see whether it was levied in accordance with the provisions of that Act. It is provided by Section 1 that "whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank, etc., or work belonging to, or constructed by Government, it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for the use of the water, which cess shall be additional to any land assessment that may be leviable on the said land as unirrigated or punjah; and the Government may prescribe the rules under which, and the rates at which, such water-cess as aforesaid shall be levied, and alter or amend the same from time to time."

The point for decision is whether water was, upon the facts found in this case, either supplied or used within the meaning of the section. The appellants did not apply for the water, and it was not allowed to flow to their land by reason of such application, and we cannot therefore say that water was supplied, inasmuch as the expression implies in its

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ordinary sense a previous request, express or implied. Was it then used? The term ordinarily presupposes freedom either to use or to abstain from using the water, and the language of the section does not suggest an intention to exclude this freedom. The preamble states that large expenditure has been, and is still being, incurred in the construction and [410] improvement of works of irrigation and drainage to the great advantage of proprietors and tenants of land, and that it is right and proper that a fit return should, in all cases alike, be made to Government on account of the increased profits derivable from lands irrigated by such works. It discloses only an intention that those who obtain a supply or use the water in view to deriving increased profits should be under an obligation to pay the water-cess. Can it be said when the Government or one or more of its tenants to whom water is supplied for profit, inundates a raiyat's dry land against his will for about two months every year, and thereby renders it unfit for dry cultivation, and when the raiyat in endeavouring to use his land sows tiruvarangam paddy trusting to the precarious chance of raising a crop which may grow in spite of the inundation, and when that crop fails, that he uses the water in view to profit by it? If he uses it, he uses it as the only mode of repairing the injury to his land and averting the loss likely to arise from it, and we cannot say that he uses the water within the meaning of the Act, if regard is to be had to the rule that the construction we are bound to place upon statutes must be reasonable. It is urged by the Government Pleader that the appellants may recover compensation for the injury done to their land from the party who is answerable for it, and that they must be taken to use the water within the meaning of the Act; though their land is flooded against their will and though tiruvarangam paddy was sown because there was a chance of its yielding a crop notwithstanding the inundation. We are unable to accede to this contention. If it were to prevail, the Government might be enabled to take advantage of their own wrong if they were under an obligation to protect the appellants' land against its being periodically flooded with the water which they bring in the canal. If holders of lands above Zupudi are the cause of the injury and are liable for the loss arising therefrom, even then the Government would be in the position of a landlord who supplies water to his tenant for their mutual profit with the knowledge that the tenant usually allows it to inundate the land of another tenant and to stagnate thereon so as to become a nuisance and without arranging for the abatement of the nuisance or providing against its recurrence. In either view of the case, we must decline to accept the suggestion. The reasonable construction is that the use contemplated by the Act is a voluntary use, though not preceded by an application, and [411] that it presupposes a freedom either to take or refuse the water. We are aware of no usage whereby a raiyat's land can be held to be lawfully inundated every year. We are unable to concur in the opinion of the Judge that the appellant used the canal water within the meaning of Madras Act VII of 1865.

It is then urged that the Collector was at liberty to claim wet assessment on the ground that a wet crop was raised, that a wet assessment was due by virtue of the right of the Crown to a share of the produce, and that any assessment imposed or levied in the exercise of the prerogative of the Crown is not open to be revised by a Court of Justice. But it is not denied that the water-cess was levied under the color of the Act in the case before us, and it is not therefore a case in which either a share of the wet crop has been claimed or a wet assessment has been demanded

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as an equivalent by virtue of the prerogative of the Crown. When a special cess is demanded in the professed exercise of a special power conferred by legislative enactment, and when that enactment directs when and how it is to be collected, Courts of Justice are bound to see that the power is exercised in accordance with the provisions of the Act, unless their jurisdiction is expressly or by necessary implication taken away by the Act.

We set aside, the decision of the Judge and restore that of the District Munsif with costs throughout.

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12 M. 411.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

SRINIVASA (*Plaintiff*), *Appellant* v. DANDAYUDAPANI AND OTHERS (*Defendants*), *Respondents*.*
[24th April and 1st May, 1889.]

Hindu Law—Will—Gift to class—Vested and contingent interest.

A will, made by a Hindu, contained the following clause: "I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands, shall enjoy the produce, and shall transmit the *corpus* intact to her male descendants."

[412] Within a month after the testator's death his eldest daughter was delivered of a son, who died in a few months. She died subsequently, leaving the plaintiff, her husband, but no male issue her surviving. The plaintiff sued as heir of his son to recover the amount of the above bequest:

Held, that as the daughter's son never acquired a vested interest in the bequest, the plaintiff's suit must be dismissed.

[R., 32 C. 992 = 1 C.L.J. 482 = 9 C.W.N. 749.]

APPEAL against the decree of K. R. Krishna Menon, Subordinate Judge at Tanjore, in Original Suit No. 22 of 1887.

The plaintiff sued as the their of one Chinnasami deceased, to recover Rs. 25,000, and interest from the estate of N. Subramanya Ayyar deceased, under his will and codicil dated respectively 24th October and 1st November 1884.

The testator died on 1st November 1884, leaving his widow, two daughters, and an adopted son named Sundaram, who was joined as defendant No. 3 in this suit. The elder daughter Subbalakshmi Ammal, the wife of the plaintiff, on the 20th November 1884, gave birth to a son, who died on 15th July 1885; and on 14th May 1886 Subbalakshmi Ammal died, leaving no male issue surviving her. The plaintiff claimed as heir to Chinnasami, the infant son mentioned above.

By the will referred to above the testator appointed defendants Nos. 1 and 2 to be executors and made bequests (among others) in the following terms:—

"1. The jewels of my house, excepting my personal ornaments, shall be divided equally between my two daughters, and they shall absolutely enjoy their respective shares.

"2. I bequeath to my second daughter the lands I own in the village of Malathukuruchy, Kombakonan taluk, the bungalow in Govinda

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* Appeal No. 165 of 1888.

Row's Street, Kombakonam, and the site I bought of one Ramachandra Ayyar in the same street, to be enjoyed by her during her life-time without power of alienation, and to be transmitted to her male descendants on her death.

" 3. I bequeath to my elder daughter Rs. 25,000 (twenty-five thousand), subject to the condition that she shall invest the same in lands or Government promissory notes, shall enjoy the produce or interest accruing thereon, and shall transmit the *corpus* in tact to her male descendants.

" 4. The lands held by me in the village of Thennalore, Kombakonam taluk, have been already gifted to my elder daughter, and those in the village of Nazabudy, Kombakonam taluk, to my **[413]** younger daughter, and they shall enjoy their respective donations absolutely."

The will further provided for the payment of Rs. 3,000 to the testator's sister as stridhanam ; and the residue of the testator's property was bequeathed to Sundaram.

The question raised in the present suit was whether the plaintiff was entitled to the sum of Rs 25,000 disposed of in Clause 3 of the will as heir to his son Chinnasami. The Subordinate Judge answered this question in the negative, saying :—

"It is clear from the words used that the testator intended to create " a life-estate in favour of his daughter and a remainder to her male " descendants, and whether he intended to create a vested remainder " or contingent one is the sole question for consideration. If the " bequest in question created a vested remainder, the residuary estate " became vested in Chinnasami at the death of the testator, and upon his " death it passed to the plaintiff. If, on the other hand, a contingent " remainder alone were created, it could not take effect till after the " death of the life-tenant, and Chinnasami having predeceased her, took " no interest whatever and passed none to the present plaintiff. . . . " Subramanya Ayyar could have hardly intended to create a vested re- " mainder in favour of persons who were not then in existence. It is true " that Chinnasami was then in existence in contemplation of law, but the " bequest is not made to a single descendant of Subbalakshmi Ammal, but " to her descendants as a class. The use of the plural shows that one per- " son of a class was not to take the whole, but all the members thereof " were to enjoy it equally. If the remainder be regarded as a vested one, " this intention of the testator to benefit them equally would have been " completely defeated, seeing that, in that case, the male descendant who " was in existence at the death of the testator, will alone become the remain- " derman and that the after-born sons of Subbalakshmi Ammal will alto- " gether be excluded. This the testator never intended. He himself was " a good lawyer and cannot therefore be expected to have made a disposi- " tion to which no effect can be given in the manner he intended. He " must have known that a bequest to a class of persons, some of whom " were at least incapable of taking as they were not in existence would be " wholly invalid under the Hindu law of gifts. If it be shown, on the " other hand, that he intended to create a contingent **[414]** remainder, it " would precisely be the same as the estate of a daughter's son under the " Hindu law. During the lifetime of the daughter, the daughter's sons " have no vested interest in the property, and upon her death they take it " jointly, and as a general rule she is to transmit the *corpus* intact to them. " This is precisely what the testator directed in his will, and this is ren- " dered more clear by the preceding disposition in favour of the younger " daughter, and I am therefore of opinion that he intended to create a

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"mere contingent remainder, which was to take effect only upon the death "of the life-tenant. Chinnasami having predeceased her, he acquired no "right whatever, and consequently the plaintiff, as his heir, has no right to "ask for the legacy, and upon this ground I dismiss the suit with costs."

The plaintiff preferred this appeal.

Ramachandra Rau Saheb (with Mr. *N. Subramanyam*), for appellant.

Though Chinnasami was not actually in existence at the time of the testator's death, he was at any rate in contemplation of law in existence at such time, and was therefore not debarred from taking the benefit of any devise in his favour. *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1).

The next point is whether Chinnasami was prevented from taking by reason of the provisions of Section 102 of the Indian Succession Act under the rule that where a devise is made to a class of persons and it fails in regard to a portion of the class it fails in regard to the whole.

The Privy Council in *Rai Bishen Chand* v. *Mussumat Asmaida Koer* (2) regret the extension of the provisions of Sections 100, 101 and 102 of the Indian Succession Act to Hindu wills. In any case Section 102 applies only where the devise fails with regard to a part of the class by reason of the violation of the rules contained in the preceding sections. The present case does not fall within either of those sections and therefore Section 102 does not apply. Moreover the Hindu Wills Act is made applicable only to wills made in the Presidency town, whereas the will under consideration is a mufassal will. *Rai Bishen Chand* v. *Mussumat Asmaida Koer* (2) and *Ram Lal Sett* v. *Kannai Lal Sett* (3) (which merely follows the [415] former case) are authorities for the proposition that the intention of a testator must be given effect to so far as is possible, and that though a part of a class to whom a devise is made could not take, the rest, if otherwise competent, could take the benefit of the devise.

The third question is whether Chinnasami took a vested interest capable of being transmitted to his heirs so as to give the present plaintiff a right to sue. If Chinnasami was capable of taking, and did take, a beneficial interest in the devise, the mere fact of his enjoyment being postponed to a prior life-interest, could not make his interest a contingent one. The words at or after the death of the person, do not denote the condition that the legatee shall survive such person, but only mark the time at which the legacy shall take effect in possession. The bequest should, therefore, be construed to mean a vested remainder. Chinnasami's interest being thus a vested remainder, the plaintiff is entitled to succeed. See *Rewun Persad* v. *Mussumat Radha Beeby* (4), *Hallifax* v. *Wilson* (5), and *Blamire* v. *Geldart* (6). The Subordinate Judge has failed to draw the distinction between vesting in possession and vesting in interest, and hence all the confusion in the judgment between vested and contingent remainders. The possession alone was postponed, but the interest accrued immediately: Williams on Real Property, 241, 244, 252, and 7th edition of Williams' Executors, Vol. II, pp. 1239, 1244-5, 1247-8.

Reference was also made to Sugden's Law of Property, pp. 286, 287, and to *Mussumat Bhoobun Moee Debia* v. *Ram Kishore Acharj Chowdhry* (7), *Visalatchi Ammal* v. *Annasamy Sastry* (8), *Raikishori Dasi* v. *Debendra Nath Sircar* (9).

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(1) 9 B.L.R. 377 = I.A. Sup. Vol. 47 (133). (2) 6 A. 560 = 11 I.A. 164.
(3) 12 C. 663. (4) 4 M.I.A. 137. (5) 16 Ves. Jun. 168.
(6) 16 Ves. Jun. 314. (7) 10 M.I.A. 279. (8) 5 M.H.C.R. 150.
(9) 15 C. 409.

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Bhashyam Ayyangar, for the respondents.

As to the Rs. 25,000 the intention of the testator was either (1) to create a daughter's estate or (2) to create an estate unknown to Hindu Law. But reading Clauses 3 and 4 of the will together, it would appear that, having already given stridhanam to his daughter, he desired to make a further provision of the same nature. See *Lakshmibai* v. *Hirabai* (1), on appeal *Hirabai* v. *Lakshmibai* (2), where it is laid down that no further departure [416] from Hindu law is to be presumed than is clearly expressed. See also *Mahomed Shumsool* v. *Shewukram* (3), *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (4), *Mussamat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (5), *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore* (6).

It is enough for me to show that there is not a devise to the son such that the plaintiff as his representative could take under it. But I go further and show that the gift to the daughter conferred on her a daughter's estate. Taking together the two principles, that the testator can make a valid devise, and that he cannot create an estate unknown to Hindu law, it follows that in spite of the existence of his widow and his adopted son he can make for his daughter, either a daughter's estate or an absolute estate, but in neither case can he prescribe a peculiar mode of succession on her death, so as to preclude the ordinary rules of stridhanam descent. If the attempt was made to prescribe a novel mode of descent I say the daughter would take a life estate, and as to the reversion no question need arise here because the adoptive son is the residuary legatee.

It is erroneous to suppose that a daughter's son's son is no heir under Hindu law. *Rewun Persad* v. *Mussumat Radha Beeby* (7) proceeded on a different set of facts. There was definite devise to definite persons. *See* Succession Act, Section 106. Both parties proceeded on the assumption that the devise was vested, and the decision went on the ground that there was division between the two brothers. *Rai Bishen Chand* v. *Mussumat Asmaida Koer* (8) was a case of a devise to a class: specific members of a class may take although a gift to a class as such would fail. *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (9), *Kherodemoney Dossee* v. *Doorgamoney Dossee* (10). *Ram Lal Sett* v. *Kanai Lal Sett* (11). After-born sons would not take. *Raikishori Dosi* v. *Debendra Nath Sircar* (12).

The passage in II Williams on executors, pp. 1247-8, referred to for appellant shows that even assuming the *corpus* went [417] to the daughter only, her children alive at the death of the testator would take after her.

To sum up :—(i) There was no devise to Chinnasami. It would be absurd to take it that the testator wished to make the daughter's children legatees with a life estate interposed, because the one alive at the testator's death would take, and if he died either before or after the daughter, and he left a widow, the widow would take in preference to all others of the daughter's sons. (ii) The testator could make daughter's estate prescribing a line of succession to be construed as a reasonable limitation in conformity with Hindu Law; he wanted only to make it plain that it was not to be stridhanam. (iii) Taking it at the worst for the respondents it was

(1) 11 B. 69 (72). (2) 11 B. 573 (579). (3) 2 I.A. 7 (14).
(4) 9 M. I. A. 123. (5) 10 M.I.A. 279.
(6) 9 B.L.R. 377=I.A. Sup. Vol. 47. (7) 4 M.I.A. 137.
(8) 6 A. 560=11 I.A. 164. (9) 2 C. 262.
(10) 4 C. 455. (11) 12 C. 663. (12) 15 C. 409.

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on the appellant's case a devise of the income to the daughter and of the *corpus* to her childern after her death.

Ramachandra Rau Saheb, in reply.

The words are plain, "to enjoy for life and transmit to descendants." The argument for the respondents is that only the sons of Subbalakshmi should take: but the word 'descendants' includes son's sons, and the testator's intention was clearly that an interest should vest on the birth of each of the daughter's children, thus there would be a deviation from Hindu law. The case is governed by *Rewun Persad* v. *Mussumat Radha Beeby* (1), which proceeded on two grounds, one of which was because the gift was a vested gift (*see* especially at p. 173 of the report) and not by *Sreemutty Soorjecmoney Dossee* v. *Denobundoo Mullick* (2) and *Mahomed Shumsool* v. *Shewukram* (3), which was decided with reference to a very different set of facts.

The rule that the whole bequest fails on failure of a part is new and foreign to Hindu Law, and Section 102 of the Succession Act only applies when the provisions of Sections 100 and 101 are contravened. See *Ram Lal Sett* v. *Kanai Lal Sett* (4), and also *Manjamma* v. *Padmanabhayya* (5).

This appeal having stood over for consideration, their Lordships delivered the following

JUDGMENTS.

WILKINSON, J.—It is argued in appeal that Exhibit A, the will executed by N. Subramanya Ayyar, has been misconstrued, [418] and that the Lower Court ought to have held that Chinnasami took a vested interest under the will.

The portion of the will which has to be interpreted runs thus: "I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands or Government promissory notes, shall enjoy the produce or interest accruing thereon, and shall transmit the *corpus* intact to her male descendants."

The will bears date 24th September 1884. It was confirmed by a codicil executed on the day of the testator's death, 1st November 1884. The testator's elder daughter, on 20th November 1884, gave birth to a son, Chinnasami, who died on 15th July 1885. The daughter herself died on 14th March 1886, and the plaintiff, her husband, now claims the estate purchased as the heir of his son Chinnasami.

It is argued on behalf of the appellant that Chinnasami was a legatee under the will and that the right to receive having become vested in him on the testator's death, it passed to his representative, he having died without receiving the legacy. There might be force in the argument if the testator had in any way specified Chinnasami as the legatee, but what he did was to bequeath certain money to his daughter subject to the condition that she should invest the same and transmit the *corpus* intact to her male descendants if she had any. The ascertainment of the persons to whom the estate was to descend in succession to the daughter was postponed until the death of the daughter. Now on the death of the daughter there were no male descendants of hers capable of taking, and the bequest therefore was void and the property reverted to the family of the donor.

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(1) 4 M.I.A. 137. (2) 6 M.I.A. 526. (3) 2 I. A. 7.
(4) 12 C. 663. (5) 12 M. 393.

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Moreover, it is contended on behalf of the respondents that the will of a Hindu must not only be construed consistently with Hindu law, but that in the absence of express words showing such an intention, a devise to a daughter does not confer an estate of inheritance, but only carries a daughter's estate as understood by Hindu law. The testator made three bequests to each of his two daughters. In the first place he directed his household jewels to be divided equally between them and to be taken by them as their absolute property. He also confirmed certain gifts of land already made to them, declaring the property to be theirs absolutely. Thirdly, to his eldest daughter he bequeathed as above [419] noted Rs. 25,000 to be invested by her in land or Government paper with remainder over to her male descendants, if any; and to his younger daughter he bequeathed certain land to be enjoyed by her during her life without power of alienation and to be transmitted to her male descendants. If the testator by these provisions did not intend to create a daughter's estate as known in Hindu Law, then he must have intended to create an estate which is unknown to Hindu Law, and so far his devise would be null and void. The testator left a widow and an adopted son who was appointed residuary legatee. He left certain property to his daughters absolutely, which property would descend as stridhanam. But the property which he left to his daughters for their life would on the death of the daughter revert to her father's heirs. As remarked by the Privy Council, "if a private individual attempts by will to make property heritable otherwise than the law directs, the gift must fail," and it is well established that the estate of a daughter exactly corresponds to that of a widow, both in respect of her restricted power of alienation and to its succession after her death to her father's heirs and not her own—*Sengamalathammal* v. *Valayuda Mudali* (1), *Kattama Nachiar* v. *Dorasinga Tewar* (2), *Ram Lal Mookerjee* v. *Secretary of State* (3). The devise of the daughter's estate to her male descendants was therefore contrary to law and as such void.

On these grounds I would affirm the decree of the Lower Court and dismiss this appeal with costs.

SHEPHARD, J.—The plaintiff claims, as the heir of one Chinnasami, deceased, property in which Chinnasami is alleged to have acquired an interest under the will of his grandfather, N. Subramanya Ayyar.

The latter's will was made on the 24th September 1884, and by it the defendants are appointed executors. The testator died on the 1st November 1884. The clause of the will under which the plaintiff claims is as follows:—"I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands or Government promissory notes, shall enjoy the produce or interest accruing thereon, and shall transmit the *corpus* intact to her male descendants." His case is that inasmuch as the testator's elder daughter, Subbalakshmi was delivered of a [420] son on the 20th November 1884, and that son, named Chinnasami, was in the eye of law alive at the testator's death, he then became entitled to the legacy subject only to the life interest of his mother and that inasmuch as Chinnasami took a vested interest in the property on his birth, it is immaterial that he predeceased his mother. In support of this contention it was argued that the words referring to male descendants should be treated as creating a gift in favour of

(1) 3 M.H.C.R. 312. (2) 6 M.H.C.R. 310. (3) 8 I.A. 46.

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a class and that, as Chinnasami was a person answering the description and ready to take at the testator's death, the Subordinate Judge was wrong in holding that his interest was a contingent one only. The case for the plaintiff assumes that there are words in this will, as in the cases reported in *Rewun Persad* v. *Mussumat Radha Beeby* (1) and *Mahomed Shumsool* v. *Shewukram* (2), indicating persons ascertainable at the testator's death, to whom Subbalakshmi should transmit the property on her death. The persons indicated are her "male descendants." In the event which happened, *viz.*, in the case of Subbalakshmi surviving the testator, it is evident that it could not at the time of his death be said who were her heirs or descendants. *Nemo est hœres viventis.* As long as she lived, Chinnasami had indeed a presumptive claim to be called her legal descendant; but in my opinion, he never acquired a vested interest inasmuch as it was uncertain whether he would be the actual heir of his mother, and in fact he did not live to become so. In my view, therefore, it is a mistake to suppose that there was here any gift to persons designated as belonging to a class in such sense that they could be ascertained and take at the date of the testator's death. To construe the will as creating such a gift would, moreover, as it seems to me, involve consequences which would be wholly foreign to the probable intentions of the testator. In construing a will it is right to have regard, among other circumstances, to the law under which the will is made, and if the language of a will made by a Hindu is susceptible of a meaning which will make it consonant with the principles of Hindu law, that meaning is generally to be adopted in preference to any other. See *Mahomed Shumsool* v. *Shewukram* (3), *Hirabai* v. *Lakshmibai* (4). According to the plaintiff's construction, if Subbalakshmi's son had died sonless, **[421]** leaving a widow, that widow, and, for the same reason, a widow of any other son who was alive at the testator's death and died in Subbalakshmi's life-time, would on her death have been entitled to the property; or, it might be that a surviving son and the widow of a deceased son might have claimed. On the principle that every possible male descendant acquired a vested interest, any person who could claim to be heir of a male descendant of Subbalakshmi, alive at the testator's death, could substantiate his or her claim to the exclusion of any sons that might be born after that date. Had the testator, who was a Vakil of learning and great experience, desired to bring about such a result, it is reasonable to suppose that he would have used apt language for that purpose. His daughter was pregnant at the time when he made his will, and, if his intention had been that imputed to him by the plaintiff, it is reasonable to suppose that he would have made special reference to the son or sons of that daughter and would not have used general words like "male descendants" which he must have known might be taken merely to indicate his intention that the property should not on his daughter's death devolve as her stridhanam. If it is necessary to put a construction on the words referring to male descendant, I think that suggested by the Subordinate Judge and maintained in the argument by Mr. Bashyam Ayyangar is the most reasonable one. An intention that the property should be held by his daughter for life, and after her death, devolve after the manner of daughter's estate, seems to me as probable as the intention that it should pass exclusively to any one or more sons of his daughter who happened to be alive at the date of his

(1) 4 M.I.A. 137. (2) 2 I.A. 7. (3) 2 I.A. 7 (14). (4) 11 B. 573.

own death is improbable. This construction puts the testator's disposition on a footing familiar to Hindu Law and does not involve the idea that he desired to prescribe a new mode of devolution of his property. For these reasons I would dismiss the appeal with costs.

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12 M. 422.

[422] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SUBBARAYA (*Defendant No.* 1), *Appellant v.* KRISHNAPPA AND ANOTHER (*Plaintiffs*), *Respondents.**
[2nd and 20th November, 1888.]

Evidence Act—Act I of 1872, *Section* 116—*Estoppel—Landlord and tenant—Kumaki land—Unassessed waste reclaimed by plaintiff—Patta granted to defendant.*

The plaintiff, who was the holder of a *warg* in Canara, demised adjacent waste land to one who brought it into cultivation and remained in occupation for two years. The land was not assessed to revenue in the name of either of these persons. At the end of two years the tenant let into occupation a sub-tenant who subsequently assigned his right to the defendant the holder of a neighbouring *warg.* The defendant obtained a *patta* for the land from the Revenue authorities. In a suit by plaintiff to eject the defendant:

Held. (1) That the defendant was not estopped from setting up a title adverse to the plaintiff and that his possession became adverse when the *patta* was granted to him ;

(2) That the plaintiff was not entitled to eject the defendant.

[R., 18 M. 434 ; 11 Bom. L.R. 1093=4 Ind. Cas. 246 (248) ; 15 Ind. Cas. 278 (279) ; **D.**, 28 M. 257=15 M.L.J. 147.**]**

SECOND appeal against the decree of C. Gopalan Nayar, Subordinate Judge of Mangalore, in appeal suit No. 278 of 1887, reversing the decree of K. Krishna Rau, District Munsif of Udipi, in original suit No. 210 of 1886.

Suit to recover possession of certain land. The land in question was *kumaki* waste land adjacent to the *wargs* of plaintiff No. 1 and defendant No. 1, respectively. The *warg* of plaintiff No. 1 was an old *warg*, while the *warg* of defendant No. 1 was *hosagame* or new *warg* created out of waste lands granted by Government to him and one Sankaranarayana in 1857 and 1865, respectively. In 1880 plaintiff No. 1 granted a *mulgenichit* of the land in question which was then a barren sand hill to Ranga Bhatta, the father of plaintiff No. 2, who converted it into paddy fields and remained in occupation until 1882; the land not being assessed in the name of any of these persons. In 1882 plaintiff No. 2 let into possession defendant No. 2, who subsequently assigned his rights to defendant No. 1. In 1885 a **[423]** revenue enquiry took place, and the tahsildar, finding that the land was *kumaki* to the first plaintiff's *warg* and partly reclaimed by him or his tenant, ordered that the revenue should be assessed in his name; but the Collector reversed this order and granted the *patta* to defendant No. 1.

The plaintiff now sued to eject the defendants, the Collector not being brought on to the record.

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* Second Appeal No. 128 of 1888.

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The District Munsif dismissed the suit; but on appeal the Subordinate Judge passed a decree in favour of the plaintiffs, against which defendant No. 1 preferred this second appeal.

Narayana Rau, for appellant.

Subba Rau, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C. J., and PARKER, J.).

JUDGMENT.

We are constrained to hold that defendant No. 1 is not estopped by the provisions of Section 116 of the Evidence Act from denying the title of the plaintiffs. It may be true that he originally got in with the connivance of defendant No. 2, who had obtained possession by permission of plaintiff No. 2, but the tenancy of defendant No. 2, if not determined before, was at any rate determined when the plot was declared by the Revenue authorities to be at the disposal of Government and granted to defendant No. 1. Since that date the interest of defendant No. 1 has been adverse. See *Ammu* v. *Ramakishna Sastri* (1).

It may be true, as pointed out by the Subordinate Judge, that, had the Collector rightly understood all the facts of the case, he would have granted the lands in dispute to the plaintiffs instead of to defendant No. 1. The question for us, however, is whether plaintiffs had acquired any legal right.

The principle to start from is that waste lands belong to the State [see *Vyakunta Bapuji* v. *Government of Bombay* (2), *Bhaskarappa* v. *The Collector of North Canara* (3), and in this case it is not denied that the land was a bare sand hill up to 1880. The plaintiffs then cultivated it, but did not get it assessed in their names, and it is impossible to hold that such cultivation for a couple of years will take away from the State its right to grant the land to such applicant as it pleases. It may be that **[424]** according to departmental rules the plaintiffs should have had the land, but the breach of a departmental rule will not create a legal cause of action.

We are of opinion therefore that the District Munsif was right in holding that plaintiffs have no title to the disputed land either by grant or prescription. The appeal must be allowed and the decree of the Lower Appellate Court reversed, the suit being dismissed, with all costs throughout.

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12 M. 424.

ORIGINAL CIVIL.

Before Mr. Justice Handley.

THE MADRAS HINDU UNION BANK (*Limited*) (*Plaintiff*) v. C. VENKATRANGIAH AND OTHERS (*Defendants*).* [26th July, 1889.]

Transfer of Property Act—Act IV of 1882, *Section* 78—*Priority of mortgages—Gross negligence—Estoppel—Agency.*

On the 20th of February 1888, defendant No.1 executed a mortgage in favour of the plaintiff Company. Defendants Nos. 2 and 3 bound themselves as sureties

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* Civil Suit No. 140 of 1888.

(1) 2 M. 226. (2) 12 B. H. C. R. App. 1. (3) 3 B. 452.

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for the due payment of the mortgage amount, on default by the mortgagor. This mortgage had not been registered at the date of the execution of the mortgages next referred to.

On the 27th of April 1888, the Secretary of the plaintiff Company handed over to defendant No. 1 most of the title-deeds which had been delivered to the plaintiff Company on the execution of the mortgage, and defendants Nos. 1 and 3 undertook that they would raise a loan thereon and discharge the debt due to the plaintiff, or return the title-deeds if they failed in raising the loan. On the 28th April 1888 defendant No. 1 deposited the title-deeds with defendant No. 4 and executed a mortgage to her for Rs. 4,000; and on the 7th May 1888 he executed an instrument creating a further charge in her favour for Rs. 1,000. These two sums were applied by defendant No. 1 to his own use, and not in discharge of the prior mortgage. The mortgages to defendant No. 4 described the mortgage premises as being then free from incumbrances:

Held, that the plaintiff Company had been guilty of gross negligence in letting the title-deeds out of their possession and that the mortgages of defendant No. 4 had accordingly priority over the mortgage to the plaintiff Company.

[R., 15 M. 268; 31 M. 7=3 M.L.T. 87=17 M.L.J. 499.]

THIS was a suit in which the plaintiff Company alleged *inter alia* that by an instrument, dated the 20th February 1888, defendant No. 1 mortgaged to the plaintiff Company certain of his immoveable [425] property to secure payment of the sum of Rs. 8,000 with interest thereon. By a further instrument, dated the 2nd March 1888, defendants Nos. 2 and 3 bound themselves to pay to the plaintiff Company the said sum of Rs. 8,000 with interest on default by defendant No. 1. According to the averments in the plaint, defendants Nos. 1 and 3 requested the Secretary of the plaintiff Company on the 27th April 1888 to give them the title-deeds of the mortgaged premises, agreeing that they would either raise a fresh loan on them and repay the mortgage amount with interest up to date or return the title-deeds; and the Secretary, believing the request to be made *bona fide*, sent a portion of the title-deeds to defendants Nos. 1 and 3 in charge of a clerk in the employ of the plaintiff Company; and defendants Nos. 1 and 3 obtained possession of the deeds from the clerk, representing to him that they wished to show the same to a third party for the purpose for raising a loan thereon to pay off the plaintiff's mortgage. The plaint further alleged that the amount due was not discharged nor the title-deeds returned. Defendant No. 4 was joined because she claimed priority in respect of a mortgage and instrument of further charge executed in her favour by defendant No. 1 on the land mortgaged to plaintiff.

Defendant No. 4 in her written statement claimed priority over the mortgage in favour of the plaintiff Company on the ground that the said mortgage and further charge respectively were taken by her *bona fide* for consideration and without notice of the plaintiff's mortgage. To this part of the pleadings the fourth issue related. It was framed as follows:—

Whether defendant No. 4 is by reason of the circumstances mentioned in her written statement, entitled in respect of her mortgage and further charge to priority over the plaintiff's mortgage.

The Acting Advocate-General (the Hon. Mr. *Spring Branson*), (Mr. *W. Grant* with him), for the plaintiff.

The Bank is not bound by the act of the Secretary in parting with the title-deeds, for it was not within the scope of his authority. But if the Bank were bound, the Secretary's conduct did not amount to such gross neglect as to deprive the Bank of priority. The gross neglect must amount to fraud. Even if there were neglect on the part of the plaintiff's Secretary, there was contributory negligence on the part of defendant No. 4. The

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whole of [426] the title-deeds were not handed to defendant No. 4, and she was accordingly put on enquiry. *Northern Counties of England Fire Insurance Company* v. *Whipp* (1), and *Mutha* v. *Sami* (2).

Mr. *Johnstone* (Mr. *R. F. Grant* with him), for defendant No. 4.

The Secretary represented the Bank, and the Bank is bound by his acts. The delivery of the title-deeds was within the scope of his authority. He was the ostensible Agent of the Bank and the Bank is estopped from questioning his authority. The conduct of the Secretary did amount to gross negligence. It placed defendant No. 1 in a position to perpetrate a fraud, and Section 78 of the Transfer of Property Act applies. The deeds delivered to defendant No. 1 were practically all the title-deeds. *Perry Herrick* v. *Attwood* (3), *Briggs* v. *Jones* (4), *Northern Counties of England Fire Insurance Company* v. *Whipp* (1).

The further arguments adduced at the hearing with reference to the above issue appear sufficiently for the purpose of this report from the following passage extracted from the judgment :—

His Lordship, having taken time to consider, delivered judgment with reference to the fourth issue as follows :—

JUDGMENT.

The fourth issue raises a difficult question as to the priority of the mortgages to the Bank, and the fourth defendant. The facts appear to be as follows :—On 27th April 1888 the title-deeds relating to the mortgaged property, with the exception of some unimportant papers, were given by the Secretary to the first and second defendants,—he taking from them two letters,—for the purpose of enabling them to raise a loan elsewhere to pay off the mortgage. These letters contemplate some person being sent with the deeds on behalf of the Bank, and the case set up in the plaint is that a clerk and bill collector of the Bank were sent with the deeds. This however was given up in the course of the case, and it was admitted that nobody on behalf of the Bank was sent with the deeds. The first and third defendants took the deeds next day to the fourth defendant's son who managed her business, and a mortgage for Rs. 4,000 was executed that day, and that sum, less a small deduction for cost of stamp and charity, was paid to the first defendant. On 7th May a further mortgage to the fourth defendant for Rs. 1,000 was executed, and that sum was received [427] by the first defendant. At the time of the execution of these mortgages the plaintiff's mortgage was not registered. Both the mortgages to the fourth defendant contain certain statements that no prior mortgage existed, and I am satisfied on the evidence that the fourth defendant, or rather her son who managed the transaction for her, advanced the money and took the mortgage *bona fide* and without any notice of the plaintiff's mortgage. The question I have to determine is whether under these circumstances the plaintiff's mortgage is to be postponed to the fourth defendant's. The first question which arises is how far the plaintiff Bank is liable for the Secretary's acts or omissions, and I think they are liable in this case. They left the deeds in the custody of the Secretary, and it would, I think, be well within the scope of his business as Secretary to allow them to go out of his possession for the purpose of enabling the mortgagor to raise a loan elsewhere to pay off the Bank's mortgage. If he did not take proper precautions in doing this, and enabled the mortgagor to defraud others,

(1) 26 Ch. D. 482. (2) 8 M. 200. (3) 2 De G. & J. 21. (4) L.R. 10 Eq. 92.

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the Bank is responsible for his carelessness. This is not like the case of *Northern Counties Fire Insurançe Company* v. *Whipp* (1). There the manager of a Company having mortgaged his own property to the Company, and being in custody of the title-deeds as manager, fraudulently executed a mortgage to a third party without notice of the Company's mortgage, and it was held that the Company did not lose their priority. But there the manager was certainly acting outside the scope of his duties. He was not the agent of the Company for the purpose of defrauding them, and they could not have anticipated that he would use the possession of the title-deeds to do so. Then in this case, assuming that the acts or omissions of the Secretary are such as the Bank is responsible for, are they such as entitle fourth defendant to priority? Section 115 of the Evidence Act as to estoppel is relied on by fourth defendant's Counsel, but I think it has no application to the case, as there is nothing to show that the Secretary had any intention to join in the fraud on the fourth defendant. The provision of law affecting the case is Section 78 of the Transfer of Property Act, and the question to be decided is whether the acts or omissions of the Secretary amount to gross negligence within the meaning of that section. Apart from [428] authority, I should consider that a prior mortgagee parting with the title-deeds to the mortgagor for the purpose of raising money by another mortgage, is guilty of gross negligence unless he takes ordinary precautions that any person advancing money on the security of the deeds should know of his mortgage, such as sending some person with the deeds, insisting that they should be inspected in his presence or otherwise. Non-registration would not of itself be gross negligence as the law allows four months, but it is a reason for extra caution. Registration would be noticed to subsequent lenders, but without it how is a prior mortgage to be discovered ?

The cases of *Perry Herrick* v. *Attwood* (2), *Briggs* v. *Jones* (3), are directly in point and confirm this view. In the case of the *Northern Counties of England Fire Insurance* v. *Whipp* (1) before referred to, all the decisions upon this subject are reviewed and certain principles are laid down which certainly seem rather to affect the doctrine of *Perry Herrick* v. *Attwood* (2), and *Briggs* v. *Jones* (3), and to require that there should be an element of fraud in the negligence of the prior mortgagee to constitute such gross negligence as would postpone him to the subsequent incumbrancer. But both the cases above-mentioned are referred to in the judgment in the later case and not dissented from, and it must be taken that they were held to be well decided, and in neither of these cases there was any suggestion of fraud on the part of the first mortgagee. I have been referred by the learned Counsel for the fourth defendant to a decision of Kernan, J., in *Damodara v. Somasundara* (4) where the learned Judge seems to have followed *Briggs* v. *Jones* (3), taking the same view as I now take of what constitutes gross negligence for which a prior mortgage will be postponed. For the plaintiff the case of *Mutha* v. *Sami* (5) is relied on, but in that case the Court really found that the prior incumbrancer was guilty of no negligence at all and did nothing but deal with his own mortgage document as he had a perfect right to do, and *Briggs* v. *Jones* (3) is quoted in the judgment without dissent. Some stress is laid by the plaintiff's Counsel on the fact that the Secretary of

(1) L.R. 26 Ch. D. 482. (2) 2 De G.&.J. 21. (3) L.R. 10 Eq. 92.
(4) See judgment printed below, (12 M. 429, *Ed.*). (5) 8 M. 200.

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the Bank kept back some of the papers relating to the mortgaged property. But I think there is nothing in this. [429] The documents he parted with carried the title as far back as 1825, and there was nothing in them to put the fourth defendant upon enquiry for further papers. It is argued for the plaintiff that the negligence and undue haste of the fourth defendant's son in concluding the transaction conduced to the fraud practised upon him by the first defendant, and that the fourth defendant is, therefore, not entitled to priority. I cannot see that there was any negligence on the part of the fourth defendant's son. The title-deeds were, on the face of them all, in order, and there was nothing to excite a suspicion that there was a prior incumbrance, and enqiry at the Registration office would have shown nothing. The mortgagor declared in the mortgage deeds there was no prior incumbrance, and there was apparently no reason why he should not be believed. I find upon the fourth issue that the fourth defendant is entitled, in respect of her mortgages of 28th April 1888 and 7th May 1888, to priority over the plaintiff's mortgage.

Branson and *Branson*—Solicitors for plaintiff.

Grant and *Ling*—Solicitors for defendants.

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12 M. 429.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

DAMODARA (*Plaintiff*) *v.* SOMASUNDARA AND OTHERS (*Defendants*).*

Transfer of Property Act—Act IV of 1882, *Section* 78—*Priority of mortgages—Gross negligence—Registration.*

A mortgagee at the request of the mortgagors returned to them their certificate of title to the mortgage premises to enable them to raise money to pay off his mortgage. This mortgage was duly registered. The mortgagors who remained in possession of the mortgage premises throughout, having shown the certificate to a third person whom they informed of the existence of the first mortgage, and borrowed Rs. 400 from him, subsequently informed him that the first mortgage was paid off, delivered the certificate to him and executed to him a mortgage of the same premises to secure the sum of Rs. 400 and a further sum of Rs. 800.

Held, that though the second mortgagee had been wanting in caution, yet since he had been thrown off his guard by the conduct of the first mortgagee, in returning to the mortgagors their certificate of title, the second mortgagee was entitled to priority in respect of his security over the first mortgagee.

[Appr., 12 M. 424 (428); 7 C.W.N. 11 (17); R., 15 M. 268; 31 M. 7=17 M.L.J. 499=3 M.L.T. 87.]

[430] THIS was a suit by a prior mortgagee against the mortgagors and a puisne mortgagee who claimed to be entitled to priority in respect of his security over the mortgage to the plaintiff under the circumstances which are set out in the judgment.

The suit came on before KERNAN, J., who, after taking time to consider, delivered the following

JUDGMENT.

The plaintiff's mortgage of 1879 from defendants Nos. 1 and 2 was duly registered, and there is now due on it Rs. 400. The certificate was

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* Civil Suit No. 152 of 1883.

put in the plaintiff's possession, and defendant No. 1 signed a rent agreement, remaining in possession. The mortgage to defendants Nos. 3 and 4 is dated 1st July 1880 and is registered, and Rs. 1,200 is due on it. The plaintiff admits that on the 6th May 1880, he, at the request of defendants Nos. 1 and 2, handed to them the certificate of the house which was the subject of his mortgage for the purpose of enabling the defendants to raise money on the security of the property. Defendants Nos. 1 and 2 signed and delivered to the plaintiff, on the 6th May, Exhibit A. On the 6th May, defendants Nos. 1 and 2 applied to defendants Nos. 3 and 4 for a loan of Rs. 1,200 on the security of the house, and they produced the certificate, but stated that there was a mortgage on the house which defendant No. 1 intended to pay out of the loan. Defendants Nos. 3 and 4 accordingly advanced to defendants Nos. 1 and 2 Rs. 800 on their promissory note, and they, defendants Nos. 1 and 2, took away the certificate. In July 1880, defendant No. 1 brought to defendants Nos. 3 and 4 the certificate and stated that the mortgage was paid off, and asked for the further loan of Rs. 400 on giving a mortgage for the full sum. Defendants Nos. 3 and 4 believing the statement that the mortgage was paid, advanced Rs. 400, and defendants Nos. 1 and 2 executed a mortgage for Rs. 1,200 which was registered. Defendants Nos. 3 and 4 did not ask defendants Nos. 1 and 2 before the mortgage was executed or afterwards, who the mortgagee was, or the amount of his mortgage, or whether it was registered, or for a copy of it, nor did they ask for possession of that mortgage, or take possession of it; but the defendant No. 1 was in possession, and defendants Nos. 3 and 4 were not informed that defendants Nos. 1 and 2 had possession under a rent agreement with the mortgagee. After possession of the certificate was obtained by defendants Nos. 1 and 2 from the plaintiff, they did not either of them return to the plaintiff within the five days mentioned in Exhibit A, and plaintiff says he was unable to find them; but they returned at the end of November and did not produce the certificate nor mention the fact of the borrowing of the money, or of the execution of the second mortgage, nor promise to pay the amount.

[431] This suit is filed by the plaintiff to recover the amount of his mortgage, and defendants Nos. 3 and 4 on their application were made supplemental defendants. They contend that their mortgage is prior to the plaintiff's on the ground that the plaintiff was guilty of gross negligence in placing the certificate in the hands of defendants Nos. 1 and 2 and thus enabling them to obtain a loan on the mortgage of the house, and they rely on Section 78 of the Transfer of Property Act. The plaintiff contends there was no gross negligence on his part, and that the defendants were not induced to advance money by any negligence of the plaintiff, but that the defendants' advance of money was owing to their own negligence in not enquiring in respect of the prior existing mortgage of which they had express notice. The equitable doctrine as to gross neglect, embodied in Section 78 of the Transfer of Property Act, is well established, and what conduct amounts to gross neglect has been considered in many cases. No general definition of gross neglect has been nor can be laid down. Each case must depend upon the facts proved in it and reasonable inferences from such facts. [His Lordship then stated the facts of *Evans* v. *Bicknell* (1), and having summarized the judgment in that case, proceeded as follows:—] If, therefore, the negligence of the plaintiff amounted to

(1) 6 Ves, Jun. 173.

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constructive fraud, he was guilty of gross neglect within the rule of equity and of the Act. Constructive fraud is defined in Story at paragraphs 258 and 390—see *Colyer* v. *Finch* (1); *Perry Herrick* v. *Attwood* (2); *Hewit* v. *Loosemore* (3); *Espin* v. *Pemberton* (4); *Layard* v. *Maud* (5). Here the plaintiff is a legal mortgagee, and the question is whether the second mortgagee has a good equitable defence—a right to have the plaintiff's mortgage postponed.

In considering the evidence, the Exhibit A, the letter of the defendants Nos. 1 and 2, though important on the question of negligence, suggests the defence that the plaintiff, in fact authorized defendants Nos. 1 and 2 to raise money on mortgage, and that defendants Nos. 1 and 2 acted on that authority in executing the mortgage to the defendants. There is no doubt that the plaintiff delivered the certificate to the mortgagor on the terms contained in Exhibit A.

Under those terms defendants Nos. 1 and 2 were authorized to place the title-deeds in another place, *i.e.*, to raise money on it from some other person, and they undertook to pay the plaintiff the amount of the principal remaining due and interest, and get back the [432] mortgage deed. The plaintiff relied on the agreement of defendants Nos. 1 and 2 to raise the money in five days and pay the remainder of his demand. During those five days defendants Nos. 1 and 2 were authorized to raise money on the security, and if they had executed the mortgage within those five days, could the plaintiff have disputed the security? On the same day the plaintiff gave to the defendants the certificate they obtained from defendants Nos. 3 and 4 Rs. 800, on a promissory note, part of Rs. 1,200, agreed to be lent on mortgage of the property, stating that there was a mortgage on the property, and that they would pay it off. The mortgage was not then executed, but it was agreed by defendants Nos. 1 and 2 to be executed when the balance of Rs. 1,200 was advanced. The plaintiff did not take any active steps after the five days to get back the deed, and even when he saw defendants Nos. 1 and 2 at the end of two months, he does not appear to have demanded or insisted on the production of the deed. The existence of Exhibit A does not appear to have been known to defendants Nos. 3 and 4. Still the authority to pledge had been given to the plaintiff. This case is in principle, though not in circumstances, the same as *Briggs* v. *Jones* (6). In the view expressed in that case I think the plaintiff's mortgage should be postponed.

The question of the gross negligence attributed to plaintiff cannot be considered apart from the authority to pledge given by the plaintiff. The plaintiff most negligently placed the certificate in the hands of defendants Nos, 1 and 2 and allowed them to represent themselves to defendants Nos. 3 and 4 as the owners. The certificate was in their name. In *Evans* v. *Bicknell* (7) the essential question was whether there was an intention by *Bicknell* that Shapnell might represent himself as owner. Here such an intention is established beyond doubt. The plaintiff took no steps to ask for the certificate at the end of the five days. The plaintiff says that defendants Nos. 1 and 2 did not return after they got the certificate for two or three months. . . . . He says defendants Nos. 1 and 2 did not say they had raised money, but they did not produce the certificate, and the plaintiff appears to have accepted their promise to pay the balance. There is no evidence of any active steps taken until this suit is filed in

(1) 5 H.L.C. 905. (2) 2 De G. & J 21. (3) 9 Hare 449.
(4) 4 Drew 333. This decision was affirmed on appeal, see 3 De G. & J. 547.
(5) L.R. 4 Eq. 397. (6) L. R. 10 Eq. 92. (7) 6 Ves. Jun. 173.

May 1883, and even then the plaintiff apparently was not aware of the claims of defendants Nos. 3 and 4. I think therefore that gross neglect is attributable to the plaintiff in delivering the deed to defendants Nos. 1 and 2 under the circumstances.

The plaintiff however contends that defendants Nos. 3 and 4 had admittedly express notice on the 6th May 1880 that there was a **[433]** mortgage, and as they made no inquiry on the subject either as to the mortgagee or after the mortgage or any copy of it, or whether it was registered, and as they did not get the possession of it, or any release of it, the defendants have been grossly negligent.

The plaintiff's mortgage is prior in point of time and registration . . . . There is no doubt that defendants Nos. 3 and 4 could have ascertained who the mortgagee was, if they had chosen to inquire, and if they had inquired of the mortgagor at any time before 1st July, the date of their mortgage, they would have been informed that the sum of the mortgage was not paid, and it would have been their duty to see that it was paid, or to have got a receipt or discharge from the mortgagee for the amount. They were wanting in caution in not making the inquiry; but I see no reason to think that they wilfully abstained from inquiry. They were informed by defendants Nos. 1 and 2, who had the deed and were in possession, that the mortgage was paid out of the loan.

The mortgagors' representations could not bind the prior mortgagee; but the fact that defendants Nos. 1 and 2 produced the deed on the 6th May and again on 1st July, and their representations to defendants Nos. 3 and 4 on both occasions, and the possession by them of the property, I think may be fairly considered to have thrown the defendants off their guard. They did not abstain from all inquiry, but were misinformed by the party whom the plaintiff enabled by his negligence to commit the fraud. I do not see that under the circumstances defendants Nos. 3 and 4 are guilty of gross negligence, though no doubt there was some negligence.

The plaintiff is no doubt the legal mortgagee, but I think he was guilty of gross neglect [see *Hewitt* v. *Loosemore* (1)], and as such neglect was much greater than that of defendants Nos. 3 and 4, if one of two parties must suffer for the acts of the third party, he who has enabled the third party to occasion the loss must sustain it. The plaintiff is therefore not entitled to the benefit of the rule "*qui prior est in tempore, potior est in jure.*"

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(1) 9 Hare 449.

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[434] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

SANKARAN (*Defendant No.* 1), *Appellant* v. PARVATHI AND OTHERS (*Plaintiff and Defendants, Nos.* 2 *to* 22), *Respondents.** [26th February and 20th March, 1889.]

Malabar Law—Decree against karnavan—Representative of tarwad—Limitation Act, 1877, *Section* 14, *exp.* 1, *Schedule II, Article* 11.

The karnavan and an anandravan of a Malabar tarwad were authorized by a karar to manage the affairs of the tarwad. A decree was obtained against them, and land belonging to the tarwad was attached and sold in execution. The plaint did not describe the defendants otherwise than by their individual names; but the plaintiff's claim was, *inter alia*, in respect of the breach of a contract by the defendants to put him into possession of certain land which was expressed to be "the jenm of the defendants' tarwad." It was found in the present suit that the amount decreed in the prior suit constituted a debt due by the tarwad:

Held, the decree and the execution sale did not bind the tarwad—*Daulat Ram* v. *Mehr Chand* (1), distinguished.

This suit was brought on 8th August 1884 to declare that the sale in execution was not binding on the tarwad. The present plaintiffs being members of the tarwad intervened in execution of the decree, but their claim was dismissed on 5th September 1882. On the 27th September 1882 they filed a suit in the Court of the District Munsif, praying for the relief now sought. The District Munsif dismissed the suit on the ground that he had no jurisdiction On appeal the District Judge made an order directing him to dispose of it, which he accordingly did; and he passed a decree against which an appeal was pending on 17th August 1883. But on the last-mentioned date the High Court set aside the order of the District Judge and directed him to ascertain the market-value of the land and make a fresh order, and the inquiry, directed by the High Court, did not terminate until 30th October 1883 when another order was made by the District Judge by which the original decision of the District Munsif was confirmed:

Held, that the prior suit terminated only on the 30th October 1883, and that the present suit was not barred, under Limitation Act, 1877, Schedule II, Article 11.

[R., 15 M. 333; 10 C.P.L.R. 67 (70); 16 C.P.L.R. 19 (24).]

APPEAL against the decree of V. P. deRozario, Subordinate Judge of South Malabar, in original suit No. 37 of 1884.

Suit by members of a Malabar tarwad for a declaration that the sale of certain tarwad property in execution of a decree passed in original suit No. 4 of 1881, on the file of the Subordinate Court at Calicut, against defendants Nos. 2 and 3 does not bind the [435] tarwad. The then defendant No. 1 was acting as karnavan, and the then defendant No. 2 was an anandravan of the plaintiff's tarwad.

Defendant No. 1 was the assignee of the decree referred to above. He raised, *inter alia*, a plea of limitation which the Subordinate Judge dealt with as follows:—

"First defendant contends that defendants Nos. 4 to 13 are barred from suing to set aside the sale of the plaint properties, under Article 11 of Schedule II of the Limitation Act, and that as the present plaintiffs could only enforce this claim in conjunction with these defendants and the latter's claim is barred, plaintiff's claim is also barred—*Ramsebuk* v. *Ramlall Koondoo* (2), *Kalidass Kevaldas* v. *Nathu Bahgvan* (3). But in

* Appeal No. 144 of 1887.

(1) 15 C. 70. (2) 6 C. 815. (3) 7 B. 217.

this suit the plaintiffs do not sue to set aside the sale. They merely ask for a declaration that the sale is invalid. The claim falls under Article 120 and is not barred." 1889 MARCH 20. — APPELLATE CIVIL. —

The Subordinate Judge held that the debt sued on in original suit No. 4 of 1881 was contracted by the defendants for proper tarwad purposes, but passed a decree for the plaintiffs on the ground that they were not bound by the decree passed in that suit against defendants Nos. 2 and 3.

Defendant No 1 preferred this appeal.

Sankaran Nayar, for appellant.

Bhashyam Ayyangar, *Sankara Menon*, and *Sundara Ayyar*, for respondents.

The further facts of this case appear sufficiently for the purpose of this report from the judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.).

JUDGMENT.

The first question for decision is whether the decree in original suit No. 4 of 1881 made by the Subordinate Judge of Calicut binds the tarwad of the plaintiffs in this suit and of the other members of the tarwad who are defendants. The defendants in that suit were the karnavan of the tarwad and an anandravan, who were by karar executed by the family authorized to manage their affairs and to raise money on security of the properties of the tarwad or otherwise. It is found in this suit that the amount decreed in suit No. 4 of 1881 is a debt due by the tarwad.

[436] But the defendants in suit No. 4 of 1881 were not described in the plaint as karnavan or anandravan, nor is any reference made in the plaint to the karar. The plaint states that the defendants agreed to grant the plaintiffs an *ubhayapattam* demise of certain lands therein specified and which the plaint alleges "are the jenm of the defendant's tarwad" on a kanom of Rupees 3,000 advanced by plaintiffs to the defendants, and that the defendants agreed to put the plaintiffs in possession of the property to be demised and that the defendants by deed agreed to pay interest. The plaint then states that the defendants did not act up to the stipulation, and the plaintiffs claimed the principal sum and interest, and were not willing to take possession. The total claim set out in the plaint is Rupees 7,560.

The decree in suit No. 4 of 1881, dated the 4th June 1881, orders the defendants in that suit to pay the plaintiffs Rupees 5,200 and costs and further interest on Rupees 3,000 at 12 per cent.

Under that decree immoveable properties of the tarwad were attached, and the plaintiffs in this suit presented to the Subordinate Court in suit No. 4 of 1881 a claim to the properties attached which, they alleged, were tarwad properties, and requested removal of the attachment. That claim was disallowed by the Court under Section 281 of the Civil Procedure Code. The property attached belonged to the tarwad. No members of the tarwad were parties to the suit No. 4 of 1881 except the two defendants thereto, who were not described in the plaint or decree as karnavan or anandravan, but were merely described by their individual names. The money alleged to have been advanced by the plaintiffs is not in the plaint stated as advanced to or for the purposes of the tarwad. No relief is either sought in the plaint against the tarwad or their properties or given by the decree. But it is contended that from the statement in the plaint that the properties agreed to be demised by the defendants in suit No. 4 of 1881

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"are the jenm of the defendants' tarwad," it appeared that the plaintiffs sought to affect the tarwad and their properties and that the defendants, therefore, represented in that suit the tarwad.

We are unable to agree to this contention, looking to the other allegations in the plaint and to the relief sought. The statement referred to merely describes whose the properties were which the defendants contracted to demise. The plaint states the defendants [437] broke that contract. The plaintiffs did not state a case against the tarwad, but stated a case of breach of contract against the defendants alone. There is nothing on the face of the plaint in suit No. 4 of 1881 to show that the defendants were sued as representatives of the tarwad or to show that the tarwad or their properties were intended to be affected by that suit, and as the decree is one against the defendants only by their individual names, we think the tarwad was not bound by the decree within the principle of the decisions of the Full Bench of this Court [see *Ittiachan* v. *Velappan* (1)], in reference to suits in which the question may be whether, under certain circumstances, the karnavan represented the tarwad—*Doulat Ram* v. *Mehr Chand* (2), *Kombi* v. *Lakshmi* (3), *Bissessur Lal Sahoo* v. *Maharajah Luchmessur Singh* (4).

It was then contended that the effect of the decision by the Privy Council in *Doulat Ram* v. *Mehr Chand* (2) shows that the principle laid down in *Ittiachan* v. *Velappan* (1) should no longer be considered as correct, and that if the karnavan was a defendant in a suit, even though he was not sued as karnavan, and though there was nothing on the face of the plaint to show that he was sued as representative of the tarwad, or that it was intended to affect the tarwad, or the property of the tarwad, still, that the tarwad would be bound by the decree. But we do not accede to this contention. What was decided in that case was that the manager of a Hindu trading family, who had authority to grant a mortgage, represented the family in a suit by the mortgagee to enforce the mortgage, and that the other members of the family, not parties to the suit, were bound by the decree subject to their right to prove that the debt was not of a nature that they should be bound thereby. That case is not in conflict with the principles decided in *Ittiachan* v *Velappan* (1) relating to suits against karnavans of tarwads. We think that case does not in its facts or in effect go the length contended for.

The next question in this case is whether this suit is barred by limitation on the ground that it was not filed within 12 months from the 5th of September 1882, the date of the order disallowing the plaintiffs' claim in suit No. 4 of 1881 under Limitation Act, 1877, Schedule II, Article 11.

[438] The answer of the plaintiffs is that after the date of the order of the 5th of September 1882 the plaintiffs within 12 months from the date of that order filed a suit in the Munsif's Court, No. 640 of 1882, on the same cause of action as that on which this suit is founded, but that Court from defect of jurisdiction was unable to entertain such suit; and that the time the plaintiffs were prosecuting that suit in good faith and with due diligence should be excluded from the computation of 12 months, and therefore this suit is not barred.

The facts are as follows: When the attachment was laid on, the plaintiffs lodged a claim under Civil Miscellaneous Petition No. 959 of 1882, claiming the property as tarwad property. That claim was disallowed by

(1) 8 M. 484 (488). (2) 15 C. 70. (3) 5 M. 201. (4) 6 I.A. 233.

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order on the 5th September 1882. On the 27th September 1882 the plaintiffs filed original suit No. 640 of 1882 in the Munsif's Court, praying to establish the right of the tarwad to the property attached and have the attachment set aside. On the 16th December 1882 the Munsif held the suit was outside his jurisdiction and returned the plaint to be presented to the proper Court. On appeal the District Judge on the 16th February 1883 held that the Munsif had jurisdiction, and directed him to try the case. The High Court by order, dated 17th of August 1883, set aside the order of the District Judge and directed him to ascertain the market-value of the land and pass a fresh order. After the District Judge set aside the order of the Munsif, the plaint was filed in the Munsif's Court and the Munsif heard the suit and made a decree thereon. An appeal was filed in the District Court and was pending when the High Court made the order of the 17th August 1883.

If the 17th August 1883 is to be taken as the date upon which the proceedings in suit No. 640 of 1882 ended under explanation I to Section 14 of the Limitation Act, then excluding the term from the 27th September 1882 to the 17th of August 1883, the plaintiffs should be barred. This suit was filed on the 8th of August 1884 in the Subordinate Judge's Court a new plaint being filed. The explanation limits the time allowed to the date when the proceedings in the first suit were ended. The order of the High Court did not end the prior suit. That order referred it to the Judge to ascertain the market-value of the land and directed him to pass a fresh order.

The order of the High Court was sent from the High Court to the Judge, and the inquiry directed by High Court having been **[439]** made the Judge, by an order, dated the 30th of October 1883, confirmed the original order of the Munsif, and the prior suit was then terminated only on the 30th of October 1883. The suit therefore is not barred by limitation.

We believe, however, that up to the date of the 30th of October 1883 the plaintiff did prosecute the prior suit with due diligence in good faith, and that the cause of action in the first suit and that in this suit is the same. The addition of members of the family as defendants does not affect the question of limitation. Being of opinion that defendants in suit No. 4 of 1881 were not sued in that suit as representatives of the tarwad, and that the decree in this suit does not bind the tarwad, and being also of opinion that this suit is not barred by limitation, we dismiss this appeal with costs.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

VYTHINADAYYAN AND ANOTHER (*Defendants Nos.* 3 and 4), *Appellants v.* SUBRAMANYA (*Plaintiff*), *Respondent.**
[5th and 13th April, 1889.]

Transfer of Property Act—Act IV of 1882, *Section* 52—Lis pendens—*Partition suit—Decree by consent.*

Pending a suit for partition of land, &c., two of the parties to the suit sold part of the land in question to a stranger who was not brought on to the record.

* Appeal against Order No. 142 of 1888.

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After the execution of sale-deed the parties to the suit entered into a compromise and a decree was passed by consent accordingly. In a suit by the purchaser for possession of the land sold to him:

Held the purchaser was not bound by the decree passed by consent.

[Overruled, 29 M. 426 (F.B.) = 16 M L.J. 372 = 1 M.L.T. 145; Diss., 6 N.L R. 240 (241); N.F., 6 Ind Cas. 750 = 13 O.C. 98; R., 18 C. 188; 6 C.L.J. 609 (612); 17 C.W.N. 413 (416); 6 O.C. 294; D., 19 P L.R. 1904.]

APPEAL under Section 562 of the Code of Civil Procedure against the order and decree of K. R. Krishna Menon, Subordinate Judge of Tanjore, in appeal suit No. 744 of 1887, reversing the decree of T. A. Krishnasami Ayyar, District Munsif of Mannargudi, in original suit No. 360 of 1886, and remanding the suit to the Court of the District Munsif to be tried on the merits.

[440] Suit for partition and possession of land conveyed to the plaintiff by defendant No. 1 and one Rammanna Ayyan by a sale-deed, dated 17th September 1874. At the time when this sale-deed was executed original suit No. 26 of 1874 was pending in the Subordinate Court of Tanjore. The above-montioned vendors and other members of their family were parties to that suit, and the prayer of the plaint therein was for the partition of the family property including the land in question in the present suit. Original suit No. 26 of 1874 was determined on 27th February 1875 by a decree passed by consent of the parties.

The District Munsif held that the plaintiff was bound by the above decree as a purchaser *pendente lite*, and passed a decree accordingly. On appeal, the Subordinate Judge reversed the decision of the District Munsif observing:—

"It is admitted that the suit in which the decree was passed was "not a contentious one, and that the decree was not the result of the "investigation of the merits of the suit. It proceeded simply upon a "razinama filed by the present plaintiff's vendors and the then plaintiffs "in the suit. It seems to me that a purchaser *pendente lite*, ought to be "bound only by such results which, from the nature of the suit, and from "the relief prayed, he might expect would take place. He had no reason "to expect that his vendors would be treacherous enough to give up certain "property to their opponents which they had already sold to plaintiff. "The force of *lis pendens* applies only to an adjudication which is the "natural result of the investigation of the merits of suits and not to mere "agreements which the parties chose to make during the pendency of the "suits. If a purchaser *pendente lite*, did not think fit to become a party "to the suit, he cannot be held bound by any agreement which the parties "chose to make or any order that may be made thereon—*Kasumunissa* "*Bibee* v. *Nilratna Bose* (1). The plaintiff is not therefore bound by the "razi decree in original suit No. 26 of 1874. The Munsif's decree, which "proceeded upon this preliminary point, is reversed and the suit remanded "for trial on its merits."

Defendants Nos. 3 and 4, who were in possession of the land in question, preferred this appeal.

Pattabhiramayyar, for appellants.

[441] *Bhashyam Ayyangar*, for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

(1) 8 C. 79 (85).

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APPEL-LATE CIVIL.

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JUDGMENT.

The facts are as follows :—The plaintiff purchased the property in dispute on 17th September 1874 from defendant No. 1, and his brother Ramanna, during the pendency of a partition suit (original suit No. 26 of 1874) to which defendant No. 1 and Ramanna were parties, that suit being brought by the present defendant No. 2 and Nagu. The sale-deed purported to convey to the plaintiff plaint items 1, 2 and 3. The plaintiff was not made a party to suit No. 26 of 1874, and it was compromised by the parties. The razinama decree gave to defendant No. 2 and Nagu (plaintiffs in that suit) the western two-thirds in items 1 and 2 and the whole of item No. 3. The defendants contended that the plaintiff is bound by the decree in that suit, being a purchaser *pendente lite*; that he can take the eastern one-third in items 1 and 2, but that he can have no portion of No. 3. The plaintiff, on the other hand, claims one-third in each item according to quality.

The District Munsif held that the plaintiff as a purchaser *pendente lite* was bound by the decree in suit No. 26 of 1874, and gave him a decree for the eastern one-third in items 1 and 2 and dismissed his claim to No. 3. On appeal the Subordinate Judge held that the doctrine of *lis pendens* applied only to an adjudication on the merits, and not to mere agreements which the parties chose to make during the pendency of the suit. He therefore remanded the suit for trial on the merits. The present appeal is against that order.

The following cases were referred to in argument :—*Munisami* v. *Dakshanamurthi* (1), *Brahannayaki* v. *Krishna* (2), *Kasumunnissa Bibee Nilratna Bose* (3), and *Jenkins* v. *Robinson* (4).

We are of opinion that the order of the Subordinate Judge is right. The true rule as to *lis pendens* as laid down in *Bellamy* v. *Sabine* (5) is that neither party can alienate the property in dispute so as to affect his opponent, and the foundation for the rule is that it would be impossible any suit should be brought to a [442] successful termination if alienations, *pendente lite*, were permitted to prevail. Hence it was held that the necessities of mankind require that the *decision of the Court* in the suit shall be binding not only on the litigant parties but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings.

According to Roman Law after *litis contestatio*, the subject in dispute became litigious and passed into quasi-judicial custody ; but where a suit is compromised by the act of the parties we think the *litis contestatio* has ceased, and the Court performs no judicial function, but only an administrative one in recording the compromise. This is the view taken by Couch, C.J., in *Kailas Chandra Ghose* v. *Fulchand Jaharri* (6) and is consistent with the principle laid down by Chelmsford, L.C., and Lord Romily in *Jenkins* v. *Robinson* (4) ; see also the use of the terms " contentious suit or proceedings " in Section 52 of the Transfer of Property Act.

We therefore confirm the order of the Subordinate Judge and dismiss this appeal with costs.

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(1) 5 M. 371. (2) 9 M. 92. (3) 8 C. 79. (4) L.R. 1 Scotch Appeals 117.
(5) 1 DeG. & J. 556. (6) 8 B.L.R. 474 (489).

1889
MARCH 12.

APPELLATE CIVIL.

12 M. 442.

12 M. 442.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

RAMAKRISTNA AND OTHERS (*Plaintiffs*), *Appellants v.* SUBBAKKA (*Defendant*), *Respondent.** [7th and 12th March, 1889.]

Hindu Law—Inheritance—Illatam—Burden of proof.

N, a Hindu, who had admittedly been taken as *illatam* into the family of his father-in-law died, leaving property which he had acquired by virtue of his *illatam* marriage. He was succeeded by his son, who died without issue, leaving only a sister surviving him. In a suit by the brother of N, who was the managing member of his family, to recover the property from the sister of the last holder:

Held, that the plaintiff was *prima facie* entitled to recover, notwithstanding the admission, and that it was for the defendant to establish any special circumstances to rebut his claim.

APPEAL against the decree of L. A. Campbell, District Judge of Nellore, in original suit No. 27 of 1887.

[443] This was a suit to establish the plaintiff's right to, and to obtain possession of, the moveable and immoveable property of one Pichi Reddi, deceased.

Plaintiff No. 1 was the brother of one Narasa, the late father of the deceased, and sued as the managing member of his undivided Hindu family, of which plaintiffs Nos. 2 and 3 were also members; he further claimed as heir to the deceased.

The defendant was the only sister of the deceased whose only brother had predeceased him leaving no issue. She was in possession of the property in dispute and claimed to be entitled to it—(1) upon the fact which was set forth in the plaint, that her father, Narasa, had been taken as *illatam* into the family of his father-in-law, and subsequently had become possessed of all the property of that family, and (2) upon the allegation, which was not tried, that her husband had been taken by Narasa as *illatam* son-in-law.

The District Judge framed the following among other issues: "Are "the natural brother and nephews of an *illatam* son-in-law heirs-at-law "of that *illatam* son-in-law's sons, who survived him, in respect of the "property of the family to which he was affiliated in preference to his "daughter?"

Upon this issue, the District Judge, after considering the two cases referred to in the judgment of Shephard, J., and *Chenchamma* v. *Subbaya* (1), recorded a finding in the negative, and without proceeding to try the other issues raised on the pleadings he dismissed the plaintiff's suit.

The plaintiffs preferred this appeal against the decree of the District Judge.

Mr. *Subramanyam*, for appellants.

Mr. *Wedderburn*, for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the following

* Appeal No. 136 of 1888.

(1) 9 M. 114.

JUDGMENTS.

1889 MARCH 12. —— APPELLATE CIVIL. —— 12 M. 442.

PARKER, J.—The District Judge has decided the suit upon the first issue only, and we are of opinion that he has placed the *onus probandi* on the wrong side.

It appears that Narasa Reddi predeceased his wife, but that, at her death at any rate, their sons Venkata Reddi *alias* Pichi Reddi and Rami Reddi took jointly as full owners. The younger brother died first without issue, and elder brother was [444] then the last full owner. According to the ordinary rule of Hindu Law his paternal uncles are nearer reversioners than his sister, and it is for those who allege a special custom or a special arrangement at variance with the ordinary rule of law to prove the same. Treating the property as self-acquired, the origin of the self-acquisition would not *prima facie* affect the right of inheritance.

The defendant alleges that her husband was taken as *illatam* son-in-law into her father's family, in order that after the death of her lost surviving brother, the entire family property should be enjoyed by her as of right. This plea it is for her to prove.

I would reverse the decree of the District Court and remand the suit to be heard on the merits. The costs will abide and follow the result.

SHEPHARD, J.—The last holder of the property sought to be recovered was Venkata Reddi *alias* Pichi Reddi, who died in November 1886, leaving him surviving his sister, the defendant, and the plaintiff, his father's brother. Apart from any special custom, there is no doubt that the plaintiff is entitled to recover. The suit has been dismissed on the ground that the plaint discloses the fact that the defendant's father, Narasa, who died 30 years ago, was taken by one Putta Venkata Reddi as his *illatam* son-in-law, and it has been held that the plaintiff who belongs to Narasa's original family cannot take property, which came to him by virtue of his *illatam* marriage, to the exclusion of a member of the family into which he married. I am of opinion that this decision cannot be supported. It has been held that a person who is taken as *illatam* into another family does not thereby lose his right of inheritance in his natural family—*Balarami* v. *Pera* (1). The tie of relationship between him and his natural family is not severed as it is when there is an adoption under Hindu Law. From this, I think, it must follow that the members of his natural family must equally have such rights in respect of property acquired by him as they would otherwise have had. The circumstance of being taken as *illatam* constitutes a mode whereby the person taken acquires property—*Challa Papi Reddi* v. *Challa Koti Reddi* (2), and if that circumstance is not inconsistent with the person affected still remaining a member of his own family, I cannot understand why it should affect the rules which would ordinarily [445] govern the devolution of his property on his death. It may seem hard that a member of the family into which the *illatam* son-in-law was taken should be ousted from the property originally belonging to that family in favour of one who belongs to another family. But that is a necessary consequence of the alienation in favour of the *illatam* son-in-law. It was competent to him, or at any rate to his last surviving son, who was sole owner of the property, to alienate, and it must equally be an incident of the property that on the death of the last sole owner it should, in the

(1) 6 M. 267.

(2) 7 M.H.C R. 25.

1889 MARCH 12. — APPELLATE CIVIL. — 12 M. 442.

absence of special custom to the contrary, go to his heirs according to Hindu Law.

In my opinion the decree of the Court below must be reversed and the case remanded for trial on the merits. Costs to be provided for in revised decree.

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12 M. 445.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

MEKAPERUMA AND ANOTHER (*Plaintiffs*), *Appellants v.* THE COLLECTOR OF SALEM AND OTHERS (*Defendants*) *Respondents.** [4th January and 5th March, 1889.]

Revenue Recovery Act (Madras), Act II of 1864, *Sections* 25, 27.—*Regulation V of* 1804, *Section* 20—*Notice on minor defaulter—Irregularity in revenue sale.*

A *mitta* consisting of an unsurveyed village, of which the plaintiffs (minors) were the registered proprietors of an undivided moiety, was brought to sale for arrears of kist and was purchased for the plaintiffs by their guardian, duly appointed under Regulation V of 1804, Section 20. The sale was subsequently cancelled; and further arrears having accrued, the mitta was attached again. Before the second attachment took place, the guardian died, and no one having been appointed to succeed him, though an application was made to the Court for that purpose, a written demand under Revenue Recovery Act, Section 25, was tendered to the plaintiffs' mother and affixed to the wall of the house on 17th January, and notice under Section 27 was served on 17th February. The sale took place in September and defendant No. 2 became the purchaser. It was admitted that a division of the village was impracticable. In a suit by the plaintiffs by their mother and next friend to set aside the sale:

[446] *Held*, since service of a demand upon the defaulter is an essential preliminary to sale, the sale was invalid so far as the share of the plaintiffs was concerned, and the sale as a whole was vitiated by the irregularity.

[D., 22 M. 440 (446) = 9 M.L.J. 190.]

APPEAL against the decree of C. W. W. Martin, District Judge of Salem, in original suit No. 9 of 1884.

Suit by two minor plaintiffs, suing by their mother and next friend to set aside a sale of their undivided share in a mitta for arrears of revenue. The District Judge dismissed the suit and the plaintiffs preferred this appeal against his decree.

The Acting Advocate-General (Hon. Mr. *Spring Branson*) and *Subramanya Ayyar*, for appellants.

The Acting Government Pleader (*Subramanya Ayyar*), *Bhashyam Ayyangar* and *Kalianaramayyar*, for respondents.

The facts of the case andthe arguments adduced on the appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

The plaintiffs' father, Mekaperuma Oodayan, was the owner of half the Senthamangalam mitta. He died in 1876 and the plaintiffs were then registered as owners of his moiety. The other sharers were defendant No. 2, who owned $\frac{1}{12}$, which he purchased in 1880; defendants

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* Appeal No. 96 of 1887.

Nos. 4 and 6, who jointly owned another $\frac{1}{12}$; defendant No. 7, who owned $\frac{1}{4}$, and defendant No. 8, who owned the remaining $\frac{1}{12}$

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APPELLATE CIVIL.

12 M. 445.

On the death of the plaintiffs' father, one Varada Peruma Oodayan was appointed their guardian by the District Court under Section 20 of Regulation V of 1804. The kist due to Government was allowed to fall into arrears, in consequence of which the whole mitta was attached and was sold on 9th March 1882 by revenue auction. It was purchased by the plaintiffs' guardian, Varada Peruma Oodayan, for Rs. 65,000, on behalf of the plaintiffs; but as he did not pay the balance of the purchase money, the sale was ultimately cancelled.

The plaintiff's guardian died on 1st December 1882, and shortly afterwards a fresh attachment of the mitta was made for the old arrears and for arrears which had accrued subsequently. At the date of this attachment no new guardian had been appointed by the District Court for the minor plaintiffs under Section 20, Regulation V of 1804. The first notice under Section 25, Act II of 1864, was tendered to the minors' mother on 17th January 1883, but she refused to receive it, and it was then affixed to the wall of the [447] house. The second notice under Section 27 is said to have been served on 17th February 1883, but it does not appear in what mode service was effected. On 2nd March 1883, the Collector wrote to the District Judge suggesting that the Court should appoint a fresh guardian for the minors. From the endorsement made by the District Judge upon the letter (dated 16th July 1883), it would appear that the Judge prepared to consult the Collector as to the fitness of Subbaraya Oodayan (plaintiff's brother-in-law) to be appointed guardian; but there is nothing to show whether any further steps were taken. At any rate when the mitta was brought to sale a second time on 14th September 1883, no fresh guardian had been appointed by the Court.

At that sale the mitta was knocked down to defendant No. 2 for Rs. 1,50,800. The plaintiff's mother and Subbaraya Oodayan above mentioned attended the sale and bid for the plaintiffs, but their last bid was Rs. 50 less than that of defendant No. 2. It would appear that they had in hand at that time some Rs. 15,000, which was nearly double the amount of the arrears of kist due on the mitta; but plaintiffs' mother and defendant No. 2 were equally desirous that the mitta should be sold, each hoping to purchase the whole estate.

The plaintiffs' mother (the unsuccessful bidder) now sues on their behalf to set aside the sale on the ground that the whole proceedings were illegal and not binding on the plaintiffs. It is alleged among other things that the Collector (defendant No. 1) was bound to have attached the moveable property of the registered holders in the first instance; that the demand notice was not served upon any properly-constituted guardian of the minor plaintiffs, nor was it legally served; that the sale of the whole mitta for so small an arrear was unnecessary and illegal; and that defendant No. 1 improperly refused to receive the arrears on the day of sale.

The District Judge overruled all the objections of the plaintiffs and dismissed the suit with costs.

The first objection taken in appeal is that under the terms of the sunnud the personal property of the defaulters should have been first sold. It appears that some of the moveables of defendant No. 2 were released on his electing that the land should be proceeded against. The other proprietors had concealed their moveables. This provision in the sunnud was no doubt meant to [448] save landed proprietors from losing their estates for non-payment of kist if the sale of their moveable

1889, March 5. — Appellate Civil. — 12 M. 445.

properties, which could more easily be replaced, would suffice to satisfy the demands of the State; but in this instance it is clear that all the proprietors wished the estate to be sold. The reason is obvious;—one $\frac{1}{12}$ share had been bought by the defendant No. 2, a man of different caste, and it was felt on all sides that the only way to prevent constant quarrels was to allow the estate to be sold and endeavour to outbid the outsider who had thus intruded into the family estate. The defendant No. 2 on his side was equally anxious for a sale, being desirous of purchasing the whole mitta. The District Judge has, we think, shown that a division of the mitta was impracticable, nor indeed did any of the parties really desire any division.

The only sound ground on which the sale can be impugned is the absence of any demand legally served upon the minors preliminary to the sale of September 1883. The service of such demand upon the defaulter is a legal and essential preliminary to sale, and the plea that the sale of September 1883 was only a re-sale will not avail since the demand then included arrears which had accrued subsequent to the first sale and for which a fresh attachment was necessary. The District Judge held that though the Collector might have exercised a more proper discretion had he waited until the Court's guardian was appointed, he had not acted illegally in dealing with the mother, the natural guardian. For the Government it was contended that Section 20, Regulation V of 1804, only threw upon the Collector the duty of reporting the case to the Judge in the first instance; that the Collector had done his duty and that Varada Peruma Oodayan had been appointed; and that though the Collector had, as a matter of courtesy and for convenience, informed the Court of the death of the guardian, he was not bound so to do. The fault, if any, it was urged was that of the District Judge.

In this view we are not able to concur. The omission of the District Court to appoint another guardian is no doubt unexplained, though possibly it may have been due to the sudden illness and death of the then presiding Judge. It would have been open, however, to the Collector to have reminded his successor of the duty which had devolved upon him, or in case of neglect to have moved this Court for a direction. But in any case it was certainly incumbent upon the Collector to see that the demand [449] notice was served upon some person legally entitled to represent the minor defaulters.

It is then urged that it is the usual practice of the Revenue Department to serve such notices upon the natural guardians of the minor heirs of deceased landholders, and that such notices are usually accepted as valid. No doubt this may be so, but in the case before us the procedure of Section 20, Regulation V of 1804, had been actually adopted and a guardian had been appointed by the Court. The guardian had died and application had been made to the Court to appoint another guardian. The mother declined to act herself and disclaimed all right to look after the interests of the minors with reference to the mitta, and petitioned the Collector prior to the sale to undertake the management of the estate under Section 28, Act II of 1864, since there was no one to look after the interests of the minors. Under these circumstances we cannot hold that the service of the demand notice upon the mother was a valid service upon the minor defaulters.

The sale of the minors' interests is therefore invalid, and this being so it appears to us that the irregularity must vitiate the whole sale. The minors are entitled to a joint undivided one-half share in a mitta which

consists of a single village unsurveyed and the division of which is admitted to be impracticable. The appeal must therefore be allowed and the sale of the mitta set aside. The appellants are entitled to their costs from respondent No. 1 in this Court and the Court below, but the other respondents will bear their own costs.

12 M. 450=1 Weir 635.

[450] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

QUEEN-EMPRESS v. JAMMU AND ANOTHER.* [10th April, 1889.]

Abkari Act—Act I of 1886 *(Madras), Sections* 55 *(a),* 69—*Rules notified by Government under Abkari Act—Rules for "immediate" removal of toddy.*

Toddy-drawers failing to remove their toddy to a shop or distillery "within a reasonable time" after it is drawn, are punishable under Section 55 (*a*) of the Abkari Act, though their licenses do not refer to the Government notification, made under the Act, prescribing its immediate removal.

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure, by H. S. Wynne, Acting District Magistrate of South Canara.

The case was stated by the Acting District Magistrate as follows:—

"The accused are both licensed toddy-drawers and the charge in both cases is that they after drawing toddy left it for some hours in the gardens, which is found to be an offence under Section 55 (*a*) of the Abkari Act, in that paragraph 6 of the Government Notification No 220, dated 28th July 1888, issued in *Fort St. George Gazette*, dated 31st July 1888, Part I, page 548, directs that toddy is to be "immediately' conveyed to a distillery or shop.

"But the same notification (*vide* page 551) contains the form of the license issued to these tappers under sanction of which they draw toddy, and nothing is said in it of carrying the toddy 'immediately' to the shop or distillery, nor is the Government notification referred to in any way in the said license so that it could be held to be incorporated in it. The section under which they have been convicted runs: 'whoever in contravention of this Act, or of any rule or order made under this Act, *or of any license or permit* obtained under this Act . . . . possesses liquor.' It seems to me doubtful whether under the circumstances the convictions are legal."

[451] The Acting Government Pleader (*Subramania Ayyar*), for the Crown.

The Court (COLLINS, C.J., and WILKINSON, J.) delivered the following

ORDER.

We are unable to concur with the District Magistrate that the conviction was wrong. The rules framed by the Governor in Council have the force of law, and in accordance with them, the holder of a tree-tapping license is bound to convey the pots containing toddy to the shop

* Criminal Revision Cases Nos. 96 and 97 of 1889.

1889 APRIL 10. — APPELLATE CRIMINAL. — 12 M. 450 = 1 Weir 635.

immediately after the removal from the trees. As remarked by the Sub-Magistrate the word "immediately" must be held to be equivalent to "within a reasonable time," and what is a reasonable time must depend on the facts of each case, care being taken that opportunity for illicit sale is not encouraged. We decline to interfere.

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12 M. 451 = 1 Weir 113.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* SUBBAYYA.* [11th and 17th July, 1889.]

Penal Code, Sections 181, 182—*Examination on affirmation of one preferring a criminal appeal—Verification of petition of appeal—Criminal Procedure Code, Sections* 342, 428, 540.

In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witnesses. The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegations in the petition of appeal on solemn affirmation, and he did so:

Held, that the appellant had not committed an offence under Section 181 or 182 of the Penal Code.

[F., 19 A. 200 (201) = 17 A.W.N. 23; R., 33 A. 163 (165) = 7 A.L.J. 1143 = 11 Cr. L.J. 537 = 7 Ind. Cas. 914; 4 Ind. Cas. 160 = 12 O.C. 308.]

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by E. J. Sewell, the Acting District Magistrate of Cuddapah.

The accused was charged under Sections 181 and 182 of the Penal Code under the circumstances set out in the judgment of the High Court.

[452] The Magistrate before whom he was charged discharged him under Section 253 of the Code of Criminal Procedure on the grounds (1) that his examination on affirmation was illegal and (2) that the information given by him was not intended by him to injure the Magistrate referred to but to procure a reversal of his sentence.

As to these grounds the District Magistrate said in his report to the High Court:—

"Neither of these reasons for dismissal seem to me valid. Section 428 "of the Code of Criminal Procedure authorises a Magistrate hearing "an appeal to take any additional evidence he may consider necessary, "and Section 540, Criminal Procedure Code, authorises him to examine "any person at any stage of any proceeding under the Code. Unless "therefore the appellant was an accused person (when Section 342 prevents his examination on oath) the Head Assistant Magistrate was "authorised to examine him on oath or affirmation. I can see no ground "for the Magistrate's opinion that Appireddi Subbayya, when appealing against his conviction, was in the position of an accused person. "Moreover, the point on which he was examined had nothing whatever to do with his guilt or innocence of the charge against him, "but was only relevant to the question whether he had been fairly and "legally tried.

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* Criminal Revision Case No. 241 of 1889.

"As to the charge under Section 182, the section includes the giving "of false information to a public servant ......knowing it to be likely that "he will thereby cause such public servant to use his lawful power to the "injury or annoyance of any person, or to do or omit anything which he "ought not to do, or omit if the true state of facts.......were known by "him.

1889 JULY 17. — APPELLATE CRIMINAL. — 12 M. 451= 1 Weir 113.

"In this case the statement that the witnesses were not summoned "was false, and there is evidence that Appireddi Subbayya knew it to be "false, it was evidently both intended and known to be likely to cause the "Head Assistant Magistrate to order a new trial or further inquiry which "he certainly would not have done if he had known the true state of the "facts."

Counsel were not instructed.

The facts of this case appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.)

JUDGMENT.

[453] The accused appealed against this conviction by the Sheristadar-Magistrate of Jammalamadugu, and in his petition of appeal, stated, among other things, that the Sheristadar-Magistrate had declined to summon the witnesses cited for the defence. On being required to give a statement to that effect on solemn affirmation by the Head Assistant Magistrate, he did so. On inquiry it appeared that that statement was false. Thereupon the accused was prosecuted for offences under Sections 181 and 182, Indian Penal Code. The Second-class Magistrate, who inquired into the case, discharged the accused under Section 253, Code of Criminal Procedure, on the ground that the appellant in a criminal case was not liable to be examined on oath or solemn affirmation and that he gave information not with any intent to injure the Sheristadar-Magistrate but in order to secure his own acquittal. The Acting District Magistrate refers the order of discharge to his Court, and suggests that it should be set aside as illegal. It was not the intention of the legislature that the accused should be called upon during the trial of a criminal case to make a statement on oath, or that he should be liable to punishment for giving false answers to questions put to him (Section 342). The Code does not require that the appeal petition should be verified; Sections 428 and 540 do not seem to us to authorise the examination of the accused as a witness. A criminal appeal is a continuation of the criminal case, and, except so far as there is a provision to the contrary, the appellant has the privilege of the accused and cannot be punished for making a false statement (section 342, Criminal Procedure Code).

On these grounds we are of opinion that the acquittal was right and that we cannot interfere on revision.

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APRIL 30.

APPELLATE CIVIL.

12 M. 454.

12 M. 454.

[454] APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

VALLABHAN (*Petitioner*), *Appellant v.* PANGUNNI AND OTHERS (*Defendants*), *Respondents.** [4th and 30th April, 1889.]

Civil Procedure Code, Sections 244, 293, 306, 309, 588—*Court-sale—Liability of defaulting purchaser—Appeal from order under Section* 293—*Resale.*

At a sale in execution of a decree a decree-holder, who had obtained leave to bid, was alleged to have made a bid through his agent of Rs 90.000, but he shortly afterwards repudiated the bid and did not pay the deposit. The property was put up for sale again on the following day under Section 306 of the Code of Civil Procedure and was in due course knocked down for a smaller sum. The judgment-debtor filed a petition under Section 293 to recover from the decree-holder the loss by resale; the petition was rejected. On appeal:

Held, (1) that the question at issue was one arising between the parties to the suit and that an appeal lay against the order rejecting the petition;

(2) that the property having been forthwith put up again and sold under Section 306 of the Code of Civil Procedure was resold within the meaning of Section 293.

[F., 16 M. 20; 28 M. 87=14 M.L.J. 475; R., 13 M. 504; 19 M. 29; 3 L.B.R. 225; D., 15 M. 226; 18 M. 439.]

APPEAL against the order of E. R. Krishnan, Subordinate Judge of South Malabar, on Miscellaneous petition No. 60 of 1888.

In original suit No. 28 of 1879, a decree was passed in favour of the plaintiff (the present counter-petitioner No. 1), and certain forest land, the property of the family of the judgment-debtors, (of whom the present petitioner was one), was brought to sale in execution. The present counter-petitioners Nos. 2—4 were the holders of other decrees, in execution of which they claimed rateable distribution of the proceeds of the above sale. At the sale counter-petitioner No. 5, who was alleged to be the agent for counter-petitioners Nos. 1—4, bid Rs. 90,000, and the property was knocked down in the name of counter-petitioner No. 1, who had obtained leave to bid; counter-petitioner No. 1, however, in a few minutes repudiated the bid. The matter having been at once reported to the Subordinate Judge, he on the same day made the following order:—

[455] "The withdrawal cannot be permitted. The nazir is directed "to levy 25 per cent. of the purchase-money or get such of the purcha-"sers as hold decrees against the judgment-debtors to put in satisfaction "of decree to that extent. In default the property is to be forthwith "put up again and sold. The deficiency, if any, will be recovered from "the purchasers under the ruling in *Javherbai* v. *Haribhai* (1)."

No deposit was paid: the property was put for sale again on the next day, 13th December, and on the 19th it was knocked down to petitioner No. 6, the Collector of Malabar, for Rs. 42,100.

In the present petition it was sought to recover from the counter-petitioners Rs. 47,900, being the difference between the two sums above referred to. The Subordinate Judge held that counter-petitioners Nos. 2—4 had not authorized the first bid, and rejected the petition, expressing his reasons as follows:—

* Appeal against Order No. 76 of 1888.

(1) 5 B. 575.

1889 APRIL 30. — APPELLATE CIVIL. — 12 M. 454.

"From all the circumstances, I find that there was no sale as "contemplated by Section 306, because there was no payment of 25 per "cent. and poundage. The ruling in *Intizam Ali* v. *Narain Singh* (1) "appears to me in point, and there was certainly no resale under Section "293, because the property was not again proclaimed. The sale, as a "matter of fact, took place on the 19th December, on which date it was "adjourned by the Court under the discretion vested in it by Section 291. "I therefore think that the order which I endorsed on the nazir's report, "dated 12th December, based on *Javherbai* v. *Haribhai* (2) cannot be "enforced. It is cancelled, and the petition is rejected."

The petitioner preferred this appeal.

Mr. *W. Grant*, for appellant.

The Acting Government Pleader (*Subramanya Ayyar*), *Bhashyam Ayyangar*, *Sundara Ayyar* and *Govinda Menon*, for respondents.

The further facts of the case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

The application now under appeal was made under Section 293 of the Code of Civil Procedure by the third defendant in original suit No. 28 of 1879 on the file of the Calicut **[456]** Subordinate Judge's Court to recover from the counter-petitioners Rs. 47,900 being the difference between the sum of Rs. 90,000, bid by counter-petitioner No. 5 as agnt for the other counter-petitioners, and Rs. 42,100 the sum for which the properties were ultimately sold.

Counter-petitioners Nos. 1—4 were decree-holders entitled to rateable distribution, and counter-petitioner No. 5 is alleged to have been their agent. The property was put up on 12th December 1887, the upset price in the proclamation being given as Rs. 5,000; but on it being represented to the Subordinate Judge that at the last auction which had been stopped, the Collector had bid Rs. 84,000 for the same property, the Subordinate Judge ordered the nazir to cry up the property at that price. The only bid after that was for Rs. 90,000 which was bid by counter-petitioner No. 5 as the agent for counter-petitioner No. 1, Pangunni Menon, in whose name the property was knocked down. Pangunni Menon failed to deposit the 25 per cent. of the purchase money, or to pay the poundage; and on it being reported to the Subordinate Judge by the nazir, that all the judgment-creditors withdrew from the sale, he passed an order directing that the property be forthwith put up again and sold and that the deficiency, if any, might be recovered from the purchasers, under the ruling in *Javherbai* v. *Haribhai* (2). The property was put up again on the following day (13th December) and purchased by the Collector for Rs. 42,100 on 19th December 1887. The sale was confirmed on 20th February 1888.

The Subordinate Judge found that counter-petitioners Nos. 2—4 had not authorized counter-petitioner No. 5 to bid for them; that there was no sale as contemplated by Section 306 of the Civil Procedure Code since there was no deposit *Intizam Ali* v. *Narain Singh* (1) and that in any case there was no re-sale under Section 293, because the property was not again proclaimed. On these grounds he dismissed the judgment-debtor's petition.

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(1) 5 A. 316. (2) 5 B. 575.

1889 APRIL 30. — APPELLATE CIVIL. — 12 M. 454.

It is first objected that there is no appeal, since Section 588 of the Code of Civil Procedure does not provide any appeal from an order under Section 293 of the Code of Civil Procedure, and it is argued that the question is not one arising between the parties to the suit or their representatives, but between the judgment-debtor [457] and the auction-purchasers, and that the summary order can only be set aside in a regular suit.

Pangunni Menon, counter-petitioner No. 1, had obtained leave on 12th December to bid at the sale, and as far as this Court is concerned, the first question appears to have been decided in *Viraraghava* v. *Venkata* (1). In that case it was held that a judgment-debtor, who claimed to have a sale set aside on the ground of fraud, the judgment-creditor having procured a sale without advertisement and purchased without leave of the Court, was debarred from bringing a separate suit to set aside the sale, inasmuch as the question arose between the parties to the suit and related to the execution of the decree within the meaning of Section 244 of the Civil Procedure Code. The decision in *Pachayappan* v. *Narayana* (2) was referred to as against this view, but in that case it does not appear that the auction-purchaser was a party to the suit. We are therefore of opinion that an appeal does lie.

We agree with the Subordinate Judge that the evidence does not show that counter-petitioner No. 5 had authority to bid for counter-petitioner's Nos. 2—4, and we observe that the Collector, counter-petitioner No. 6, has been improperly made a party in this appeal. As against counter-petitioners Nos. 2—4 and 6, the appeal must therefore be dismissed with costs. The appeal must also fail as regards counter-petitioner No. 5, who only bid as Pangunni Menon's agent in the presence of his principal.

The decision in *Intizam Ali* v. *Narain Singh* (3) does not appear to us to affect the present case. There the bidder did not pay the deposit till some days subsequent to the sale, and the Court held on the application of the judgment-debtor that the sale was invalid since the property should have been forthwith put up again and sold; hence the judgment-debtor was held entitled to have the sale set aside. In the case before us there is no question whether Pangunni Menon is entitled to claim the benefit of the sale. The only question is whether the judgment-debtor is entitled to recover from him the deficiency of price which has happened on a re-sale.

In this case the Subordinate Judge ordered the procedure laid down in Section 360 of the Civil Procedure Code to be observed, and the property to be forthwith put up again and sold. But it [458] is contended that such sale was not a re-sale within the meaning of the Code, but only a continuance of the original sale, and we are referred to Section 309 of the Civil Procedure Code as showing that where a re-sale was intended, a fresh notification was necessary. We were also referred to the remarks of Mr. Justice Norris in *Bhim Singh* v. *Sarwan Singh* (4).

With regard to the case last quoted, we may observe that the real question before the learned Judge was whether there had been a material irregularity in publishing or conducting the sale and the question whether the putting up to sale again under Section 306 was a re-sale within the meaning of the Code was not before the Court. We observe also that under Section 309, a fresh notification is not prescribed in the case of *every*

(1) 5 M. 217. (2) 11 M. 269. (3) 5 A. 316. (4) 16 C. 33 38.

re-sale, but only when the re-sale is in default of payment of the purchase money within the time allowed for such payment. The reason for this is obvious. Under Section 307 a purchaser who has paid the deposit is allowed 15 days' grace to pay the balance; if he fail other bidders will have dispersed and a fresh notification is necessary; but it is not necessary when the purchaser fails to deposit at once his 25 per cent. under Section 306 and the property is put up again forthwith.

1889 APRIL 30. — APPELLATE CIVIL. — 12 M. 454.

We are unable to hold that when property is put up again forthwith and sold under Section 306 of the Civil Procedure Code, that it is not resold within the meaning of Section 293, and we are fortified in this opinion by the fact that the High Courts of Bombay and Calcutta have arrived at a similar conclusion, *Javherbai* v. *Haribhai* (1) and *Ramdhani Sahai* v. *Rajrani Kooer* (2).

The claim as against counter-petitioner No. 1, Pangunni Menon, has not been determined on the merits. We must therefore allow the appeal with respect to him and remand the case for a fresh order. The costs hitherto incurred as between him and the appellant will be provided for in the revised order. As against the other respondents the appeal must be dismissed with costs. (Separate costs for Collector and one set of costs for the others).

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12 M. 459 = 1 Weir 42.

[459] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

QUEEN-EMPRESS *v.* VENKATASAMI.* [15th April, 1889.]

Penal Code, Section 84—Plea of insanity in criminal cases—Legal test of responsibility in cases of alleged unsoundness of mind,

The accuesd stabbed a child (his brother's wife) with a sword and killed her. He was charged with murder, and plea of insanity set up at the trial. No motive could be assigned for his attack on the child, in which he persisted in the presence of other persons; and it appeared that he had been in the habit of treating the child kindly and affectionately. He was suffering from fever and want of food at the time, and the medical evidence showed it was possible that the act was committed under a sudden attack of homicidal mania. It was in evidence that he had abused some of his relations a short time before—the abuse being probably due to irritability of mind caused by fever. He confessed the crime to the Village Magistrate and answered questions put to him rationally, but before the committing Magistrate and the Sessions Judge he denied that he had killed the child. He was convicted of murder:

Held, that as the accused was not proved to have been by reason of unsoundness of mind incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law, the conviction was right. *Queen-Empress* v. *Lachman Dagdu* (I.L.R., 10 B. 512) approved.

[F., 23 C. 604 (609); R., 14 B. 564 (570); 13 Cr. L.J. 164 (166) = 13 Ind. Cas. 916 = 7 N.L.R. 185; 4 Ind. Cas. 985 (989) = 6 M.L.T. 101 = 94 P.L.R. 1909 = 16 P.W.R. 1909 (Cr.); 17 C.P.L.R. 113 (117); 15 O.C. 321 (340); Rat. Unr. Cr. Cas. 698 (699).]

CASE referred to the High Court under Section 374 of the Code of Criminal Procedure for the confirmation of the sentence of death passed on the accused by H. H. O'Farrell, Acting Sessions Judge of Kurnool.

The accused was convicted of the murder of a child (his brother's wife) under the circumstances set out in the judgment of the Court. In

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* Referred Case No. 7 of 1889.

(1) 5 B. 575, (2) 7 C. 337.

1889 APRIL 15. — APPELLATE CRIMINAL. — 12 M. 459 = 1 Weir 42.

support of the plea of insanity, the medical officer of the district was called and gave the following deposition:—

"The prisoner before the Court has been under my observation in the district jail since 4th of February in consequence of a requisition addressed to me from this Court. So far as my observation has gone while the prisoner was in the jail, I have no reason to believe that he is insane; but if the medical evidence is [460] required on the whole merits of the case, this opinion might be modified.

"I have been present in Court the whole of to-day, and have heard the evidence given by the witnesses. I find from the evidence that the prisoner had been sick of fever for six days previous to the occurrence; that he had had very little food during that period; and that whilst in this enfeebled condition, he had fever on the night previous to the deed, and that during the period when he was supposed to have had fever he used words in a manner which renders it possible that he was then suffering from delirium. I consider that the abusive tendency taken by the delirium is a matter of great importance. He was evidently suffering from the opinion that some one had injured him, and I find that the prosecution offers no theory of intention whatever. It is shown that the sword or swords with which the deed was committed were in the same hut. It is also admitted that he lived affectionately with the child he killed, and that none of the abuse of the previous evening was directed towards her. It is an established fact that during and after paroxysms of intermittent fever, there occasionally arises a want of mental control known as *post febri lunacy*. I consider that the chances are that the prisoner was labouring under the impression that some one had injured him and under this opinion and incited thereto by the fact of the sword being at hand without in all probability knowing that this was a child had started at unknown enemies. The fact of the goat having been wounded also helps the theory to some extent, especially if the Head Constable's theory is correct that the wound was not caused by a slash but by a thrust. A thrust would show more deliberate intention to kill what was in reality only a harmless goat. Had he slashed the goat, the theory that the Head Constable suggested that he missed the girl and hit the goat would be more tenable. The prisoner is now in feeble state of health, and has an enlarged spleen, from which I infer that he has suffered from malarial fever recently. He has also suffered from fever in jail.

"*By Court.*—I have had no reason to suppose that the prisoner had suffered from epileptic fits; but if he had been subject to them, it would greatly favour the theory of a homicidal impulse; and such impulse would be greatly aggravated by the existence of fever at the time. If the prisoner had committed the deed in [461] a state of febrile delirium, it is quite consistent that after the delirium had left him he would be aware of what he had done. It depends greatly on the degree of delirium; but it would quite consist with delirium that he should know what he had done."

Mr. *Subramanyam*, for the accused.

The Acting Government Pleader (*Subramanya Ayyar*), for the Crown.

The Court (COLLINS, C. J., and MUTTUSAMI AYYAR, J.,) delivered the following

JUDGMENT.

We are not satisfied that at the time the appellant committed the act, he was by reason of unsoundness of mind incapable of knowing the

1889 APRIL 15. — APPELLATE CRIMINAL. — 12 M. 459 = 1 Weir 42.

nature of the act and did not know that the act was wrong or contrary to law. No motive has been suggested for his killing the child. The appellant was suffering from fever and had taken little food for some days. When the Village Magistrate arrived, he asked the appellant—Who killed the girl? and the appellant replied "I killed her," and answered the questions the Magistrate put to him rationally. The appellant undoubtedly acted very strangely a short time before the murder. He abused his father and brother for not returning from the hills where they had gone some days before, and he also abused some women the same morning. The wounding of the goat is strange, but the circumstances under which he stabbed the goat are not fully explained or can be accepted as sufficient evidence of insanity. We observe that there is no positive evidence that the appellant was suffering from delirium at the time he committed the murder, or that he was unconscious of the nature of the act he had committed.

The abuse of his relations was most likely due to irritability of mind caused by the fever he was suffering from. The medical officer's evidence does not amount to more in our opinion than that there is the possibility of a sudden attack of homicidal mania; but judging the evidence by the ordinary judicial tests which we are bound to apply, we cannot say that it warrants a finding that the appellant did not know that what he was doing was wrong within the meaning of Section 84 of the Indian Penal Code. The case of *Queen-Empress* v. *Lakshman Dagdu* (1) cited by the Acting Government Pleader contains, in our opinion, the points **[462]** of law to be decided in such cases. While, however, confirming the conviction, we decline to confirm the sentence of death, and direct that in lieu thereof the appellant be transported for the term of his natural life; and we direct that the evidence in the case and this judgment be brought to the notice of His Excellency the Governor in Council in order that he might, if he think fit, reduce the sentence under the special circumstances of this case.

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12 M. 462.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MAHALINGA (*Defendant No.* 1), *Appellant v.* MARIYAMMA AND OTHERS (*Plaintiffs*), *Respondents.* [13th March, 1889.]

Aliyasantana law—Yajaman—The rights of the senior member of the family being a female.

The senior member of an Aliyasantana family, if a female, is *prima facie* entitled to the yajamanship: and in the absence of a special family custom or a binding family arrangement to the contrary, the management of the family affairs by another member is to be presumed to be by the sufferance of the yajaman for the time being.

[D., 15 M. 186.]

SECOND appeal against the decree of J.W. Best, District Judge of South Canara, in appeal suit No. 140 of 1886, confirming the decree of C. Venkobacharyar, Subordinate Judge of South Canara, in original suit No. 37 of 1885.

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* Second Appeal No. 73 of 1888.

(1) 10 B. 512.

1889 MARCH 13. — APPELLATE CIVIL. — 12 M. 462.

The plaintiff as senior member of an Aliyasantana family sued to remove her younger brother, defendant No. 1, from the management of the family and to recover possession of the family property.

Both the Subordinate Judge and, on appeal, the District Judge decreed as prayed by the plaintiff. Defendant No. 1 preferred this second appeal.

Ramasami Mudaliar, for appellant.

Ramachandra Rau Saheb, for respondents.

The facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKAR, JJ.)

JUDGMENT.

[463] Respondent No. 1 is the senior member of an Aliyasantana family in South Canara and the appellant is her younger brother and has been the *de facto* manager of the family for upwards of 20 years. Respondent No. 1 brought the present suit on the death of her uncle to establish her right to assume management of the family property, and to remove the appellant from possession. She rested her claim on two grounds, namely, that as the senior member of the family, she was the lawful yajaman, and that the appellant was guilty of misconduct. The Subordinate Judge considered that the misconduct imputed to the appellant was not proved. Though the District Judge did not concur in that opinion, yet he preferred to rest his decision mainly on the ground that respondent No. 1 was the lawful yajaman of the family, and that the appellant's management was liable to be put an end to at her pleasure. It is urged in appeal that this view of the case is contrary to law.

The first point argued before us is that Exhibit K and the appellant's evidence in this case have been misunderstood. In Exhibit K the appellant stated that he had been managing according to the instructions of the females of the family, but that his management was not liable to be set aside except for fraud. In his evidence he said that he had been managing the affairs of the family with the consent of respondent No. 1 and the other females and his uncle Teampa Hegade. Though these statements, as urged for the appellant, do not amount to a clear and unequivocal admission that the appellant's management was by sufferance, yet they certainly afford some evidence of it, inasmuch as he distinctly admitted in Exhibit B that he had been in management during the life time of his uncle, who was both his senior and a male member of the family.

The next contention is that decision ought to be in accordance with the special usage of the family. The question of a family usage was raised by the first issue in the case, and the finding is that no such usage has beed established. It appears further that no special family karar or arrangement has been set up. The substantial question then for decision was whether, according to the general Aliyasantana usage, the senior male excludes from management the senior member of the family when she is a female. We are of opinion that the decision of the Judge on this point is correct. It is in accordance with the decision of **[464]** this Court in *Subbu Hegadi* v. *Tongu* (1), *Devu* v. *Deyi* (2) and *Govindan* v. *Kannaran* (3). Though it was considered not yet settled whether the senior female might not exclude the senior member of the family from management if

(1) 4 M.H.C.R. 196. (2) 8 M. 353. (3) 1 M. 351.

he is a male, still it was never doubted that the senior member, if a female, is entitled to the yajamanship. It is true that females are generally excluded from management in Malabar by reason of their sex, but it is the incident of a special usage which has been recognized to obtain in that district. As observed by the Judge, the Aliyasantana system of inheritance as well as the marumakkatayam usage has probably originated from a type of polyandry which prevailed in ancient times, and the natural result of that system would lead to the senior female being the yajaman of the family. We agree in the opinion of the Judge that the practice obtaining in Malabar whereby females are excluded from management cannot be extended to the Aliyasantana families in South Canara. In the absence of a special family custom or a binding family arrangement, the Judge was right in presuming that the appellant's management was by the sufferance of yajaman for the time being, and that it did not preclude the yajaman from resuming the management at his or her pleasure at any time. It has been held by this Court that such a presumption is legal, with reference to a Malabar tarwad (1), the constitution of which is similar to that of an Aliyasantana family.

We are of opinion that the second appeal cannot be supported and dismiss it with costs.

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12 M. 465.

[465] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Wilkinson.

THAYAMMA (*Defendant*), *Appellant* v. KULANDAVELU AND OTHERS (*Petitioners*), *Respondents*.*
[24th January and 11th April, 1889.]

Rent Recovery Act—Act VIII *of* 1865 (*Madras*), *Section* 17—*Attachment and sale of the tenants' interest in the land for arrears of rent.*

When default has been made in the payment of rent and the saleable interest of the defaulting tenant in the land is attached, the attachment cannot be declared invalid in a summary suit under Section 17 of the Rent Recovery Act.

Under Section 38 of the same Act, a landlord cannot attach the saleable interest of a defaulting tenant in the land, until the expiry of the current revenue year.

[Appr., 27 M. 241=14 M.L.J. 67.]

SECOND APPEAL against the decrees of R. S. Benson, Acting District Judge of South Arcot, in Appeal Suits Nos. 190 to 193 of 1887, confirming the decisions of T. V. Narayanasami Ayyar, Temporary Deputy Collector of South Arcot, in summary Suits Nos. 19 to 22 of 1886.

Summary suits against a mittadarni by three tenants. The mittadarni having attached the tenant's interest in the land for arrears of rent accrued due had obtained an order that it be brought to sale. The tenants now objected to the sale on the following grounds :—

" (i) That the attachment, if true, has been made on the 4th June 1880, which is one year after the arrears became due, and that the application for sale does not lie under Section 2.

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* Second Appeal Nos. 1135 and 1138 to 1140 of 1888.

(1) See *Nambiatan* v. *Nambiatan* (2 M.H.C.R. 110), Reporter's Note.

1889 APRIL 11. — APPELLATE CIVIL. — 12 M. 465.

"(ii) That the original pattadars have not been served with notices under Section 39.

"(iii) That the application for sale has not been made in time."

The Lower Courts held the first objection to be valid and passed decree in favour of the tenants.

The mittadarni preferred this second appeal.

Mr. *Subramanyam*, for appellant.

Respondents were not represented.

[466] The further facts of the case and the arguments adduced on these second appeals appear sufficiently for the purpose of this report from the order of the Court (COLLINS, C. J., and PARKER, J.)

ORDER.

Two objections are taken to the decree of the Lower Appellate Court. First, it is argued that Section 17 of the Act had no application and that the Courts below were not authorized to declare the attachment invalid under that section. We are of opinion that this contention must prevail. The District Judge appears to think that the words "and sale" in Section 15 render the provisions of Sections 15-17 applicable to sales of the interest in land. We observe that the words quoted are superfluous, the rules in Section 15 having nothing to do with sales. Section 15 deals with the demand and its service. Section 16 provides for notice to the Collector and the appraisement of the property. Section 17 deals with the effect of any irregularity in the distraint of moveable property. Section 18 is the first section which lays down any rules as to sale, and it is this and the subsequent Sections 33-36 which appear to be referred to in Section 40. The tenants' remedy against a notice under Section 39 is by preferring a summary suit within one month. Whether the present is such a suit has not been decided.

It is then argued that the Courts below were wrong in deciding the landlord was bound to take proceedings within one year from the date on which the rent fell due, and that the true explanation of Section 38 is that for the purposes of that section, rent becomes due at the end of the current revenue year. We are unable to accede to this argument. Section 2 of the Act lays down in general terms that process against a tenant must be taken within one year from the time when the rent became due. It is admitted that in this case the rent became due in March 1879, and that the attachment, if any, was not made until June 1880. In our judgment the provisions of Section 38 are clear and the Legislature thereby intended to give a defaulting tenant the opportunity of making good the arrears within the current revenue year. The landlord has, by Section 14, the right to proceed against the crops and moveable property of the tenant as soon as rent is unpaid; but, if he wishes to attach the saleable interest of the defaulter, he must wait to do so, until the expiry of the current revenue year. It is argued that thereby his right is **[467]** considerably curtailed. This, no doubt, is so, but such appears to us to be the intention of the Legislature in favour of the tenant.

We shall call upon the Lower Appellate Court to return a finding upon the following issues:—

(1) "Whether the notice required by Section 39 was duly served.

(2) "Whether the present suit was brought within time."

Fresh evidence may be taken.

[The District Judge having reported that neither party called any evidence, these second appeals were dismissed at the final hearing.]

12 M. 467.

1889 MARCH 20.

APPEL-LATE CIVIL.

12 M. 467.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

KULLAYAPPA (*Plaintiff*), *Appellant v.* LAKSHMIPATHI (*Defendant*), *Respondent.** [18th January and 20th March, 1889.]

Limitation Act—Act XV of 1877, *Sections* 4, 6, 14—*Proceedings* bona fide *prosecuted in a Court without jurisdiction—Rent Recovery Act (Madras)—Act VIII of* 1865, *Section* 78—*Rent claimed by landlord not having tendered legal patta.*

A landlord not having tendered a legal patta to his tenant made a demand on him as for rent, and on his refusal to pay attached his holding. The tenant, to release the attachment, paid the sum demanded under protest on 23rd September 1885. On 22nd March 1886, the tenant filed a suit on the Small Cause side of the District Munsif's Court to recover the amount so paid: that suit was dismissed for want of jurisdiction on 2nd September 1886. On the last-mentioned date, the tenant filed the present suit on the same cause of action:

Held, (1) the suit was not barred by limitation under the six months' rule in Section 78 of the Rent Recovery Act by reason of the provisions of Section 14 of the Limitation Act 1877;

(2) the landlord not having tendered a legal patta was not in a condition to establish any right to recover rent directly or by way of set-off.

[R., 34 A. 496 (502) = 10 A.L.J. 3 = 16 Ind. Cas. 149 (152); 14 M. 365; 17 M. 225: D., 20 B. 543; 18 M. 99 (F.B).]

SECOND APPEAL against the decree of S. Gopalacharyar, Subordinate Judge of Madura (East), in appeal suits, Nos. 374 and 478 of 1887, reversing the decree of M. A. Tirumalacharyar, District Munsif of Dindigul, in original suit No. 438 of 1886.

Suit to recover, together with interest, Rs. 71-2-3, being a sum paid under protest by the plaintiff to the defendant to release [468] the attachment of the plaintiff's land by the defendant for arrears of rent wrongly alleged to be due by the plaintiff to the defendant for Fasli 1293.

The District Munsif held that no proper patta having been tendered by the defendant to the plaintiff for Fasli 1293, the attachment was illegal; finding, however, that on the footing of a proper patta there would have been due by the plaintiff to the defendant Rs. 48-9-8, he passed a decree for the plaintiff for Rs. 22-8-7 only.

Both parties appealed against this decree, and on appeal, the Subordinate Judge held that the suit was barred by limitation, and accordingly passed a decree dismissing it.

The facts supporting the plea of limitation, appear sufficiently for the purpose of this report from the judgment of Kernan, J. Upon this plea the Subordinate Judge said:—

"Section 78 above referred to prescribes that Civil Courts shall not take cognizance of such a suit unless it be instituted within six months from the time at which the cause of action arose. Here the cause of action is admitted to have arisen on 25th September 1885, when the money was paid by the plaintiff, see *Hanuman Kamut* v. *Hanuman Mandur* (1), and this suit was instituted on 2nd September 1886; but the intervening time between 22nd March 1886 when the plaint was presented treating the claim as a Small Cause suit, and 2nd September 1886 when it was returned,

* Second appeal No. 1166 of 1888.

(1) 15 C. 51.

1889 MARCH 20. — APPELLATE CIVIL. — 12 M. 467.

is sought to be excluded from calculation under Section 14 of the Limitation Act, 1877. Section 4 of that Act lays down that subject to the provisions contained in Sections 5 to 25, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule thereto annexed shall be dismissed. It is therefore clear that under ordinary circumstances recourse could be had to the provisions of Section 14 only in a case where the limitation for the suit is provided by the second schedule annexed to the Act. But here the period of limitation has been provided by a special enactment and not by the Limitation Act. That enactment contains no saving provision of the kind, nor entitles the parties to claim the benefit of Section 14 of the Limitation Act. On the authority of the rulings in *Mohummud Buhadoor Khan* v. *The Collector of* **[469]** *Bareilly* (1), *Gobindo Coomar Chowdhry* v. *Manson* (2), and *Timal Kuari* v. *Ablakh Rai* (3), and on the *ratio decidendi* of the ruling in *Syed Mohidin Hussen Saheb* in re (4), I must hold that the advantage of Section 14 of the Limitation Act cannot be claimed by the plaintiff, and that his suit must be deemed to have been instituted more than six months after the date on which the cause of action arose."

The plaintiff preferred this second appeal.

Mahadeva Ayyar, for appellant.

Subramania Ayyar, for respondent.

JUDGMENT.

KERNAN, J.—The appellant was the plaintiff in the original suit No. 438 of 1886. The respondent was the defendant in that suit.

The appellant is a tenant of the respondent, who attached the holding of the former, under the Rent Recovery Act, in order to recover Rs. 71-2-3 alleged to be due for Rent for Fasli 1293. The respondent did not tender to the appellant a proper patta and was therefore not entitled to proceed to attach or sell the appellant's land. The respondent was about to set up for sale the land under the attachment and the appellant under protest and to prevent the sale, paid the respondent on the 23rd September 1885 Rs. 71-2-3 claimed for rent. This suit was filed on the 2nd September 1886 praying for a decree directing the repayment by the respondent to the appellant of the sum paid under protest and interest amounting in all to Rs. 75. The Munsif decided that as no proper patta had been tendered by the respondent, the attachment was illegal.

But he allowed the respondent to set off as against the appellant's claim the sum which he found would be a proper sum to be paid by the appellant if a proper patta had been tendered. The sum so allowed was Rs. 42-5-10 and interest amounting to Rs. 6-3-10, in all to Rs. 48-9 8, and the Munsif made a decree for the appellant for Rs. 22-8-7 and proportionate costs.

Both plaintiff and defendant appealed to the Subordinate Judge against the Munsif's decree. The plaintiff appealed on the ground that the set off should not have been allowed, and the defendant appealed on the ground that the plaintiff's entire claim should have been disallowed and that his suit was barred by limitation.

[470] The Subordinate Judge dismissed the plaintiff's appeal, and allowing the defendant's appeal, reversed the Munsif's decree and

(1) 1 I.A. 167. (2) 15 B.L.R. 56. (3) 1 A. 254. (4) 8 M.H.C.R. 44.

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12 M. 467.

dismissed the suit, principally on the ground that it was barred by limitation.

The appellant has appealed to this Court on the ground that the suit is not barred by limitation, and that the set off should not have been allowed. The facts on which the question of limitation has been raised are these, *viz.*, the cause of action arose to the appellant on the 23rd September 1885,—that being the day on which the money was paid by him; the plaint in this suit was filed on the 2nd of September 1886 in the Munsif's Court under Act VIII of 1865, Section 78; but that section limits the time for bringing an action under it to six months from the date of the cause of action; the period of six months from the cause of action expired on the 23rd of March 1886. But the appellant had filed in the Munsif's Court on the small cause side on the 22nd of March 1886 a suit under Section 78 of the Act for the same cause of action as in this suit, and that suit was on the 2nd of September 1886 dismissed on the ground that the Court had no jurisdiction to here the suit. In *Shaunkara Subbien* v. *Vellayan Chetty.* (1) it was held that a suit on the small cause side filed under circumstances like those here, was not maintainable by the Small Cause Court for want of jurisdiction. Section 14 of the Limitation Act, 1877, provides as follows:—"In computing the period of limitation prescribed for a suit, the time during which the plaintiff has been prosecuting "with due diligence another civil proceeding whether in the Court of first "instance or in appeal against the defendant shall be excluded when the "proceeding is founded on the same cause of action and is prosecuted in "good faith in a Court, which from defect of jurisdiction or other cause "of the like nature is unable to entertain it." Section 4 of the Limitation Act, 1877, is as follows:—"Subject to the provision contained in "sections five to twenty-five (inclusive) every suit instituted after the "period of limitation prescribed therefor by the second schedule hereto "annexed shall be dismissed." Section 6 provides that when by any special law a period of limitation is specially prescribed for any suit, nothing in the Limitation Act shall affect or alter the period so prescribed.

[471] It has been several times decided that the general sections of the Limitation Act from 5 to 25 are applicable to suits for which periods of limitation are prescribed other than those described in the second schedule to the Limitation Act—See *Nijabutoola* v. *Wazir Ali* (2) and *Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha* (3) as to registration; and *Guracharya* v. *The President of the Belgaum Town Municipalities* (4) and *Reference under Forest Act V of* 1882 (5), as to a suit brought before a Court which had no jurisdiction to try it.

Therefore this suit, which was filed on the 2nd of September 1886, being the day of the dismissal of the prior suit, was not barred by limitation as regards time, as the previous suit was filed one day before the expiry of six months from the date, 23rd September 1885, when the cause of action accrued.

The Judge observed that the plaintiff did not act in good faith as it had been decided long before he filed the suit that such suit would not lie in a Small Cause Court. No doubt every one is supposed to know the law, and the law is always certain; but if that principle was to be strictly applied, then Section 14 of the Act would be useless, so far as regards

(1) 5 M.H.C.R. 179. (2) 8 C. 910. (3) 10 C. 265.
(4) 8 B. 529. (5) 10 M. 210.

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defect of jurisdiction. I think the Judge was in error in this respect. The Judge also observes that the plaintiff did not prosecute the prior suit with due diligence, but we do not see evidence of any want of due diligence.

The Munsif was wrong in allowing credit to the respondent for any sum as for rent, as the respondent not having tendered a patta was not in a condition to establish any right to recover rent directly or by way of set off.

I think the decree of the Lower Appellate Court should be reversed, and a decree should be made for plaintiff for the sum claimed, Rs. 71-2-3, and interest up to the date of this decree at 6 per cent. per annum, with cost of this suit throughout, including the costs of the appeal.

MUTTUSAMI AYYAR, J.—I concur.

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12 M. 472.

[472] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

SITHARAMA (*Counter-Petitioner No.* 4), *Appellant v.* VYTHILINGA (*Petitioner*), *Respondent.** [2nd May, 1889.]

Civil Procedure Code of 1882, *Section* 589—*Civil Procedure Code Amendment Acts—Act VII of* 1888, *Section* 56 —*Act X of* 1888, *Section* 3—*Appeal against order of a Subordinate Court on a petition of insolvency.*

The judgment-debtor having been arrested in execution of a decree passed by the Small Cause Court at Madras, which was transferred for execution to the Subordinate Court of South Malabar, applied to the District Court to be declared an insolvent. The District Court transferred the application for disposal to the Subordinate Court, and the application was granted on 25th July 1888. On 5th November 1888 one of the opposing creditors appealed to the High Court:

Held, that the appeal did not lie.

[F., 23 A. 56 (58) = 20 A.W.N. 194; 4 Ind. Cas. 617 = 19 M.L.J. 68 = 4 M.L.T. 455; R., 15 M. 89; 15 C.L.J. 239 (240) = 13 Ind.Cas. 605; 2 N.L.R. 54.]

APPEAL against the order of E. K. Krishnan, Subordinate Judge of South Malabar, on insolvent petition No. 4 of 1888, granting the prayer of the petition.

One of the opposing creditors presented this appeal to the High Court.

Ramachandra Ayyar, for appellant.

Sundara Ayyar, for respondent.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and WILKINSON, JJ.).

JUDGMENT.

A preliminary objection is taken on the ground that no appeal lies to this Court. We are of opinion that this objection must prevail. The decree of the Madras Court of Small Causes was transferred for execution to the Subordinate Court of South Malabar. In execution the judgment-debtor was arrested, and applied to the District Court to be declared an insolvent. The District Judge in virtue of the powers conferred by Section 360 transferred the application to the Subordinate Court of South

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* Appeal against Order No. 141 of 1888.

Malabar for disposal, and on the 25th July 1888, the judgment-debtor was declared an insolvent. This appeal to this [473] Court was presented on 5th November 1888. The first clause of Section 589, Act XIV of 1882, by which appeals from orders in cases of insolvency lay to this Court, was repealed by Section 56 of Act VII of 1888, which came into force on the 1st July 1888. An appeal from such orders was, however, allowed by Section 588 (17), and the question is, to what Court did the appeal in this case lie? It certainly did not lie to the High Court, because the first clause of Section 589, which constituted the High Court, the Court of appeal had been repealed. Inasmuch as the suit in which the decree was passed was a small cause suit from which no appeal lay, Clause 2 of the former Section 589 did not apply. In the absence of any special provision as to the forum, the District Court would be the Court to which an appeal from an order passed by a Sub-Judge would lie. The proviso added to Section 589 by Section 3 of Act X of 1888 appears to us to explain what was intended to be the law when the first clause of Section 589 was repealed.

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The appeal therefore must be dismissed with costs.

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12 M. 473=1 Weir 655.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

QUEEN-EMPRESS *v.* SITHARAMAYYA AND OTHERS.*
[10th April, 1889.]

Arms Act—Act XI of 1878, *Section* 19 *(a)—Sale of sulphur and ammunition by agent of a license-holder.*

Sale of sulphur and ammunition by the agent of one holding a license (in form VI) under Act XI of 1878 is not illegal.

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by H. G. Turner, District Magistrate of Vizagapatam.

The case was stated as follows :—

"In this case the Senior Assistant Magistrate convicted two persons : "the first under Section 19 *(a)* of the Arms Act, Act XI of 1878 (offering "for sale without license) and the second under [474] Sections 19 *(a)* of "Act XI of 1878 and 109 of Penal Code, and sentenced them to Rs. 5 "and 15, fines, respectively. The second of these was a licensed sulphur "and ammunition dealer at Parvatipur, and the first was his gumasta. "The circumstances under which they were convicted are briefly these :—

"In the latter part of March last, the second accused, having had "occasion to go to Vizagapatam, applied to the Taluk Magistrate of Parva- "tipur for one month's leave, proposing at the same time that his "gumasta, the first accused in the case, should be allowed to conduct "his business during his absence. The Taluk Magistrate sent on the "application with his recommendation to the Senior Assistant Magis- "trate, who informed the Taluk Magistrate that the applicant might, if "he liked, leave the place, closing his shop, but that if he wished to have "his business carried on during his absence by his gumasta, he must

* Criminal Revision Case No. 51 of 1889.

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"apply to the District Magistrate for a temporary transfer of his license "to that individual. Meantime, that is, before the Taluk Magistrate "communicated to him the Senior Assistant Magistrate's order, the second "accused had left Parvatipur in anticipation of his leave, leaving the "business of his shop in the hands of his gumasta, the first accused, as "originally proposed.

"Some time after this, the Police Inspector of Parvatipur requested "the Senior Assistant Magistrate to inform him whether a license-holder "could, during his absence from the station at which he was licensed, "have his business carried on on his behalf by his gumasta, and his reply "that he could not, without a temporary transfer of the license by the "District Magistrate, resulted in the Police charging the two accused "before him as above.

"On these facts I doubt the legality of the Senior Assistant Magis-"trate's conviction of the accused. Though rule 24 of the Arms Act "rules says in general terms that a license granted under the rules "covers only the articles and the persons named therein, the restriction "is distinctly stated in the instructions given in the cases of licenses "in forms VIII and IX and not in that of license form VI which "forms the subject-matter of this reference. This shows that in respect "of this restriction the latter class of licenses was intended to be treated "differently from the former class. Regarding a license issued under the "old Abkari Act (Madras Act III of 1864), the High Court have "[475] decided that the license covers the agent also. See High Court's "Proceedings, 11th December 1871, No. 1982, printed at page 405 of "Weir's Criminal Rulings, 3rd edition. The Senior Assistant Magistrate "seems to think that, if the transactions are carried on by an agent "while the license-holder is present in the station, though not in the "shop, the requirements of the law are fulfilled, but I do not see how his "(the license-holder's) temporary absence elsewhere could affect the ques-"tion when by the steps he took he sufficiently declared to the authorities "that the transactions would be carried on on his behalf and on his "responsibility."

The Acting Government Pleader (*Subramanya Ayyar*), for the Crown.

The Court (COLLINS, C.J., and WILKINSON, J.) delivered the following

JUDGMENT.

We can see nothing in the Act or the rules which renders sale by the agent of a license-holder illegal. The Government Pleader supports the reference and contends that the conviction is illegal. Although in the rules endorsed on the license the words "or his authorized agent" are not to be found, yet from the wording of rule 6 it would appear that as the license is intended to cover sales effected upon the premises, and as it cannot reasonably be insisted that every sale on the premises of a license-holder must be conducted by the license-holder in person, the sale by an agent was contemplated.

We set aside the conviction and order the fines to be refunded.

12 M. 475=1 Weir 144.

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LATE
CRIMINAL.

12 M. 475=
1 Weir 144.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

QUEEN-EMPRESS *v.* NARAYANA.* [3rd May and 10th July, 1889.]

Penal Code—Section 188, *Criminal Procedure Code—Sections* 133, 134, 135, 136—*Service of notice of orders under Section* 133.

A Magistrate made an order under Section 133 of the Code of Criminal Procedure requiring N. to fence a certain well in a public street or to appear before him and [476] move to have the order set aside; a copy of this order was affixed to the house of N., but he did not appear. The Magistrate then adopted the procedure prescribed by Sections 136, 140, and made an order requiring N. to fence the well by a certain date. N. who was personally served with notice of the above order did not comply with it. The Magistrate then sanctioned the prosecution of N. under Section 188 of the Penal Code. N. appeared and produced evidence to prove that he was not liable to fence the well:

Held, that the accused was guilty of the offence of disobedience to an order duly promulgated by a public servant and was not entitled to go behind the order and show that it was one which ought not to have been made.

The mode of service of notice of an order under Section 133 considered.

[**F.**, 13 A. 577 (579); **D.**, 20 A. 501=18 A.W.N. 141]

PETITION under Sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of H. J. Joseph, Acting Joint Magistrate of Kumbakonam, dated 10th January 1889, made in Appeal Case No. 91 of 1888, confirming the finding and sentence of the Second-class Magistrate of Kumbakonam Taluk in Calendar Case No. 186 of 1888.

Mr. *Parthasaradhi Ayyangar*, for the petitioner.

The facts of the case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.).

JUDGMENT.

There is a well in a public street at Swamimalai in the Kumbakonam Taluk, Tanjore District, which required to be fenced in order that no danger might arise to the public. On the 21st July 1888, the Sub-Divisional Magistrate of Kumbakonam made an order under Section 133, Criminal Procedure Code, calling upon the accused, Narayana Rao Peshwa, either to fence the well or appear before the Second-class Magistrate of Kumbakonam on 10th August and to move to have the order set aside. A copy of the order was affixed to his house, but the accused neither fenced the well nor appeared in accordance with such order either to show cause against it, or to move for the appointment of a jury to try whether it was reasonable and proper. The order was made absolute under Section 136 on 30th August, and a notice was thereupon issued as directed by Section 140 requiring the accused to fence the well before the 25th September 1888, and informing him that in case of disobedience he would be liable to the penalty provided by Section 188, Indian Penal Code. This notice was personally served on the accused, and as he did not fence the well within the time specified, the Sub-Divisional Magistrate sanctioned his prosecution on 26th September. Accordingly the accused was charged with an offence punishable under Section 188, Indian

* Criminal Revision Case No. 159 of 1889.

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12 M. 475 = 1 Weir 144.

[477] Penal Code. His defence was that he was not the owner of the well, that he was not liable to fence it, and that it belonged to one Govinda Ayyan. The accused cited four witnesses, and they, as well as the fifth and seventh witnesses for the prosecution, supported his statement. The Tahsildar-Magistrate, however, observed that their evidence did not appear to be true, and that even if it were otherwise, the accused was liable to the penalty prescribed by Section 188, Indian Penal Code. He convicted the accused and sentenced him to pay a fine of Rs. 15 or to suffer simple imprisonment for 15 days. On appeal, the Acting Joint Magistrate upheld the conviction and the sentence, and considered that the accused was not at liberty to go behind the order and to show that it was one which ought not to have been made as he was not the owner of the well. It is urged in revision that the conviction is illegal. We see no reason to interfere. It is not denied that the order in question was made by a Sub-Divisional Magistrate, and that such Magistrate, was lawfully empowered to make it. Nor is it suggested that the well is not in a public street or that the safety of the public does not require that it should be fenced. Though the conditional order made under Section 133 was not served personally on the accused, yet there is nothing on the record before us to show that personal service was practicable, or that service in the mode prescribed by Section 71 was not legal in the special circumstances of the case. The main question then is whether the accused is entitled to an acquittal, if he shows in answer to the charge preferred under Section 188, Indian Penal Code, that he had no control over the well either as owner or possessor or otherwise, and that the order was made on an erroneous view of his relation to the property in question. We are of opinion that he is not, for the imputability consists, not in the actual existence of any jural relation between the accused and the well ordered to be fenced, but in wilful disobedience of the order lawfully made by a competent Magistrate under Section 133. Section 135 imposes on the person against whom such order is made an obligation either to do the act which the order directs him to do, or to appear to show cause against it or to ask for a jury to try its validity, and Section 136 makes an intentional omission to comply with such direction penal by declaring him liable to the penalty provided by Section 188 of the Indian Penal Code, and directing that the order shall be made absolute. It is [478] true that under Section 133 the conditional order can only be made against a person owning, possessing, or exercising control over the well according to the information then before the Sub-Divisional Magistrate, but it must also be remembered that when the Magistrate accepts the information and bases a conditional order upon it, and when the party against whom the order is made neither does the act commanded nor takes action to vacate the order, the *ex parte* information becomes conclusive evidence and the omission becomes penal and subjects the party concerned to the penalty prescribed by Section 188, Indian Penal Code. Though Section 188 refers to the offender as a person directed to abstain from a certain act or to take certain order with certain property *in his possession* or *under his management*, yet it is not competent to the accused to re-open the question of possession, &c., by reason of Section 136 which conclusively presumes that the conditional order was correctly made and directs that he shall be liable to the penalty prescribed by Section 188. We take the words "in that behalf" to mean, for his failure to comply with the requirements of Section 135, and they do not therefore support the accused's contention. The provisions of Section 136 are stringent, because the intention is to create facilities for conditional orders, which

Magistrates are authorized to pass under Chapter X in order to prevent danger to the public, becoming final without needless delay and thereby promptly to ensure public safety.

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APPELLATE CRIMINAL.

12 M. 475 = 1 Weir 144.

We have no doubt that the accused was properly convicted, and we therefore dismiss this application.

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12 M. 479.

[479] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

MUTHU (*Plaintiff*), *Appellant* v. CHELLAPPA AND OTHERS (*Defendants*), *Respondents*.* [10th July, 1889.]

Limitation Act—Act XV of 1877, *Schedule II, Article* 179—*Appeal against part of decree —Execution against judgment-debtors whose interests were not sought to be affected by the appeal.*

In a suit for land against several defendants, plaintiff obtained, on 14th June 1884, a decree against the shares of defendants Nos. 3 and 4, the shares of defendants Nos. 5 and 9 being exonerated. The decree-holder appealed against that portion of the decree which exonerated the shares of defendants Nos. 5 and 9, defendants Nos. 3 and 4 being brought on to the record of the appeal as respondents. The appeal having been dismissed, the decree-holder applied on 20th October 1887 for execution against the shares of defendants Nos. 3 and 4.

Held, the application for execution was barred by Limitation Act, 1877, Schedule II, Article 179.

[**Diss.**, 22 B. 500 (505); 26 M. 91; **D.**, 23 M. 60; **Cons.**, 23 C. 876 (880).]

APPEAL against the order of H. T. Ross, Acting District Judge of Madura, on Civil Miscellaneous Appeal No. 2 of 1888, reversing the order of M. A. Tirumalacharyar, District Munsif of Dindigul, on Civil Miscellaneous Petition No. 490 of 1887.

Application for execution of the decree in Original Suit No. 133 of 1882.

On the 14th April 1883, plaintiff obtained a decree for certain lands under a sale-deed executed by defendant No. 2, father of defendants Nos. 3 to 9. Defendants Nos. 3 and 4 had consented to be bound by the plaintiff's oath, and defendants Nos. 2 and 5 to 9 were *ex parte*.

On the 14th June 1884 a revised decree was passed exonerating the shares of defendants Nos. 5 to 9, and confirming the original decree as against defendants Nos. 3 and 4.

Plaintiff appealed against this decree, and on 20th October 1884 his appeal was dismissed.

On 20th October 1887, plaintiff applied for execution of his decree against third and fourth defendants' three-eighth share.

[480] The plea of limitation was set up. The District Munsif overruled this plea, holding on the authority of *Sangram Singh* v. *Bujharat Singh* (1), that the plaintiff was compelled to join defendants Nos. 3 to 9 as parties to his appeal, and granted the petition. The District Judge, on appeal, reversed this order, holding that defendants Nos. 3 and 4 were not necessary parties to the appeal, and that the petition was therefore barred under Limitation Act, 1877, Schedule II, Article 179.

The decree-holder preferred this appeal.

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* Appeal against Appellate Order No. 30 of 1888.

(1) 4 A. 36.

1889 JULY 10. — APPELLATE CIVIL. — 12 M. 479.

Ramachandra Ayyar, for appellant.

Subramanya Ayyar, for respondents.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and WILKINSON, JJ.).

JUDGMENT.

The decision of the Judge is clearly right. The decree obtained by the plaintiff (appellant) against the shares of defendants Nos. 3 and 4 was in no way imperilled by the appeal presented by him against that portion of the decree which exonerated the shares of defendants Nos. 5 to 9. This view is in accordance with the decisions in *Hur Proshad Roy* v. *Enayet Hossein* (1) and *Raghunath Pershad* v. *Abdul Hye* (2). As observed in the former case by the Court "the reason for suspending the operation of the law of limitation during the pendency of an appeal is that it is manifestly undesirable to force the execution of a decree while there is any doubt as to the rights of the decree-holder against the appellant." Our attention has been called to the case of *Nur-ul-Hasan* v. *Muhammad Hasan* (3), in which it was remarked as an *obiter dictum* that the terms of Article 179 of the Limitation Act were so wide that they must be held to apply to every case in which an appeal had been presented, without regard to the interest of the person presenting the appeal and the extent of the power of the Appellate Court to interfere. We are unable to assent to this view. Suppose that A, obtaining a decree for the possession of land against B, presented an appeal against so much of the decree as disallowed A his costs, and the appeal was dismissed, it would be unreasonable to hold that the time for the execution of the decree, so far as it awarded A the land, [481] began to run from the date of the appeal decree. We consider that the sounder principle is that laid down in the Calcutta Court, and we therefore dismiss the civil miscellaneous second appeal with costs.

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12 M. 481.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

NARASIMHA (*Plaintiff*), *Appellant v.* SURYANARAYANA (*Defendant No.* 1), *Respondent.** [11th and 22nd March, 1889].

Rent Recovery Act (Madras)—Act VIII of 1865—*Suit in Civil Court to enforce exchange of patta and muchalka—Declaratory decree—Civil Procedure Code, Section* 53—*Amendment of plaint.*

A suit in the Court of a District Munsif to enforce acceptance of a patta and execution of a muchalka by defendant in respect of a holding in a village to which plaintiff claimed title, was dismissed as not being maintainable:

Held, that the suit should not have been dismissed but the plaint should have been amended by the addition of a prayer for a declaration of the plaintiff's title; and that the Court then would have had jurisdiction to grant by way of consequential relief the relief originally sought.

[F., 2 L.B.R. 4; R., 13 M. 361; 14 M. 441.]

SECOND APPEAL against the decree of C. W. W. Martin, District Judge of Salem, in Appeal Suit No. 150 of 1886, reversing the decree of Sultan

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* Second Appeal No. 879 of 1888.

(1) 2 C.L.R. 471. (2) 14 C. 26. (3) 8 A. 573.

Mohidin Saheb, District Munsif of Krishnagiri, in Original Suit No. 265 of 1885.

1889 MARCH 22.

APPELLATE CIVIL.

12 M. 481.

Suit to enforce acceptance of a patta and execution of a muchalka.

The plaint alleged that the village in which the defendant occupied certain land had been sold to the plaintiff and that the plaintiff had called on the defendant to accept a patta and to execute a muchalka, and that the defendant had refused. The defendant in his written statement denied the plaintiff's title and alleged that he was holding under another landlord.

The District Munsif passed a decree "that the defendant do [482] "accept the patta marked as Exhibit B, and execute a corresponding "muchalka to the plaintiff in respect of the plaint lands." The District Judge on appeal held that the suit was not maintainable and dismissed the suit without recording any finding as to the plaintiff's title.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar, for appellant,

Subramanya Ayyar, for respondent.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and SHEPHARD, J.).

JUDGMENT.

At the hearing of this appeal the doubt occurred to us whether, inasmuch as the duty of accepting a patta and giving a muchalka is one imposed by statute and a special remedy for enforcing it is prescribed by the same statute, this suit instituted in a Civil Court was maintainable. The object, however, of the Act in requiring the exchange of patta and muchalka is to insure the existence of evidence of the terms of the holding; and, as a landlord can, on proper occasion arising, certainly maintain a declaratory suit, so we think that in such suit he might obtain, by way of consequential relief, the delivery of a muchalka corresponding to the patta already tendered by him. Being entitled to a declaratory decree, he should not be remitted to another suit, to obtain the muchalka to which the Act entitles him. It will be understood that he can only be so entitled if he succeeds in proving that he has before suit tendered a patta in the form in which the defendant was bound to accept it, and further that it is not competent to the Court trying this question to exercise the power of amending the patta which the Collector has under Section 10 of the Act.

In the present case there is no prayer for a declaratory decree. The plaintiff asks only that the defendant be compelled to accept the patta tendered by him and to execute a muchalka in like terms.

The District Judge has dismissed the suit on a ground which is clearly not tenable and has recorded no finding on the main issue. We must reverse the decree of the District Judge and direct him, after amending the plaint by the insertion of a prayer [483] for declaration of the plaintiff's right, to re-hear the appeal on the merits, having regard to the above observations. We make no order as to the costs of this appeal, but the other costs must be provided for in the revised decree.

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MARCH 27.

APPELLATE CIVIL.

12 M. 483.

12 M. 483.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

CHENGAL REDDI AND OTHERS (*Defendants*), *Appellants v.* VENKATA REDDI (*Plaintiff*), *Respondent.** [27th March, 1889.]

Oaths Act—Act X of 1873, *Section* 9—*Civil Procedure Code, Section* 462—*Consent by guardian of a minor defendant to accept the oath of the plaintiff.*

It was agreed by the defendants who were majors and by the father and guardian of a minor defendant on his behalf, that one of the issues in a suit should be determined under Oaths Act, Section 9, by the oath of the plaintiff. The oath was taken and a decree was passed accordingly;

Held, that the minor defendant was bound by the consent of his guardian since there was no evidence of fraud or gross negligence on the part of the latter, although the Court had not sanctioned the agreement under Section 462, Civil Procedure Code.

[**Diss.**, 17 C.P.L.R. 147; **Appr**, 28 A. 35=2 A.L.J. 493=A.W.N. (1905) 171; 27 C. 229; **R.**, 15 Bom. L.R. 223 (224); 15 Ind. Cas. 161=95 P.R. 1912=159 P.W.R. 1912; 18 P.R. 1891; **D.**, 24 M. 326]

APPEAL against the decree of C. S. Crole, District Judge of Chittoor, in Original Suit No. 20 of 1887.

Suit for partition of family property. In the written statement of the defendants, it was alleged that a partial partition had already taken place and the first issue was framed upon this allegation. The District Judge said:—"This issue was by consent left to abide the taking of an "oath by plaintiff in a temple at Chittoor, which he has done. So the "family is found to be undivided and the plaintiff to be entitled to half the "total property belonging to it." A decree was passed accordingly.

The defendants preferred this appeal, on the ground, *inter alia*, that defendant No. 4, who was a minor, was not bound by the decree passed under the above circumstances.

Mr. *Ramasami Raju*, for appellant.

Mr. *Subramanyam*, for respondent.

[484] The further facts of the case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

JUDGMENT.

This appeal arises from a suit for partition instituted by the respondent. One of the matters in dispute was whether there was a prior division as alleged by the appellants; and they agreed, under Section 9 of the Indian Oaths Act, to accept the respondent's oath in regard to it in a certain temple as conclusive. The respondent took the prescribed oath and the Judge passed a decree in his favour on the footing that there was a subsisting co-parcenary. It is urged in appeal that the appellant No. 4 is a minor, that the appellant No. 1, his guardian, was not competent to consent to the claim against the minor being settled by the oath of the respondent. at least without the previous sanction of the Court. We are referred in support of this contention to Section 462 of the Civil Procedure Code and to two decisions—*Rajagopal Takkaya Naiker* v. *Muttupalem Chetty* (1) and *Sharat Chunder Ghose* v. *Kartik Chunder Mitter* (2). The conduct of the

* Appeal No. 21 of 1888.

(1) 3 M. 103. (2) 9 C. 810.

suit was in the hands of the guardian, and it was for him to produce such evidence as was likely to support the contention and to decide what was best to do in the circumstances of the case. It is not shown that other evidence was available in proof of the prior partition, and that in agreeing to accept the plaintiff's oath, the guardian acted prejudicially to the minor's interest. The step taken by the father affected not only the minor's interest, but also his own interest, and it was concurred in by two of his adult sons. It is noteworthy that this appeal is preferred not only on behalf of the minor, but also on behalf of his father and brothers, and that the objection is pressed upon us by the very parties who entered into the agreement in the Court below. The minor might not be bound by the act of his guardian if it were tainted with fraud or gross negligence savouring of fraud, but we cannot say, in the absence of any evidence, that the father's act was either fraudulent or manifestly unreasonable. Neither Section 462 nor the decisions under it have any application to this case.

1889 MARCH 27. — APPELLATE CIVIL. — 12 M. 483.

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12 M. 485.

[485] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RAMACHANDRA (*Plaintiff*), *Appellant v.* DEVU (*Defendant*), *Respondent.** [24th July, 1889.]

Civil Procedure Code, Section 209—Stipulated interest—Interest after filing plaint.

A creditor having stipulated for interest at a certain rate is entitled to a decree for interest at that rate up to the date of decree. *Mangniram Marwari* v. *Dhowtal Roy* (I.L.R., 12 Cal., 569), dissented from.

[Diss., 17 C.P.L.R. 38.]

APPEAL against the decree of M. R. Weld, Acting District Judge of Ganjam, in Original Suit No. 20 of 1887.

Suit to recover from defendant the sum of Rs. 7,958-14-10, being the principal and compound interest due on a registered bond, dated 24th June 1881, and also principal and interest due on footing of a document described as a receipt, dated 31st August 1886, with interest up to realization of the amount. The stipulated interest was in each case 21 per cent. per annum; the sums due were agreed to be repaid on 4th March 1882 and 23rd October 1886 respectively.

The defendant admitted the claim, but "requested, in consideration of his involved circumstances, that the interest may be reduced," and also asked for a decree by instalments.

The District Judge said:—"I will only give one per cent. per annum from this date, as the interest previously charged is so enormous, nor will I give costs. Decree for the amount of Rs. 7,958-14-10 to be paid in four half-yearly instalments with interest at one per cent. per annum. Interest in case of default to be one per cent. per annum. Each party to bear their own costs."

The plaintiff preferred this appeal "against that portion of the decree which disallowed the plaintiff the costs of the suit and interest on the amount sued for from the date of the plaint to the date of the decree."

* Appeal No. 102 of 1888.

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12 M. 485.

[486] *Sundara Rau*, for appellant.

The interest was not in the nature of a penalty *Tejpal* v. *Kesri Singh* (1), and the plaintiff is entitled to interest as the agreed rate up to the date of decree—*Bandaru Swami Naidu* v. *Atchayamma* (2), and see Civil Procedure Code, Section 209. The District Judge should also have given plaintiff the costs of the suit. *Carvalho* v. *Nurbibi* (3).

[The Chief Justice referred to *Orde* v. *Skinner* (4).]

Ethiraja Mudaliar, for respondent.

The case is within the rule of the Full Bench at Calcutta in *Mangniram Marwari* v. *Dhowtal Roy* (5), in which *Orde* v. *Skinner* (4) is distinguished.

The Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.), delivered the following

JUDGMENT.

We think the plaintiff is entitled to interest at the rate stipulated, *viz.*, 21 per cent. to the date of decree. See *Bandaru Swami Naidu* v. *Atchayamma* (2) and *Orde* v. *Skinner* (4). It is true that a Full Bench of the Calcutta Court has decided to the contrary—see *Mangniram Marwari* v. *Dhowtal Roy* (5), but with great respect to that Court we are not inclined to follow their ruling in opposition to the case of *Bandaru Swami Naidu* v. *Atchayamma* (2) and also with reference to the remarks of the Privy Council in *Orde* v. *Skinner* (4). We therefore direct the decree to be amended by allowing interest at the rate of 21 per cent. from the date of the plaint to the date of decree.

With regard to the question of costs, we decline to interfere with the discretion of the District Judge, and as the appeal partly fails, we direct each party to bear their own costs of this appeal.

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12 M. 487.

[487] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SITHAMMA (*Plaintiff*), *Appellant v.* NARAYANA AND OTHERS (*Defendants*), *Respondents*.* [14th March, 1889.]

Limitation Act—Act XV of 1877, *Schedule II. Articles* 120, 123—*Executor* de son tort —*Suit for a share of Government promissory notes by an heir against one falsely professing to hold them under a will.*

Suit in 1887 by a daughter to recover her share of Government promissory notes, being stridhanam of her mother who died in 1880. The property in question had been in the possession of a son of the deceased since her death. He claimed the property under a will, but the will was set aside by the Court as false in 1884 :

Held, that Limitation Act, Schedule II, Article 123, is applicable only to cases in which the defendant lawfully represents the estate of the deceased, and that the suit was accordingly barred by limitation.

[R., 19 A. 169 ; 16 M. 61; 13 C.L.J. 239 (241) = 15 C.W.N. 107 (109) = 7 Ind. Cas. 704; 6 Ind. Cas. 50 = 20 M.L.J. 288 (290) = 8 M.L.T. 4.]

APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in Original Suit No. 28 of 1887.

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* Appeal No. 116 of 1888.

(1) 2 A. 621. (2) 3 M. 125. (3) 3 B. 202. (4) 3 A. 107. (5) 12 C. 569.

The District Judge held that the suit was barred by Limitation Act, Schedule II, Article 120, and accordingly passed a decree dismissing it. The plaintiff preferred this appeal.

Bhashyam Ayyangar, for appellant.

Subramanya Ayyar, for respondents.

The facts of this case, and the arguments adduced on appeal, appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.)

JUDGMENT.

This was a suit brought by the appellant to recover her one-third share of three Government promissory notes of the aggregate value of Rs. 9,000 in the possession of the respondent No. 1. The promissory notes belonged to one Bojjamma, who died in September 1880, leaving her surviving a son, respondent No. 1, and three daughters, the appellant and respondents Nos 2 and 3. Upon Bojjamma's death, respondent No. 1, took possession of her property, including the Government securities, and claimed to hold it under a will, whereby, as alleged by him, the property was bequeathed to him and others. Subsequently litigation ensued regarding the will, which was finally set aside by the High Court as false in July 1884. The appellant's case was **[488]** that the Government promissory notes were Bojjamma's stridhanam, that her daughters were entitled to take them in preference to her son, that he was wrongfully in possession under the forged will, that, as one of three daughters, she was entitled to a one-third share, and that the cause of action arose in August 1884. The plaint was filed in September 1887. The Acting District Judge held that the cause of action arose on the day that Bojjamma died, that Article 120 applied, and that the claim was therefore barred by limitation. Hence this appeal.

It is conceded that the appeal must fail whether the three or six years' rule is applicable to the suit. But it is urged that the respondent No. 1 held the Government promissory notes in dispute as executor *de son tort*, and that the suit is therefore governed by Article 123, Schedule II, of the Limitation Act. Article 123 purports to apply to a suit for a legacy or a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate. According to its true construction, the article applies only to cases in which the defendant lawfully represents the estate of a deceased person. An executor *de son tort* is certainly liable to be treated as incurring the liability of an executor for certain limited purposes, but the point for consideration is whether he represents the estate of the deceased for purposes of limitation in a suit like the one before us. We are of opinion that he does not. If the contention were to prevail, a suit brought by one who claims to be the heir of a deceased person against every defendant who wrongfully retains the moveable property belonging to that person under a claim of title, which has no foundation, would not be barred before the expiration of twelve years. In order that a suit for the recovery of moveable property instituted by an heir might be treated as a suit for a distributive share of an intestate estate, it must be established that the party in possession is either really an executor or an administrator, or, to use the language of 23 and 24 Vic., Cap. 38, Section 13, a legal personal representative of the deceased. This view is in accordance with the

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decision in *Issur Chunder Doss* v. *Jugut Chunder Shaha* (1), and the *dictum* of Wilson, J., in *Kally Churn Shaw* v. *Dukhee Bibee*(2).

We agree with the Judge that the claim is barred by limitation and dismiss the appeal with costs.

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12 M. 489.

[489] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar, and Mr. Justice Parker.

LAKSHMANA (*Appellant*) *v.* PARAMASIVA AND OTHERS (*Respondents*),* [15th February, 1889.]

Civil Procedure Code, Sections 32, 588 (2)—*Appeal against order that a plaintiff be made defendant.*

An appeal lies under Civil Procedure Code, Section 588 (2), against an order under Section 32 that a plaintiff be made defendant.

APPEAL against the order of C. W. W. Martin, District Judge of Salem, on civil miscellaneous petition No. 617 of 1887 in original suit No. 8 of 1887.

The District Judge having made an order on 31st August directing that Lakshmana Goundan, defendant No. 6, be made a plaintiff, on 21st December, set aside that order and directed that Lakshmana Goundan be made a defendant. Lakshmana Goundan preferred this appeal against the last-mentioned order.

Bhashyam Ayyangar and Desika Charyar, for appellant.

Subramanya Ayyar, for respondents.

The facts of the case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

JUDGMENT.

An appeal does certainly lie and we are unable to accede to the contention that the cases specified in Section 588, Clause 2, do not include an order, whereby a party, who is plaintiff, is made defendant, or a defendant made plaintiff. On the merits it is conceded that the order cannot be supported. The respondents admit the assignment in their application of 21st December 1887, and the assignors admitted the assignment through their vakil when the order of 31st August 1887 was made.

We do not see why the Judge set aside his own order without an application and when the assignment was admitted.

We set aside the order appealed against and restore the order of 31st August 1887. Appellant is entitled to his costs in this appeal.

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* Appeal against Order No. 20 of 1888.

(1) 9 C. 79. (2) 5 C. 692 (696).

12 M. 490.

1889 AUG. 9.

APPELLATE CIVIL.

12 M. 490.

[490] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

LAKSHMI (*Plaintiff*), *Appellant v.* SUBRAMANYA (*Defendant*), *Respondent.** [22nd February and 9th August, 1889.]

Hindu Law—Will of a Hindu in favor of his wife made on his taking a son in adoption —Adoption made on the understanding that the dispositions of the will be observed.

A Hindu, on taking a son in adoption, executed a "settlement as to what should be done by my adopted son and my wife after my lifetime," providing that on an event, which happened, the wife should enjoy certain land for life in lieu of maintenance. In a suit by the widow of the executant against the adoptive son for possession of the land:

Held, that the instrument was a will.

On its appearing that the defendant's natural father, when he gave him in adoption, tacitly submitted to the arrangement contained in it.

Held, that the adoptive son was bound by its provisions.

[F., 21 M. 10; R., 27 M. 577=14 M.L.J. 310; 33 M. 304 (307)=7 Ind. Cas. 357=20 M.L.J. 519=8 M.L.T. 139; Cons., 14 M. 172; Expl., 16 M. 400.]

SECOND APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in appeal suit No. 490 of 1887, reversing the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in original suit No. 28 of 1886.

Suit by a Hindu widow to recover from her husband's adoptive son, with mesne profits, certain land which her husband was alleged to have settled upon her under exhibit A. The Subordinate Judge passed a decree in favor of the plaintiff for the land, but disallowed her claim to mesne profits. The District Judge, on appeal, reversed the decree of the Subordinate Judge, holding that Exhibit A was on its true construction a will, and that it was for that reason invalid as against the defendant under the rule in *Vitla Butten* v. *Yamenamma* (1).

Exhibit A began as follows:—"Vyavasta Patra Udambadikkai (deed "of settlement), executed on the 25th Kartigai of Rudrotakary year, by "me, Ramaien, son of Subbien, residing in Veppathoor, as to what should "be done in my family. As I this day adopt —, aged—, son of Subbra- "maien, of the said village, son of my divided junior uncle, for my "spiritual benefit, [491] because I have no issue, the following is the "settlement as to what should be done by my adopted son and my wife "after my lifetime;" and proceeded (after making certain dispositions "immaterial for the purpose of this report) as follows:—"all the remain- "ing properties and the cash as per documents shall be enjoyed by my "wife alone until my adopted son, above said, attains the proper age and "she shall protect the adopted son and live jointly with (him). If, while "so continuing to live, they shall not agree to live jointly after the said "adopted son shall have attained the proper age, my wife shall enjoy "with all privileges for her maintenance, for her lifetime, the nanjai "and punjai lands appertaining to $\frac{1}{4}$ karai out of the $\frac{5}{8}$ karai in the "'Ulloor' (native village), and the cocoanut tope called the Cavery "Amman Koviladi on account of the Ulnatham and Poronatham attach- "ed thereto, half of the vessels then remaining and with the profits,

* Second Appeal No. 682 of 1888.

(1) 8 M.H.C.R. 6.

1889 AUG. 9. — APPELLATE CIVIL. — 12 M. 490.

"remaining after deducting the vari and erai (assessment, &c.), in respect "of the said ¼ karai, she shall maintain herself for her lifetime, live in "'Thamanai thalvaram,' including the 'Rali' (apartments of the house), "on the northern side, in the house on the 1¼ house-ground, on the western side, and are the backyard."

The plaintiff preferred this appeal against the decree of the District Judge.

Subramanya Ayyar, for appellant.

Ramachandra Rau Saheb and *Mahadeva Ayyar*, for respondent.

The further facts of this case and arguments adduced on second appeal appear sufficiently for the purpose of this report from the judgments of the Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.)

JUDGMENT.

MUTTUSAMI AYYAR, J.—The appellant is the widow of one Ramayyan, and the respondent is his adopted son. On the 9th December 1863 Ramayyan executed Exhibit A which provided *inter alia* that, in case the appellant and respondent did not agree to live together, the former should enjoy the land in dispute during her lifetime in lieu of maintenance. A disagreement arose between them after Ramayyan's death, and the appellant separated from the respondent and claimed to be placed in possession of the land. The respondent resisted the claim, alleging, among other things, that exhibit A was a will and that it was invalid as against ancestral property which devolved on him by right of **[492]** survivorship. The Subordinate Judge was of opinion that the instrument was a deed of settlement and decreed the claim. On appeal the District Judge held that it was a will and dismissed the appellant's suit. I agree with the Judge that Exhibit A is upon its true construction a will. The disposition contained in it was clearly intended to take effect after Ramayyan's death and the contention that the document was styled a deed of settlement is immaterial. It is the substance of the transaction that ought to be taken as a guide. It is conceded that where a Hindu father disposes by will of ancestral property, the disposition is inoperative as against his son; but it is argued that when the disposition made is in the nature of a provision for the maintenance of the testator's widow, the will is valid. I am unable to adopt this view. The ground on which a will in regard to ancestral or joint family property was held to be invalid in the case of *Vitla Butten* v. *Yamenamma* (1), is that directly the testator dies the co-parcener's right of survivorship takes effect and that a testamentary disposition cannot be permitted to prevail against that right. In the absence of testamentary power the contention that that power was exercised for the purpose of making a provision for the support of the testator's wife could not in my opinion validate the will.

Another contention in appeal is that in the case before us it was known to all the parties concerned, when the respondent was given in adoption, that Exhibit A was in existence and that the respondent was given and taken in adoption on the understanding that the disposition contained in it was to be accepted by him. The decision in *Vinayak Narain Jog* v. *Govindrav Chintaman Jog* (2) lends support to the contention. In that case it was held that when the adopted son and the person

(1) 8 M.H.C.R. 6. (2) 6 B.H.C.R. 224.

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who gave him in adoption were fully cognisant of the disposition of property made by the testator, and with the knowledge of such disposition the natural father consented to the adoption taking place and when the disposition and the adoption might under the circumstances be regarded as one transaction, the disposition though contained in a will could not be repudiated by the adopted son. The principle underlying the decision is that the disposition was one which it was competent to the testator to make prior to the [493] adoption, and that its acceptance being presumably a condition subject to which the adoption was made, it made no difference that the disposition was testamentary. In the case before us the Subordinate Judge observes that Exhibit A was made two days prior to the respondent's adoption, and that but for acquiescence in it the adoption might not have taken place. The Judge, however, has expressed no opinion on this point. The disposition impugned is nothing more than charging the appellant's maintenance on a specific portion of family property and creating for her a life estate in A and thereby preventing discord and litigation between the mother and the son by reason of their not agreeing to live together. Before disposing of this second appeal, I would ask the Judge to ascertain whether, when the respondent was given in adoption, the person who gave him in adoption was aware of the existence of Exhibit A, and whether, but for his consent to it, Ramayyan would not have adopted the respondent. Both parties will be at liberty to adduce fresh evidence, if so advised, in regard to this issue. If the Judge should be of opinion that the respondent's parents consented, either expressly or tacitly, to the arrangement when the adoption took place, he will also return findings on the 7th and 8th issues.

SHEPHARD, J.—While I agree in thinking that there should be a finding on the proposed issue, I should like to add my reasons for holding that a finding on that issue may entitle the plaintiff to a decree in the suit. The question is whether the parties to an adoption, that is, the parents on the one side and on the other, can by contract between themselves prescribe the terms on which the adopted child shall enter the family of the adopting parent, in such manner as to bind the adopted child, and further whether such a contract can be effectively carried out by a will executed by the adopting parent. As far as this Court is concerned there appears to be no distinct authority on the question, for in the case of *Lakshmana Rau* v. *Lakshmi Ammal* (1), the disposition made by the adopting widow was upheld on another ground and the judgment does not profess to decide the point now at issue. On the other hand in the Bombay reports there is distinct authority in favour of the plaintiff's contention, and in one case the disposition impugned by the adopted son was, as it is in the present [494] case, made by will—*Venayak Narayan Jog* v. *Govindrav Chintaman Jog* (2). In the present case the adoption was made not by a widow, as in the case of *Lakshmana Rau* v. *Lakshmi Ammal* (1), but by the plaintiff's husband who, before the adoption took place, was unquestionably at liberty to alienate his property as he pleased, subject only to the plaintiff's right of maintenance. If being thus full owner he might before the adoption have disposed of his property in part or in whole in favour of the plaintiff, I fail to see why he should not, when making the adoption, stipulate with the other party to the adoption that a certain part of his property should be set apart for the maintenance of his wife and to that extent taken out

(1) 4 M. 160. (2) 6 B.H.C.R. 224.

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of the category of property in which his intended son should have the full right of a co-parcener. It seems to me a mistake to say that the infant adopted son on whose behalf the natural father consents to such a stipulation can only be bound by that consent on the principle on which he might be bound by other agreements made on his behalf, *viz.*, on the principle that the agreement is made for a necessary purpose, *Lakshmana Rau* v. *Lakshmi Ammal*(1), for the supposition is that, but for the consent of the natural father the adoption would never have taken place. To object to the agreement is therefore tantamount to objecting to the adoption. The adoption and the disposition of his property by the father being part of one transaction, the son never acquired any interest in the property disposed of and therefore no question can arise as to his guardian's competency to deal with it.

These considerations, if well founded, also dispose of the defendant's contention that, in view of the right of survivorship, Ramayyan's will must as against him be inoperative. The will was only a means by which the supposed contract was carried into effect. It was a term of that contract that certain property should be withdrawn from Ramayyan's estate and applied to a particular purpose, which should take effect after his death. To that extent the defendant never acquired co-parcenary right in his father's property and consequently there was no right of survivorship. The circumstance that the disposition was made by will makes no difference because the will must not be regarded by itself but as part of the contract, and before the adoption took place it was **[495]** competent to Ramayyan to bind himself by contract to make the will which he did make. For these reasons I am of opinion that if it can be shown that the adoption was made on an understanding between the parties that the defendant should take his place in the family subject to the arrangement made by his adoptive father in favour of the plaintiff, the plaintiff ought to succeed in this suit.

[The District Judge recorded a finding in the affirmative on the issue framed by the High Court; and when the case came on for re-hearing and the Court passed a decree setting aside the decree of the District Judge and restoring that of the Subordinate Judge.]

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12 M. 495.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VALLABHA (*Defendant No.* 1), *Appellant v.* MADUSUDANAN (*Plaintiff*), *Respondent.** [1st March and 29th April, 1889.]

Defamation—Illegal declaration that one is out-casted—Observations on the use of books of history to prove local custom, and on the position as heads of their caste of the representatives of the ancient sovereigns of the West Coast.

According to the usage of certain Nambudris, a caste enquiry is held when a Nambudri woman is suspected of adultery, and if she is found guilty, she and her paramour are put out of caste.

An enquiry was held into the conduct of a certain woman so suspected; she confessed that the plaintiff had had illicit intercourse with her and thereupon they were both declared outcastes, the plaintiff not having been charged nor

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* Second Appeal No. 151 of 1888.

(1) 4 M. 160.

having had an opportunity to cross-examine the woman or to enter on his defence and otherwise to vindicate his character. In a suit for damages for defamation by the plaintiff against those who had declared him an outcaste:

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Held, the declaration that the plaintiff was an outcaste was illegal, and it having been found that the defendants had not acted *bona fide* in making that declaration, the plaintiff was entitled to recover damages.

Observations on (1) the use of books of history to prove local custom, and (2) on the position as heads of their caste of the representatives of the ancient sovereigns of the West Coast.

[Appr., 24 B. 13; R., 23 B. 122 (129); 38 C. 153 = 12 Cr. L.J. 355 = 10 Ind. Cas. 955; 33 M. 67 (70) = 3 Ind. Cas. 955 = 19 M.L.J. 714 = 6 M.L.T. 290.]

SECOND appeal against the decree of the District Judge of South Malabar, in appeal suit No. 613 of 1887, confirming the [496] decree of the District Munsif of Angadipuram, in original suit No. 479 of 1886.

Suit by a Nambudri Brahman who alleged that the defendants had defamed him by declaring him an outcaste, to recover Rs. 140 as damages. It was stated in the plaint that defendant No. 1 and the plaintiff were on bad terms, that defendant No. 1 gained over to his side defendant No. 3, and his mother, who had been long leading a life of adultery and caused them to say that plaintiff was guilty of illicit intercourse with her; that the defendants subsequently made a show of holding a caste enquiry and declared the mother of the third defendant an outcaste and maliciously published that the plaintiff was unfit to enter temples, to get his meals in choultries, and to enter the houses of Nambudri Brahmans; and that the caste enquiry was held contrary to custom and the shastras.

Defendant No. 1, who is the Rajah of Walawanad, denied the allegations in the plaint and stated that the suit being one concerning religious questions was not maintainable, that it was at the request of defendant No. 3 and agreeably to usage that he directed a caste enquiry into the charge of adultery against the plaintiff with the mother of defendant No. 3, that at the enquiry the plaintiff was declared guilty of adultery, that he consequently interdicted the plaintiff from entering temples, that this act was within the scope of his authority and was done *bona fide*, and that the suit ought, therefore, to be dismissed.

Defendant No. 2 denied the allegations in the plaint and stated that he took part in the enquiry into the charge of adultery against the mother of defendant No. 3 under the direction of defendant No. 1 who is the Rajah of the country, that this was according to usage, that the enquiry was held in accordance with the custom of the country and the shastras, that in the enquiry so held the plaintiff was found to have committed adultery with the mother of defendant No. 3, and that there were others who took part in the enquiry like himself and that he was not liable to pay damages to the plaintiff.

Defendant No. 3 denied the allegations in the plaint and stated that the suit was not maintainable, that plaintiff was outcasted after an enquiry held in accordance with the rules and customs followed by Malabar Brahmans and that plaintiff was therefore not entitled to recover damages.

[497] *Sankaran Nayar*, for appellant.

Narayana Rau, for respondent.

The further facts of this case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C. J., and MUTTUSAMI AYYAR, J.).

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JUDGMENT.

The appellant is the Rajah, and the respondent is a Nambudri Brahman of Walawanad in South Malabar. The latter sued the former and two others for defamation of character and obtained a decree for Rs. 140 as damages. On appeal the award was upheld by the District Judge. Hence this second appeal.

The facts of the case are shortly these :—In April 1884 a Nambudri woman, named Itticheri, preferred a complaint against the respondent to the Tahsildar-Magistrate of Walawanad, stating that the respondent had three years before "reduced her to a position of infamy and promised to get her redeemed from the infamy or to maintain her," and that when she insisted on his fulfilling the promise, he pushed her down and threatened to cut her with a chopper. The Magistrate dismissed the complaint under Section 203 of the Code of Criminal Procedure on the ground that whatever the respondent did was on her own showing done in self-defence. It appears that according to the usage obtaining among Brahmans of this class on the West Coast, a caste enquiry is held whenever a Nambudri woman is suspected of adultery, and that if she is found guilty, she and her paramour are put out of caste. According to the evidence in this case when a woman is suspected, her kinsmen and their family priest examine her maid servant and ascertain if there is ground for a fuller enquiry. This preliminary investigation is termed *dasivicharom*, and it is initiated by her kinsmen and their family priest. On its being ascertained that further enquiry is necessary, a report is made by them to that effect to the Rajah, recognized as the protector of the caste usage, and the woman is meanwhile asked to reside in a detached part of the house called the "anjampura." On the Rajah approving of the report, he appoints a Smarthan (a Brahman acquainted with Smriti), four Mimamsakars (men versed in sifting evidence) and two others called Akomkoima and Puramkoima to aid in the investigation. The investigation is then conducted at the time and place **[498]** appointed, and if the woman is found guilty, the woman and her paramour are pronounced to be outcastes. In Tulam 1060 (October-November 1884) defendant No. 3, Itticheri's son, and his kinsmen and the family priest examined her maid servant, and made a report to defendant No. 1, appellant, the titular Rajah of Walawanad, that further enquiry was necessary. The appellant then appointed defendant No. 2, the hereditary Smarthan in that part of the country, four Mimamsakars (assessors) and two others to conduct the regular investigation. It would seem that on the third day of the enquiry, Itticheri confessed that the respondent had illicit intimacy with her. Relying on her statement and without charging the respondent or giving him an opportunity to cross-examine the woman or enter on his defence and otherwise vindicate his character, the Smarthan and the others pronounced the swarupam or the declaration that Itticheri and the respondent were out of the caste. It is in evidence that the regular enquiry terminated before Kumbom 1060 (February-March 1885). In March 1885 the respondent attempted to enter the Edathpurath temple under the supervision of the appellant and that the officiating priest in charge of the institution objected to his doing so on the ground that he was an outcaste. Thereupon the respondent brought this suit. His case was that he was innocent, that the appellant bore personal ill-will to him and acting in collusion with defendants Nos. 2 and 3, got Itticheri to accuse him of criminal intimacy with

her, that the enquiry was not held in accordance with the custom of the caste, and that the declaration that he was an outcaste was false and malicious. The District Munsif considered that the malice attributed to the appellant had no foundation, and that the enquiry conducted in this case was in accordance with caste usage, but he observed that the respondent had no opportunity given to prove his innocence or to cross-examine Itticheri, and that though the procedure followed was in accordance with the practice hitherto followed at caste enquiries, it was at variance with the well-known principle that no one should be condemned without being heard and that it was open to abuse. On that ground he decreed the claim against the appellant and others. It was contended *inter alia* in appeal that the defendants acted *bona fide*. The Judge declined to accept the contention on three grounds, *viz.*, (1) that the respondent had no notice of the charge and no opportunity of vindicating his character **[499]** or proving his innocence, (2) that, if the caste custom was followed in its integrity, defendant No. 3 and his relatives should have represented the matter to the Collector as the local representative of the Queen-Empress, and have awaited the orders of the Government, (3) and that the appellant omitted to make any enquiry before appointing defendant No. 2 to hold the regular investigation, and that his conduct was therefore not *bona fide*. It is argued before us that none of these grounds can be supported in law.

It was certainly a serious defect in the investigation that the respondent was not heard before he was condemned upon the uncorroborated statement of Itticheri, who had publicly avowed her intimacy with him even before her kinsmen thought of complaining against her conduct, and the declaration that the respondent was an outcaste was clearly bad in law. No imputation ought to be made in a reckless or inconsiderate manner. Nor can it be said that when means of obtaining accurate information is available and when it is discarded and no earnest effort is made to arrive at the truth, the belief in which the imputation was made was formed with due care and caution, or *bona fide*. No enquiry can be treated as fair when a person deprived of his *status* in his caste is not heard before he is condemned. On the question of *bona fides*, however, the Judge is in error in observing that defendant No. 3 and his kinsmen ought to have reported to the Collector their suspicion against Itticheri and awaited the orders of the Government. Though the appellant is only a titular Raja and not a sovereign prince, yet he may be the recognized head or hereditary patron of the caste who as such may be entitled by usage to take part in an enquiry like the one before us, especially as non-interference in matters of caste or religion is a recognized principle of the British rule. The Judge has apparently overlooked the fact that what was formerly done by the appellant's ancestors as sovereign princes, who were both rulers and heads of the caste, might still be lawfully done by the appellant by the usage of the caste and the avowed policy of the British Government. Further the Judge refers to the appellant's omission to hold an enquiry before appointing defendant No. 2 and others to conduct the regular investigation, and relies on Sangunni Menon's History of Travancore, p. 77. This book is not one of the exhibits in this case. Neither the **[500]** witnesses for the appellant nor those for the respondent are alleged to refer to such duty. Nor have they been examined in regard to it. We do not consider that it was regular to rely upon the book without first calling the attention of the parties to it and hearing them as to whether the procedure prescribed therein is an incident of the usage as

1889 APRIL 29. — APPELLATE CIVIL. — 12 M. 495.

it obtains in the Walawanad taluk. Notwithstanding these errors of procedure to which we call attention in view to prevent their recurrence, we are of opinion that the decision of the Judge must be supported on the ground already mentioned. We dismiss this second appeal with costs.

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12 M. 500=13 Ind. Jur. 376.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

RAMIREDDI (*Defendant*), *Appellant v.* SUBBAREDDI (*Plaintiff*), *Respondent.** [12th and 13th April, 1889.]

Civil Procedure Code, Section 13—Res judicata—*Previous suit dismissed as premature.*

A suit by the assignee of a mortgage bond against the mortgagor was dismissed on the ground that the plaintiff was not entitled to sue for want of notice to the defendant under Section 132 of the Transfer of Property Act. The plaintiff then gave express notice of the assignment to the mortgagor and sued on the bond again :

Held, the claim was not *res judicata* and the second suit was accordingly not precluded by Section 13 of the Code of Civil Procedure.

SECOND APPEAL against the decree of L. A. Campbell, District Judge of Nellore, in appeal suit No. 188 of 1887, confirming the decree of T. Ramachandra Rau, District Munsif of Nellore, in Original Suit No. 132 of 1886.

The plaintiff sued as assignee of a mortgage bond executed to his assignor by the defendant. He had sued on it before in original suit No. 1102 of 1885 on the file of the District Munsif's Court, but the defendant then pleaded that he had not notice of the transfer, and the District Munsif holding this plea to be valid, dismissed the suit. In the present suit the defendant pleaded that the claim was *res judicata*. The District Munsif, and on appeal the District Judge, held that the claim was not *res* [501] *judicata* because the former suit was dismissed as premature, the cause of action in the view taken by the Court not having then arisen, and decreed for the plaintiff.

The defendant preferred this second appeal.

Sadagopacharyar, for appellant.

Mr. *Subramanyam*, for respondent.

The following authorities were among those cited in the course of the argument : *Ummatha* v. *Cheria Kunhamed* (1), *Parthasaradi* v. *Chinnakrishnan* (2), *Avala* v. *Kuppu* (3), *Watson* v. *Collector of Rajshahye* (4).

The further facts of this case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and WILKINSON, J.).

JUDGMENT.

The only question for determination in this appeal is whether the Lower Courts were right in holding that the plaintiff's suit is not barred by the provisions of Section 13 of the Civil Procedure Code.

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* Second Appeal No. 1121 of 1888.

(1) 4 M. 308. (2) 5 M. 304. (3) 8 M. 77. (4) 13 M.I.A. 160.

1889 APRIL 13. — APPELLATE CIVIL. — 12 M. 500 = 13 Ind. Jur. 376.

As transferree of a mortgage, the plaintiff instituted original suit No. 1102 of 1885 in the Court of the District Munsif of Nellore to recover the principal and interest due under the mortgage deed. The defendant admitted the execution of the mortgage deed, but pleaded—(1) that the mortgagee had not given him notice of the transfer to plaintiff, and (2) that the assignment was invalid, inasmuch as he had discharged the debt. The Court of first instance disposed of the case on a preliminary point. Being of opinion that under Section 132 of the Transfer of Property Act the transferor himself was bound to give defendant notice of the transfer, and finding that the transferor had given no such notice, the District Munsif dismissed the suit "for want of notice." Plaintiff having caused notice to be given to defendant by the transferor, then instituted original suit 132 of 1886. The question of notice was not raised, and the only issues were—(1) was the debt discharged? (2) is plaintiff's suit barred as *res judicata*? Both Courts have held that the present suit is not barred by reason of the former decision, and the defendant appeals to this Court.

In our judgment the decree of the Courts below is right. To conclude a plaintiff on the ground of *res judicata* it is necessary **[502]** to show not only that there was a former suit between the same parties, for the same matter, and upon the same cause of action, but also that the matter directly and substantially in issue has been heard and finally decided by the Court which tried the former suit.

In original suit No. 1102 of 1885, the Court of first instance decided, no doubt erroneously, that the plaintiff had no cause of action. The merits of the case were not gone into, the suit being dismissed because the plaintiff's assignor had not given the notice which, in the opinion of the Court, he was bound to give before his assignee could seek to make the defendant liable. The matter directly and substantially in issue, *viz.*, the liability of the defendant, was not heard and decided in the former suit. As remarked by the Privy Council in the case of *Kali Krishna Tagore* v. *The Secretary of State* (1) "in order to see what was in issue in a suit or what "has been heard and decided, the judgment must be looked at. The decree "is only according to the Code of Civil Procedure to state the relief granted "or other determination of the suit. The determination may be on various "grounds, but the decree does not show on what ground, and does not afford "any information as to the matters which were in issue or have been de-"cided." We make these remarks because the appellant's pleader relies on the judgment of this Court in *Avala* v. *Kuppu* (2), in which it was laid down that "it is by the decree and not by the judgment that a question of *res judicata* must be decided." It was held by a Bench of the Calcutta High Court in *Shokhee Bewah* v. *Mehdee Mundul* (3) that a suit on the same cause of action and between the same parties as a former suit which was summarily dismissed without being tried on its merits is not one which has been heard and determined by a Court of competent jurisdiction in a former suit. The decision is in accordance with the remarks of the Privy Council in the case of *Watson* v. *Collector of Rajshahye* (4).

For these reasons, we think the present suit was not barred and dismiss this second appeal with costs.

(1) 16 C. 173. (2) 8 M. 77. (3) 9 W.R. 327. (4) 13 M.I.A. 160.

1889 JULY 18.

APPELLATE CIVIL.

12 M. 503.

12 M. 503.

[503] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

ARUNACHALLAM (*Defendant*), *Appellant v.* MURUGAPPA (*Plaintiff*), *Respondent.** [18th July, 1889.]

Civil Procedure Code, Sections 244, 462—Execution proceedings—Decree by consent of guardian of minor defendant—Application to stay execution, &c., for want of sanction of Court under Section 462—No appeal lies from order rejecting such application.

An application to stay execution of and to set aside a decree, passed with the consent of the guardian of a minor defendant, for want of sanction of the Court under Section 462, Civil Procedure Code, was rejected:

Held, no appeal lay against the order of rejection.

[Rel., 14 C.L.J. 83 = 10 Ind.Cas. 532 (535); R., 16 Ind.Cas. 543 (544); 17 M.L.J. 288; 1 O.C. 49; 7 O.C. 199.]

PETITION of appeal against the order of S. Gopalachariar, Subordinate Judge of Madura (East), on miscellaneous petition No. 161 of 1888.

Application of the minor defendant by his guardian that the execution of the decree passed in original suit No. 42 of 1879 be stayed and the decree be set aside, on the ground that it was passed on a compromise entered into with the plaintiff by the guardian of the minor defendant without the consent of the Court given under Section 462 of Civil Procedure Code.

The Subordinate Judge held that the consent of the Court had been given, and dismissed the application.

The minor defendant filed a petition of appeal against the order of the Subordinate Judge.

Bhashyam Ayyangar and *Kalianaramayyar*, for appellant.

Subramanya Ayyar and *Seshagiri Ayyar*, for respondent, objected that no appeal lay.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following

JUDGMENTS.

WILKINSON, J.—The defendant in original suit No. 42 of 1879, on whose behalf his mother and guardian had compromised the suit, now applies through his guardian (mother) to stay execution [504] of the said decree on the ground that, the compromise having been entered into without the leave of the Court which is required by Section 462, Civil Procedure Code, the decree is a dead letter and not enforceable.

The Subordinate Judge dismissed the application on the ground that the leave of the Court had been obtained, that a suit to set aside the compromise had failed, and that the application was too late.

The minor, through his mother and guardian, appeals, and the plaintiff's pleader raises the preliminary objection that no appeal lies. It is argued that unless it is held that the question is one which arises between the parties relating to the execution of the decree, there is no provision of the Code which provides for an appeal. This is conceded by the appellant's pleader, who contends that as the question is merely one

* Appeal against Order No. 129 of 1888.

1889 JULY 18. APPELLATE CIVIL. 12 M. 503.

which affects the voidability or otherwise of the decree, it is one which relates to the execution of the decree, and as such is cognizable under Section 244. It was laid down in the case of *Sudindra* v. *Budan* (1) that "a question whether the decree was obtained by fraud or "collusion is not one which relates to the execution of the decree, but "which affects its very subsistence and validity, and such a question can "only be raised by a separate suit."

The objection taken in this case by the defendant's guardian affects the validity of the decree; for if it is found that the compromise was entered into without the leave of the Court, it would not be binding on the minor. But that question cannot be decided in execution. As was pointed out by Garth, C.J., in the case of *Eshan Chundra Safooi* v. *Nundamoni Dassee* (2) there are only three ways in which a minor can avoid the consequences of his guardian's compromise:—first, by an application to the Court in which the compromise took place, secondly, by a regular suit to set aside the judgment founded on the compromise, or, thirdly, by bringing a fresh suit.

The question whether or not the decree was void as against the minor was not one relating to the execution of the decree and th order passed by the Subordinate Judge was not therefore an order passed under Section 244 and no appeal lies. The appeal must therefore be dismissed with costs.

[505] MUTTUSAMI AYYAR, J.—I am of the same opinion. From the order appealed against Section 588 provides no appeal. Every decree passed by a Civil Court is presumed to be valid so long as it is in force. Section 244 accordingly presupposes that there is a decree and that it is valid, and then declares that certain questions shall be dealt with by an order in execution and not by a regular suit. The question whether the decree under execution is valid for the purposes of execution is not within the purview of that section. It may be that the decree is liable to be set aside in a fresh suit or on an application for review of judgment. It may also be, when execution is refused on the ground that the decree is illegal on the very face of it or of the proceedings mentioned therein, an appeal will lie. The order might then be regarded as substantially setting aside a subsisting decree and consequently as being in the nature of a decree as defined by Section 2 of the Code of Civil Procedure. But it is not necessary to determine that question for the purposes of this appeal, and it would suffice to state that the order before us did not refuse execution.

I would also dismiss this appeal with costs.

(1) 9 M. 80.

(2) 10 C. 3 57.

1889
APRIL 2.

APPEL-
LATE
CIVIL.

12 M. 505.

12 M. 505.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

ADAKKALAM AND OTHERS (*Defendants*), *Appellants v.* THEETHAN (*Plaintiff*), *Respondent**.
[20th October, 1888 and 2nd April, 1889.]

Registration Act—Act III of 1877, *Section* 17 *(c)—Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement.*

In a suit for redemption filed by an assignee for value of the equity of redemption against a mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgage premises to him, that part of the purchase-money had been acknowledged as paid, and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. The agreement was in writing, but not registered.

[506] *Held*, that though the agreement was not admissible in evidence as creating an interest in land, still it might be used for the purpose of obtaining specific performance, and the plaintiff having purchased the equity of redemption with notice as above was not entitled to redeem.

Per cur:—The plaintiff having knowledge of the agreement was put upon enquiry to ascertain whether the tender had been made and whether there was any objection to his purchase on that ground.

[R., 14 M. 55; 29 M. 320; 29 M. 336 (F B.) = 1 M.L.T. 153; 35 M. 63 (70) = 8 Ind. Cas. 520 = 21 M.L J. 44 = 9 M.L.T. 142; 12 C.L.J. 25 (30) = 15 C.W.N. 375 (378) = 6 Ind. Cas. 346; 13 C.W.N. 326; 5 C.P.L.R. 102; 10 C.P.L.R. 107 (110).]

SECOND APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in Appeal Suit No. 872 of 1886, reversing the decree of T. Kanagasabai Mudaliar, Subordinate Judge of Tanjore, in Original Suit No. 38 of 1885.

Suit by the assignee of the equity of redemption to redeem mortgages, dated 1874 and 1881, and executed by Narayana Ayyar (deceased) and his widow, Latchmi Ammal, to the late father of the defendant and to defendant No. 1, respectively. The assignment to the plaintiff took place on 15th June 1885; on 22nd July the plaintiff called on defendant No. 1 to surrender the mortgage premises on payment of the amount due on the mortgages, and on his refusal this suit was filed.

The defendant pleaded that the mortgagor entered into a contract with him in writing on the 28th May 1885 to sell him the whole of the plaint properties for Rs. 1,200 exclusive of the amounts of the mortgage, &c., due to him; that she received in advance Rs. 400 and promised to receive the balance and execute a deed of sale on the 11th June; that she refused to fulfil the contract when he went to her with money and stamped paper; that the plaintiff's sale-deed was brought to existence by deliberate fraud, notwithstanding his protest against it at the time and that the deed of sale sued on is not valid in law. He denied the plaintiff's allegation of his offer to redeem and the defendant's refusal.

The agreement set up by the defendant was not registered. Its terms are recited sufficiently for the purpose of this report in the following order of the High Court.

* Second Appeal No. 88 of 1888.

The Subordinate Judge dismissed the plaintiff's suit; on appeal the District Judge reversed his decree and passed a decree for redemption as sought.

The defendant preferred this second appeal.

Bhashyam Ayyangar, for appellants.

Rama Rau and *Pattabhiramayyar*, for respondent.

[507] The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from order of the High Court (COLLINS, C.J., and PARKER, J.).

ORDER.

The land in suit was in possession of defendant No. 1 under mortgages executed to him by Narayana Iyer and his widow, Latchmi Ammal. On 28th May 1885 Latchmi Ammal settled accounts with defendant No. 1 and executed to him Exhibit I. By that document she stated that the price settled in full satisfaction of all claims in respect of sale, mortgage, &c., was Rs. 1,200, of which sum she admitted receipt of Rs. 400. The balance Rs. 800 was to be paid by 11th June 1885, on which payment being made Latchmi Ammal was to execute a sale-deed. One-eighth pangoo, which was under mortgage to defendant No. 1, was to be restored to Latchmi Ammal's possession.

Notwithstanding this agreement, Latchmi Ammal sold the equity of redemption of the plaint property to plaintiff on 15th June 1885. Plaintiff on 22nd July 1885 sent a notice by post, calling on defendant No. 1 to accept the mortgage amount and deliver up the land and, on his refusal, brought this suit to recover. Defendant No. 1 pleaded in answer the agreement Exhibit I given to him by Latchmi Ammal, and resisted plaintiff's suit for possession, as plaintiff had bought with notice of that agreement.

The District Judge held that Exhibit I was compulsorily registrable under Clause (*c*), Section 17 of the Registration Act, under the ruling in *Ramasami* v. *Ramasami* (1), but held further—following the ruling in *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (2): and *The Bengal Banking Corporation* v. *Mackertich* (3)—that the document would be admissible as proving an agreement to convey. The Judge held, however, that though defendant No. 1 might have a remedy against Latchmi Ammal and plaintiff in the form of a suit for specific performance, such right to sue could be no defence in the present action, as Exhibit I was inadmissible in so far as it tended to affect the immoveable property in question. The Judge further held that the letter of July 1885 was a good and sufficient tender and gave a decree for the plaintiff, the redemption money having been paid into Court.

We are of opinion that the view taken by the District Judge as to Exhibit I was right. Though not receivable in evidence[508] (being unregistered) as creating an interest in land, it might be used for the purpose of obtaining specific performance of the agreement, *The Bengal Banking Corporation* v. *Mackertich*(3). In this respect the want of registration would not be a fatal bar as against the subsequent registered conveyance. See *Kadar* v. *Ismail*.(4)

But in this case the defendants were in possession, and had been for years in possession by virtue of their mortgage. Exhibit I stipulated that the balance of the purchase-money (Rs. 800) should be paid by 11th June 1885, and defendant No. 1 alleged that he went to Latchmi Ammal with

(1) 5 M. 115. (2) 5 B. 143. (3) 10 C. 315.
(4) 9 M. 119.

1889 APRIL 2. — APPELLATE CIVIL. — 12 M. 505.

the money and with the stamped paper for the execution of the conveyance, but that she refused to fulfil the contract, and that plaintiff's sale-deed was deliberately executed on 15th June in fraud of his rights and in spite of his protest, the plaintiff having offered Latchmi Ammal a large sum as purchase-money. If this be the case, *i.e.*, if defendant No. 1 can prove both the agreement to convey and the tender of the purchase-money, we do not think that we ought to compel him to bring another suit to obtain specific performance of his contract of sale. He is in possession, and all that Latchmi Ammal could claim would be the payment of Rs. 800 on her execution of a sale-deed. If plaintiff bought with the knowledge of the agreement and the tender, he ought not to be allowed to obtain possession.

No issue appears to have been framed in the Courts below as to this point and we will therefore refer to the District Judge the following issues for trial :—

(1) Did defendant No. 1 by 11th June 1885 tender to Latchmi Ammal the balance of the purchase-money (Rs. 800) and a stamped paper for the execution of a conveyance ?

(2) Did plaintiff purchase from Latchmi Ammal with knowledge of the agreement and the tender ?

(3) Is defendant No. 1 entitled to a charge upon the property to the extent of Rs. 400 under Section 55, paragraph 6, Clause (*b*), of the Transfer of Property Act ?

Further evidence may be taken.

The District Judge returned findings in the affirmative on all the above issues.

[509] The second appeal having come on again for final hearing the Court delivered the following

JUDGMENT.

It is contended that plaintiff had no knowledge of the tender, but we consider that having knowledge of the agreement he was put upon enquiry to ascertain whether the tender had been made, and whether there was any objection to his purchase on that ground. He did not go into the box to explain the matter. We cannot in this appeal consider plaintiff's claim for repayment of purchase money. We reverse the decree of the Lower Appellate Court and restore that of the Subordinate Judge. The appellant is entitled to his costs in this Court and in the Lower Appellate Court.

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12 M. 509.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

CHERU KURUP (*Defendant*), *Appellant v.* CHERU KANDA KURUP (*Plaintiff*) *Respondent.** [9th April, 1889.]

Civil Procedure Code, Section 624 — Who may review judgment — Grant of application for review.

An application for review of judgment was presented on other grounds than those specified in Section 624 to a District Munsif who had delivered the judgment, and he thereupon ordered the decree to be produced. The District Munsif having resigned, his successor heard and determined the application.

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* Second Appeal No. 739 of 1888.

1889
APRIL 9.
APPELLATE CIVIL
12 M. 509.

Held, it was not competent to the District Munsif who had not delivered the original judgment to entertain the application for review.

[F., 10 C.P.L.R. 62; R., 13 M. 178 (F.B.).]

SECOND APPEAL against the decree of Lewis Moore, Acting District Judge of South Malabar, in appeal suit No. 74 of 1888, affirming the decree of N. Sarvothama Row, District Munsif of Calicut, in original suit No. 192 of 1886.

An application by the decree-holder in original suit No. 341 of 1885, made under Section 331 of Civil Procedure Code, having been registered as a suit between the decree-holder and the claimant came on for hearing before O. Chandu Menon, District Munsif of Calicut, and was dismissed with costs on 29th September 1886.

[510] An application for review was then presented, and on 1st October the District Munsif made an order thereon as follows: "Produce copy of the decree."

The matter came on for determination before the successor in office of the District Munsif above referred to who granted a review and passed a decree for plaintiff as prayed for in the petition. The decree was affirmed on appeal by the Acting District Judge, against whose decree the defendant preferred this second appeal.

Sankaran Nayar, for appellant.

Govinda Menon, for respondent.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and SHEPHARD, J.).

JUDGMENT.

Two points have been argued on behalf of the appellant, but it is sufficient to express an opinion on the first only, which is that under Section 624 of the Civil Procedure Code, it was not competent to the District Munsif who had not delivered the original judgment to entertain the application for review made on the plaintiff's behalf. The District Judge observes that it was not shown that any new and important evidence had been discovered, and in this respect the respondent's vakil has not succeeded in showing that the District Judge was wrong. But the District Judge held that as the application was in the first instance presented to Mr. Chandu Menon, and he had thereupon ordered the decree to be produced, the terms of the section had been satisfied. The District Judge refers to a decision in *Karoo Singh* v. *DeoNarain Singh* (1) as an authority for the position taken by him and prefers to follow that case to the case of *Pancham* v. *Jhinguri* (2). But even the decision in *Karoo Singh* v. *Deo Narain Singh* (1) does not go so far as to hold that the mere physical reception of an application is sufficient, for there notice had been issued and in order to issue notice the matter had to be judicially considered.

We are of opinion that the order of the Disrrict Munsif was wrongly granted, and therefore reverse the decree of the Lower Appellate Court and dismiss the suit with costs to the appellant throughout.

(1) 10 C. 80. (2) 4 A. 278.

1889
APRIL 1.

APPEL-
LATE
CIVIL.

12 M. 511.

12 M. 511.

[511] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SAMBASIVA (*Petitioner*), *Appellant v.* SRINIVASA AND OTHERS (*Defendants*), *Respondents.** [1st April, 1889.]

Civil Procedure Code, Section 232—Order rejecting petition for execution by transferee of decree—No appeal from such order.

A petition, by one claiming to be the purchaser at a Court sale of the interest of a decree-holder under a decree, for execution of the decree, was rejected.

Held, no appeal lay from the order rejecting the petition.

[**F.**, 14 M. 478; **R.**, 16 A. 483 (491); **Expl.**, 25 M. 545.]

APPEAL against an order made by the Subordinate Judge of Negapatam on a petition for the execution of the decree in original suit No. 80 of 1878.

The petitioner, claiming to be the transferee by operation of law of the decree in original suit No. 80 of 1878, by virtue of his purchase of the decree-holder's interest at a sale held in execution of another decree, applied for execution under Section 232, Civil Procedure Code.

The Subordinate Judge rejected his petition.

The petitioner appealed to the High Court.

Sundara Ayyar, for appellant.

Kalianaramayyar, for respondent.

JUDGMENT.

We are of opinion that no appeal lies from the order of the Subordinate Judge.

The order passed is under Section 232, Civil Procedure Code, and refuses to recognize the petitioner as the transferee of the decree by operation of law. The case seems identical with that decided by the High Court of Bengal in *Mahabir Singh* v. *Ram Baghwan Chowbey* (1).

We must dismiss the appeal with costs.

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* Appeal against Order No. 63 of 1888.

(1) 11 C. 150.

12 M. 512 (P.C.) = 13 Ind. Jur. 409 = 5 Sar. P.C.J. 455.

1889 JULY 17. PRIVY COUNCIL. 12 M. 512 (P.C.) = 13 Ind. Jur. 409 = 5 Sar. P.C.J. 455

[512] PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Hobhouse, Sir Barnes Peacock and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

PUTHIA KOVILAKATH KRISHNAN RAJA AVERGAL (*Defendant*) v. PUTHIA KOVILAKATH SRIDEVI AND OTHERS (*Plaintiffs*). [16th and 17th July, 1889.]

Concurrence of Lower Courts in findings upon questions of fact—Agreement for division of family property in equal shares—Malabar custom.

Two Courts in concurrence found that there had been an agreement between two parties, interested in a family fund, that it should be divided into equal fourth parts among the four branches of the family, but that an unequal division, made under a decree, had resulted from unfair dealing. To contest, upon this appeal, those findings of fact, nothing was stated to make it appear to the Committee that, if they went through the whole of the evidence, they would differ from the Courts below on anything but questions of pure fact. Accordingly, their Lordships were of opinion that the case fell within the rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below.

APPEAL from a decree (23rd March 1885) of the High Court, affirming a decree (3rd April 1884) of the Subordinate Judge of South Malabar.

The suit out of which this appeal arose was brought by the respondents against the appellant for Rs. 37,633, with interest, calculated from the 19th January 1881, as money received by the defendant on that date on behalf of the plaintiffs, having been paid by the Official Trustee as part of a one-fourth share of joint property to which the plaintiffs were entitled. They alleged that the defendant having received the whole of their share had paid over only part, improperly retaining the balance now claimed.

The defence was that according to an agreement for partition contained in a razinama filed in a suit in which a decree was made by the High Court, the plaintiffs were entitled to no more than the sum which they had received. The plaintiffs and defendant were members of a family of zamorins, or rajas, at [513] Calicut, comprising three "kovilakams" or houses, and the parties belonged to the first of these called the Puthia Kovilakam. They were governed by the Marumakatayam law of inheritance, under which descent is traced in the female line, a person's heirs being the children of his sisters. Each kovilakam or house had its separate estate, and the senior female representative of each, known as the Valia Thamburatti of such kovilakam, was entitled to the management of the property belonging to it. There were also five stations or places of dignity, known as stanoms, to which separate property was attached, and these belonged to the senior male members of the kovilakams in succession, as explained in *Vira Rayen* v. *Valia Rani of Pudia Kovilagom* (1). The fund, of which the partition led to the present litigation, consisting of jewels and money of the value of Rs. 4,77,996, constituted the bulk of the joint estate of the Puthia Kovilakam, and was

(1) 3 M. 141.

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derived from a zamorin, who died in 1845. The mother of the first and second of these respondents, and grandmother of the third, was the Valia Thamburatti of the Puthia house, and manager. She, being anxious for the safety of the fund, made it over for safe keeping to the Collector of South Malabar, and then at his request to the Official Trustee at Madras.

The first branch, dissatisfied at this, in September 1879, sued the Official Trustee and the Valia Thamburatti, claiming to have the right of that branch to one moiety of the fund declared, as being the defendants of one of the two sisters whom they declared to have been the donees in 1845.

The Valia Thamburatti in her defence denied their right to interfere with her management. But while matters so stood, a compromise was entered into among the four branches of the family at Calicut. By this, it was agreed that the fund in question should be divided into four equal parts, each branch taking one, and to carry this out, an authority to a vakil at Madras was signed at Calicut, to have four persons (parties afterwards to the present suit) made defendants to the then pending suit and to have it disposed of and partition made. The result was that there was executed at Madras the razinama, which the present suit alleged to be fraudulent by reason of its arranging, without due consent, and contrary to the subsisting understanding that the moiety of [514] the fund should be unequally divided between the two of the parties, one of whom represented, without due authority, the present respondents. On the 5th May 1880 the razinama was filed, and a decree made by consent; the present appellant receiving the moiety of the fund now in question from the Official Trustee on the 19th January 1881.

In the present suit the issues raised between the parties were as to the validity of the razinama, and the decree founded thereon, and also as to limitation.

The Courts below concurred in finding that the agreement in question was for the equal division into four parts, and that the razinama of 1880 was in violation of that agreement, and the result of fraud so that the decree which followed it was not binding on the respondents. The Courts below also concurred in holding that the plaintiff's suit was not barred by limitation, whether it were regarded as a suit to recover money received to their use, and improperly retained, or for relief on the ground of fraud, inasmuch as the suit was brought within three years of the fraud in question becoming known to these respondents.

Mr. *J. D. Mayne*, for the appellant, argued that there were grounds for doubting the correctness of the finding of the Courts below. (Their Lordships referred to *Venkateswara Iyan* v. *Shekhari Varma* (1), where they interfered with concurrent decisions, but pointed out that in that case the question raised was one dependent on the admissibility of subordinate facts and the construction of documents). He took, *seriatim*, the grounds mentioned in the Original Court for its decision, and contended that on important points the Court was in error. (Their Lordships also referred to *Pauliem Valloo Chetty* v. *Pauliem Sooryah Chetty* (2), where concurrent judgments on fact were allowed to be disputed, but they distinguished the present case). The whole evidence showed that the plaintiffs left their interests in the hands of the Valia Thamburatti, the

(1) 8 I.A. 143=3 M. 384. (2) 4 I.A. 109=1 M. 252.

legal manager of their estate, and there was nothing establishing fraud in the razinama of 1880 (1).

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[515] Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne*, for the respondents, were not called upon. Their Lordships' judgment was delivered by LORD HOBHOUSE.

JUDGMENT.

Their Lordships consider that this case is concluded by the findings of the Courts in India. So far as regards the merits of the case, two questions are raised: first, whether there was an agreement between the parties interested in the fund which is the matter in dispute, that it should be divided into equal fourth parts among the four branches of the family; and, secondly, whether the unequal division, which actually took place and which was affirmed by the decree of the Court, was due to underhand or foul play. On the first point the Subordinate Judge finds that there was an agreement for equal division, and he finds that on the ground of oral evidence which he believed. It is quite true that in assigning reasons for preferring that evidence to evidence given the contrary way, he relies upon some documents which are contemporary, or nearly contemporary, with the transaction, showing that letters were written or instructions given by other branches of the family in terms which point to the division of the property in equal fourths, and one of which refers to similar documents written on behalf of all the branches of the family. Then it is stated by the defendant that there were letters and papers containing instructions which warranted the actual transaction that was carried out, and the actual division of the money, but none of those letters or papers are forthcoming, and the mention of them and their disappearance does not benefit the case of the defendant. Those are the reasons assigned by the Subordinate Judge for preferring the evidence which affirms an agreement for equal division into fourths. Whatever his reasons are, the question remains one of pure fact. The two Courts have found the same way on that question of fact. Nothing is stated to make their Lordships conclude that if they went through the whole of the evidence, and differed from the Courts below, they would differ from them on anything but questions of pure fact. Therefore the case clearly falls within that wholesome rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below. Their Lordships think they would be making a departure from that principle if they were to allow [516] this evidence to be canvassed for the purpose of reversing the decision.

The same thing may be said with respect to the second question of dishonesty or foul play. It all resolves itself into a question of credit due to the witnesses, and their Lordships have the same reluctance to interfere with the findings of the Court on that question. So far as to the merits of the case.

Then a defence is raised on the ground of bar by lapse of time; and it is said that the case falls within Article 95 of Act XV of 1877. That article provides that a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud, must be brought within three years

(1) The cases reported in Moore's I.A. in which the concurrence of two Courts upon fact has been adverted to, are given in a list under the title "Practice," in the Digest of the Mooer's I.A. Ca. made by the late H. J. Tarrant, Esq., in 1874, see pp. 242, 250, 251 and 258.

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from the time when the fraud becomes known to the party wronged. Whether the case does fall within that article or not is a question in controversy, but their Lordships will treat it for the sake of this judgment as falling within that article, that being the ground which is most favourable to the appellant's case. Then the question arises, when did the fraud become known to the plaintiffs in this suit? That again is a question of pure fact. Both Courts have found that there is no evidence that the fraud became known before the month of December 1880. It is doubtful whether it became known so early, but that is sufficient. The plaintiffs swear, and are believed when they swear, that they did not know of the fraud within the statutory time; and as they have given as much evidence of a negative as people can be expected to give, it was for the defendant to come forward and show something which might carry the knowledge home to them. He has not done it. That issue is found against him, and upon those findings their Lordships think that the Court was right in holding that, even if the case falls within Article 95, the plea of limitation is not proved.

The result is that the appeal fails, and should be dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellant: *Lawford, Waterhouse and Lawford.*
Solicitors for the respondent: *Burton, Yeates, Hart and Burton.*

13 M. 1.

1889 APRIL 25.

APPELLATE CIVIL.

APPELLATE CIVIL.

13 M. 1.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

THIRUMALAI (*Petitioner*), *Appellant* v. RAMAYYAR AND ANOTHER (*Counter-Petitioners, Defendants*), *Respondents.**
[15th and 16th and 25th April, 1889.]

Civil Procedure Code, Sections 253, 546, 583—Surety for the due performance of appellate decree—Mode of enforcing liability of such surety—Execution proceedings.

When security had been given on behalf of the respondent to an appeal under Section 546 of the Code of Civil Procedure for the due performance of the decree of the Appellate Court and the Appeal had been successful :

Held, that under the provisions of Sections 253,583, the decree of the Appellate Court could be enforced against the sureties in execution proceedings. *Venkapa Naik* v. *Baslingapa* (I.L.R. 12 Bom. 411), approved.

[F., 14 Bur.L.R. 170 (172)=4 L.B.R. 197; Appr., 17 A. 99 (102); 28 M. 117 (118) =14 M.L.J. 430; R., 25 B. 409 (413); 31 B. 128 (133); 23 C. 212 (215); 31 M. 330 (332)=3 M.L.T. 317; 2 Bom.L.R. 203 (205); 13 C.P.L.R. 104 (106); 109 P. R. 1906=1 P.L.R. 1907; Cons., 15 M. 203 (211).]

APPEAL against the order of S. Subbayyar, Subordinate Judge of Tinnevelly, made on an application for the execution of the decree of the High Court in appeal No. 21 of 1886.

Defendant No. 2 in original suit No. 4 of 1884, on the file of the Subordinate Court, preferred the above appeal and obtained a decree reversing the decree of the Subordinate Court; he now sought to execute the decree of the High Court to the amount of Rs. 3,000 against two sureties who had furnished security on behalf of the plaintiff under Section 546 of the Code of Civil Procedure for the fulfilment of the appellate decree.

[2] The Subordinate Judge dismissed the application and the petitioner preferred this appeal.

Bhashyam Ayyangar, for appellant.

Rama Rau, for respondents.

The further facts of this case and the arguments adduced on the appeal appear sufficiently for the purpose of this report from the judgment of MUTTUSAMI AYYAR, J.

JUDGMENT.

MUTTUSAMI AYYAR, J.—This was an application for the execution of a decree, passed by the High Court in appeal, against two sureties who engaged under Section 546, Code of Civil Procedure, to become liable for the performance of that decree before it had been passed. The Subordinate Judge dismissed the application on the ground that the decree could not be enforced against a surety. He observed that Section 253 was applicable to decrees of the Court of first instance only, and that Section 583 was not intended to extend its operation to decrees passed in

* Appeal against Order No. 159 of 1888.

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appeal. It is contended before us that the construction suggested by the Subordinate Judge is not the true construction, and our attention is drawn to the decisions in *Bans Bahadur Singh* v. *Mughla Begam* (1), *Rash Behary Mookhopadhya* v. *Maharani Surnomoyee* (2), and *Venkapa Naik* v. *Baslingapa* (3). From the course of decisions on Section 204 of Act VIII of 1859* it is clear that that section was considered to include decrees passed in appeal. This is conceded for the respondents in this case, but it is argued for them that the wording of Section 204 has since been changed, that the change of expression has been intended to limit the special rule embodied in that section to decrees of the Court of first instance, and that the extension contemplated by Section 583 does not include the provisions of Section 253. The only case decided in this Court that has some bearing on the question is that of *Balaji* v. *Ramasami* (4). In that case, however, the surety contracted the obligation after the Appellate Court had passed its decree pending the disposal of **[3]** an application for review. The Court, while declining to enforce the appeal decree against the surety, observed that "assuming that Section 253 can be extended to appeals, it applied only to cases in which the security had been given before the passing of the decree in appeal." The point now raised for decision is whether Section 253 can be extended to appeals. In the other High Courts there has been a difference of opinion. The High Court at Bombay and the majority of the Judges at Allahabad considered that the present Code did not alter the rule embodied in Section 204, whilst the High Court at Calcutta, and some of the Judges at Allahabad considered that decrees of the Court of first instance alone could be enforced against sureties under the existing law. Comparing Section 253 of the present Code of Civil Procedure with Section 204 of Act VIII of 1859, it cannot be denied that there has been a change of expression in a material point. The words in the one were "whenever a person has become liable for the performance of a decree, &c.," whilst the words substituted for them in the other are "whenever a person has, before the passing of a decree in an original suit, become liable, &c." The case presupposed by the one set of words is the obligation of a surety contracted for the fulfilment of a decree whether in an original suit or in an appeal, whilst the case suggested by the other set of words is that of a surety who contracted the obligation before the passing of the decree in an original suit. I do not think that the words "the decree in an original suit" can be taken to mean the final decree in that suit, whether it is passed by the Court of first instance or by the Court of Appeal. The word "final" which is not found in Section 253 will then have to be introduced into it, and we are not at liberty to alter the words. Again, Section 583 shows that the Legislature first premised a distinction between decrees in suits and decrees in appeals, and then extended the operation of the rules applicable to the execution of decrees of Courts of first instance to the execution of decrees of the Appellate Courts.

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*Act VIII of 1859, Section 204: Whenever a person has become liable as security for the performance of a decree or of any part thereof, the decree may be executed against such person to the extent to which he has rendered himself liable, in the same manner as a decree may be enforced against a defendant.

Section 364: Application for execution of the decree of an Appellate Court shall be made to the Court which passed the first decree in the suit, and shall be executed by that Court, in the manner and according to the rules hereinbefore contained for the execution of original decrees.

(1) 2 A. 604. (2) 7 C. 403. (3) 12 B. 411. (4) 7 M. 284.

The natural inference is that Section 253, as suggested by its language, enacts a rule applicable to decrees of the Court of first instance. But Section 583 appears to me to contain a statutory declaration that that rule shall also apply to decrees in appeal. The words "according to the rules hereinbefore prescribed for the execution of decrees in suits" must ordinarily include every [4] rule relating to the mode of execution, and Section 253 is inserted in the sub-division E of Chapter XIX which treats of the mode of executing decrees. It is then said that Section 253 blends together the liability and the machinery, whilst the rules extended by Section 583 are those which relate exclusively to the machinery; but I do not think there is sufficient foundation for this distinction. The sections which relate to the liability of the surety and which provide for its enforcement are not one and the same, whether in Act VIII of 1859 or in the present Code of Civil Procedure. In the former enactment Sections 76 and 83 indicated how a surety became liable for the fulfilment of the original decree, and Section 36 of Act XXIII of 1861 explained how his liability for the performance of the decree passed in appeal originated.* In the present Code, Sections 479, 484 and 546 correspond to them. In the former it was Section 204 that provided the machinery for its enforcement, whilst in the latter the machinery is contained in two Sections, 253 and 583. The words in Section 253 "whenever a person has, before the passing of a decree in an original suit, become liable for the performance of the same," only premise the case in reference to which the rule of procedure is prescribed; and they do not support the remark that the liability [5] and the machinery for its enforcement are blended together. Such being the case there is nothing unreasonable in holding that Section 583 includes the rule embodied in Section 253 among the rules applicable to execution of decrees in suits, and extends them all to execution of decrees passed in appeal. As to the question of necessity for changing the language of Section 204 of Act VIII of 1859 it seems to me that the change was designed to bring the language of Section 253 into complete accordance with the general scheme of the Code. Between Section 204 and Section 362 of Act VIII of 1859 there was this incongruity or want of

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* Act VIII of 1859, Section 76: If the defendant fail to show such cause, the Court shall order him to give bail for his appearance at any time when called upon while the suit is pending, and until execution or satisfaction of any decree that may be passed against him in the suit; and the surety or sureties shall undertake, in default of such appearance, to pay any sum of money that may be adjudged against the defendant in the suit, with costs. Any order made by the Court, under the provisions of this section, shall be open to appeal by the defendant.

Section 83: If the Court, after examining the applicant and making such further investigation as it may consider necessary, shall be satisfied that the defendant is about to dispose of or remove his property, with intent to obstruct or delay the execution of the decree, it shall be lawful for the Court to issue a warrant to the proper officer, commanding him to call upon the defendant, within a time to be fixed by the Court, either to furnish security in such sum as may be specified in the order to produce and place at the disposal of the Court when required the said property or the value of the same or such portion thereof as may be sufficient to fulfil the decree, or to appear and show cause why he should not furnish security. The Court may also in the warrant direct the attachment until further order of the whole or any portion of the property specified in the application.

Act XXIII, of 1861, Section 36: When an order is made for the execution of a decree against which an appeal has been preferred, it shall be lawful for the Court which pronounced the decree to require security to be given for the restitution of any property which may be taken in execution of the decree or of the value thereof, and for the due performance of the decree or order of the Appellate Court. The Appellate Court may in any such case direct the Court which pronounced the decree to take such security.

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precision. The case presupposed by the former was one in which a surety was liable forthe performance of a decree, and the words "a decree" included appeal decrees. Again, the rules applicable tothe execution of original decrees were declared by Section 362 to apply to the execution of decrees of an Appellate Court. In the present Code all the rules applicable to the execution of original decrees were kept distinct, collected together in Chapter XIX and classified under appropriate heads. In carrying out this scientific arrangement, it was probably considered desirable to make Section 253 in express terms what its place in the Code implies, *viz.*, strictly a provision on the mode of executing original decrees and to indicate its applicability to the decrees of Appellate Courts by the general direction in Section 583 that all the rules that apply to one shall likewise apply to the other. Again, the obligation which the surety undertakes is an obligation to fulfil the decree which may be passed against the defendant or appellant in the original suit or in appeal, and the obligation is contracted before the Court and is as much a matter of record as the decree undertaken to be fulfilled. There is no apparent reason for directing the successful party to obtain a fresh decree against the surety whilst the very obligation is to fulfil the decree against the defendant or the appellant. If this principle is to be recognized for the purpose of executing against the surety decrees of the Court of first instance, it is difficult to see why decrees of Appellate Courts should be excluded from its operation. I am therefore of opinion that the construction placed on Sections 253 and 583 in *Venkapa Naik* v. *Baslingapa* (1) is the true construction, and I would set aside the order of the Subordinate Judge and **[6]** direct that the decree be executed against the sureties in accordance with law.

The respondents will pay the appellant's costs throughout.

WILKINSON, J.—I also am of opinion that the decree can be executed against the surety, the provisions of Section 253 being made applicable by Section 583.

M. 6.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SIVASANKARA (*Defendant*), *Appellant v.* VADAGIRI (*Plaintiff*), *Respondent.** [14th August and 29th September, 1889.]

Temple management—Dismissal of dharmakarta, grounds for—Dharmakarta guilty of misfeasance retained in office on terms.

A suit to remove a dharmakarta, though he is held to have been guilty of misconduct in the discharge of his duties as such may, in the absence of any proved and deliberate dishonesty on the defendant's part, be dismissed on conditions to be complied with by him.

APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in original suit No. 22 of 1885.

Mr. *Gover*, *Rama Rau*, and *Mahadeva Ayyar*, for appellant.

Ramasami Mudaliar, *Sadagopa Charyar* and *Ranga Charyar*, for respondent.

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* Appeal No. 128 of 1887.

(1) 12 B. 411.

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The facts of the case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.

The appellant and the respondent are the joint dharmakartas of Kandasami temple at Tiruporur. in the District of Chingleput. The respondent charged the appellant with various acts of misfeasance and sues for his dismissal from the office of dharmakarta. The District Judge has found against the appellant with regard to three of the charges made against him. He has found that the appellant has been guilty of malversation in respect of casuarina trees at Kalavakam and of improperly maintaining his mother and sister out of temple funds, and he has also found, [7] though this is not a charge specifically made in the plaint, that appellant has been persistently setting the respondent's authority at naught. Concerning the charge of consorting with dancing girls and using temple money for their use, while the District Judge believes that appellant has been guilty of immorality, he does not find that the immorality was accompanied by malversation of property. On the strength of the three charges above mentioned, the District Judge has decreed the appellant's removal from office. With regard to the last of the three charges we are disposed to agree with the District Judge in thinking that the appellant was endeavouring to ignore and disregard the respondent's position as a co-trustee. It is in evidence that, when the Government severed its direct connection with the management of the temple in 1842, the respondent's father and the appellant's predecessor in office were appointed as joint trustees, and that from that time they acted as such. In 1874 an agreement was made between the respondent and the appellant's predecessor, the purport of which was to abridge the functions of the respondent and restrict him to looking into the accounts of the temple once a month, and acting in all matters with the consent of his co-trustee. This agreement, we are of opinion, can only be regarded as made for mutual convenience as long as mutual confidence subsisted. Any other construction of it would involve the recognition of a right in a trustee to abdicate or delegate his duty.

We must, therefore, hold that the appellant is not justified by the arrangement with his predecessor in conducting himself as he has done with regard to the respondent. He has taken a wrong view of his position and his duties; but, unless it appears that in the conduct he has pursued he has been actuated by dishonest motives, we do not think he should be dismissed from the office of trustee. As regards the maintenance by the appellant of his mother and widowed sister out of temple funds, the evidence on both sides shows that they lived together in the mutt and under his protection. The admission in the written statement that he has no means lends weight to the evidence for the respondent that temple funds have been spent upon their support and the evidence of the two witnesses who say that the appellant's sister had property of her own is vague and inconsistent. We therefore agree with the District Judge in thinking that this charge is well founded. Whatever may be the moral obligation on the appel-[8] lant's part to support his mother and sister, we must hold that an expenditure of temple funds for that purpose is not justified and constitutes a breach of trust. It is, however, of a comparatively venial character and would not by itself merit the extreme penalty of dismissal from office.

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The more serious charge is that relating to the misappropriation of casuarina trees. The fact that two hundred trees in a garden at Kalavakam, belonging to the devastanam, were some two or three years ago cut down and sold by the defendant is spoken to by several witnesses. Two of the respondent's witnesses depose to the purchase of the wood by Ruthnavalu Mudali for Rs. 110. The first witness says that the money was paid to the appellant in the temple and taken charge of by the accountant. The appellant's witnesses, other than the appellant himself, admit the existence of the plantation, and the fact that some two or three years ago some trees, but not two hundred, were cut down. These trees, they say, were used for making pandals for the temple. The defendant, in his written statement, says:—"There never was a casuarina garden belonging to Tiruporur Kandasami," meaning apparently to deny in terms what is alleged in the eighth head of charge. This denial he repeats in his evidence adding "there is a tope in Kalavakam; it is my own property; the late dharmakarta purchased it from his own money." He says further that no account was kept with regard to the casuarina plantation and that such account was not handed to the amin, but when the Commissioner came on the second occasion, appellant says he showed him an account. From the list of accounts taken charge of by the amin as to which he speaks in a general way, it appears that there was a casuarina account, but no particulars are given and it is not shown to what garden it refers, by whom it was kept, or in whose custody. In a later report of another amin, the account is said to be "not found," but again no particulars are given, and the amin, who is examined, merely says he made a list and a report. The District Judge, without any examination of the evidence, has simply recorded a finding of guilty on the charge of misappropriating casuarina trees. Apparently he gave credit to the plaintiff's witnesses, and, if they are believed, it is clear that the appellant has not accounted for the proceeds of the trees. The District Judge says nothing concerning the appellant's assertion of a claim to the casuarina garden [9] in his own right, although the circumstance of his making such a claim would, if the claim were made deliberately and with the knowledge that he was seeking to appropriate temple property, have constituted important evidence against the appellant. We observe that the appellant did not in his written statement lay any claim to the garden; his denial seems to have strict reference to the charge as laid in the plaint and, in a paragraph, it is admitted that the devastanam has some casuarina plantation. The same admission, moreover, is made throughout the evidence of the witnesses and even the appellant declares that the trees admitted to have been cut down were used for devastanam purposes. Having regard to all the circumstances, we are not prepared to take a more serious view of the appellant's conduct with regard to the casuarina than has been taken by the District Judge. We accept the finding that the appellant has not accounted for the proceeds of trees sold, but acquit the appellant on the graver charge of attempting to appropriate the garden to himself as his private property.

It is contended on behalf of the appellant that the misconduct proved against him is not sufficient to warrant his dismissal from office, and reliance is placed on the observations made in the case of *Chinna Jiyan* v. *Durma Dossji* (1). Having regard to the considerations of expediency suggested in that case and to the absence of any proved and deliberate

(1) 5 Mad. Jur. 214.

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dishonesty on the appellant's part, we are of opinion that the interests of the temple do not absolutely demand the dismissal of the appellant. At the same time we do not altogether acquit him of misconduct. In the attitude he has assumed to the co-trustee, in using temple funds for the support of his mother and sister and not accounting for the money realized by sale of wood, he has acted wrongly and improperly. We shall not, therefore, dismiss the suit unconditionally. But we direct that, if within one month from the date of the decree the appellant do file in the District Court an undertaking signed by him to the effect that henceforth he will loyally co-operate with the respondent, allowing him to take an equal part in the management of the temple and its property, and to have access to the accounts, and liberty to examine the jewels and other things in the temple, and also that henceforth he will not **[10]** expend any part of the temple moneys on the maintenance of his mother and sister or for any other purposes than those of the temple, and further that, if within one month from the same date, the appellant do pay the sum of Rs. 110 into the District Court, this appeal be allowed and the decree of the District Court be reversed except as to costs, and the suit dismissed. On the appellant's making default in filing the above mentioned undertaking or paying the money into Court as required, the appeal will stand dismissed. In either event, the appellant must pay the costs of this appeal.

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13 M. 10.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

NARASIMMA (*Defendant*), *Appellant* v. MANGAMMAL (*Plaintiff*), *Respondent.** [25th April and 2nd May, 1889.]

Hindu law—Inheritance—Mother's brother--Father's sister.

According to the Hindu law current in the Madras Presidency, the father's sister is not entitled to inherit in preference to the mother's brother.

Semble: Per Wilkinson, J.—The father's sister is a bandhu.

[N.F., 26 B. 710 (713); F., 15 M. 421 (422); R., 28 A. 187 (192) = 2 A.L.J. 654 = A. W.N. (1905) 242; 4 N.L.R. 31 (35).]

APPEAL against the decree of G. D. Irvine, Acting District Judge of Coimbatore, in Original Suit No. 25 of 1887.

Suit to establish the plaintiff's right as heir to one Ellama Naik (deceased) and to recover from the defendant the amount collected by him under an heirship certificate. The plaintiff was paternal aunt and the defendant was maternal uncle of the deceased. The Acting District Judge held that the plaintiff was a nearer heir than the defendant, on the ground that she was a bandhu *ex parte paterna* and accordingly passed a decree in favour of the plaintiff.

The defendant preferred this second appeal.

Bhashyam Ayyangar and *Ramachandra Ayyar*, for appellant.

The plaintiff has obtained a decree on the ground that she is a bandhu *ex parte paterna*. If she could be entitled to inherit, it would be as a sapinda and not a bandhu ; but, in the right view of the law, she is not an heir at all, and in any case she cannot come **[11]** in before the defendant

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* Appeal No. 169 of 1888.

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or until the male heirs are exhausted. In the enumeration of bandhus in Mitakshara, Chap. 11, Section 6 (see Mayne's Hindu Law, 4th edition, § 472) a son of either the plaintiff, the father's sister, or the defendant, the mother's brother would have been expressly included as "own cognate kindred." Neither paternal aunt nor maternal uncle comes within the terms of that enumeration, but the latter is really included and elsewhere he appears as a specified bandhu.

In *Lakshmanammal* v. *Tiruvengada* (1) the contest was between a sister and sister's son; but the decision, which was in favor of the latter, did not involve a decision that a sister was in the line of heirs: the Court said if that matter had to be decided, a reference to the Full Bench would have been necessary. But in any view that decision is inapplicable here, for the sister being mentioned in certain texts, and some commentators including "sister" in "brother," and Manu, chap. IX, 211, 212, giving her certain special rights, there are indications that she has a right to inherit (though not so clear as those with regard to a widow or daughter), whereas there are none as to the father's sister.

In the scheme of the Mitakshara—*sagotras* come first, then *samonadakas* who are still of the same *gotra*, and then *bandhus* who are not of the same *gotra*. Among *sagotra sapindas* are inserted some female relations—wife (regarded in Bombay as a *sagotra*, because the wife of a *sapinda*), mother and great-grandmother. Then among the *bandhus* (who are enumerated in the Mitakshara by way of illustration merely) appear the offspring of a female *sapinda* with a male of a different *gotra*. The father's gotra is of course the gotra of the son, who is accordingly called *binna gotra sapinda*, because he is the offspring of persons of two *gotras*, and this would appear to be the true definition of a *bandhu* and explains his being postponed as such to *samonadakas* of fourteen degrees of remoteness.

(*Shephard*, *J.*—Your conclusion then is that the maternal uncle is a bandhu, because the mother's mother is a *sapinda* who marries into a different gotra?)

Yes; and it is also a fact to be noticed with reference to the enumeration in the Mitakshara that it gives only the extreme limits of the relationship—mentioning the sons, not the father.

[12] But the maternal uncle is specified as a bandhu in the Viramitrodaya, translated in *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (2).

As to the claims of the father's sister, see *Mari* v. *Chinnammal* (3), where, after discussing the Bombay rule that a mother is a *gotraja sapinda* because of her marriage into the *gotra*, the Full Bench decided practically that a stepmother is not a bandhu or an heir at all, because "mother" does not include "stepmother," and *Muttusami Ayyar*, *J.*, said he did not think that all female sapindas are to be recognized as heirs in this Presidency. The exclusion of females to its full extent is exemplified and explained in that case and also in *Krishnayya* v. *Pichamma* (4), *Gauri Sahai* v. *Rukko* (5). The Judge is wrong in attaching so great importance to the fact that the plaintiff is related through the father and the defendant through the mother; the maternal uncle comes under "own kindred" and so would the paternal aunt if she could come in at all.

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(1) 5 M. 241. (2) 2 B. L. R. F. B. 28 (42). (3) 8 M. 107.
(4) 11 M. 287. (5) 3 A. 45.

1889 MAY 2. — APPELLATE CIVIL. — 13 M. 10.

Subramanya Ayyar and *Mahadeva Ayyar*, for respondent.

Neither party comes under the expressions employed in the Mitakshara enumeration of bandhus, and there is no decided case precisely in point, but *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (1) proceeds on the view that it would be absurd to hold that where sons are bandhus the parents would not be bandhus. It is admitted that a sister is a bandhu, and by parity of reasoning a paternal aunt would be one too; and as she is among paternal kindred, she would necessarily be a preferable heir to any maternal kindred. See also Stokes' Hindu Law Books, p. 447, as to Mitakshara, Chapter II, Section 5, Clause 5.

JUDGMENT.

WILKINSON, J.—The question for determination in this appeal is—who is entitled to succeed to the property of the deceased minor, his father's sister (plaintiff), or his mother's brother? The Lower Court has decided in favor of the paternal aunt, on the ground that she is a bandhu, and that the father's kindred have in Hindu Law a preference over the kindred of the mother.

On appeal it is argued (1) that the paternal aunt is not a bandhu; (2) that if it be held that the father's sister is a bandhu and in the line of heirs, she will come in only after all male heirs [13] are exhausted; and (3) that the maternal uncle, being a specified bandhu, comes in before the paternal aunt.

The position of the maternal uncle as a bandhu was recognized by the Privy Council in the case of *Gridhari Lall Roy* v. *The Bengal Government* (2). Their Lordships relied on a passage written by the author of the Mitakshara, though not to be found in that portion of the Treatise translated by Colebrooke, and on a passage of the Viramitrodaya, and were of opinion that the enumeration of bandhus in the text of Mitakshara, Chapter II, Section 6, is illustrative and not exhaustive. The passage in the Viramitrodaya, with reference to the said enumeration, is as follows:—

"The term cognate (bandhu) in the text of Yajnavalkya must comprehend the maternal uncles and the rest, otherwise the maternal uncles and the rest would be omitted, and their sons would be entitled to inherit and not they themselves though nearer in the degree of affinity, a doctrine highly objectionable."

The words "and the rest" must, I think, apply to "father's sister," "mother's sister," and the others whose sons are enumerated in the passage in the Mitakshara together with the maternal uncle. It follows, therefore, that the same passages, which are an authority for classing the maternal uncle among the bandhus, support the claim of the maternal aunt to be recognized as a cognate or bandhu. But then we must hold on the authority of *Lakshmanammal* v. *Tiruvengada* (3) that, in virtue of the rule excluding the females in favor of preferential male heirs, the claim of the maternal uncle is superior as bandhu to that of the father's sister.

The decree of the Lower Court must be reversed and the suit dismissed with costs throughout.

SHEPHARD, J.—The question in this appeal is—who is the nearer heir to one Ellamma Naik deceased: his father's sister, the plaintiff, or his mother's brother, the defendant? There is no doubt that the latter

(1) 2 B.L.R. F.B. 28 (42). (2) 12 M.I.A. 448. (3) 5 M. 241.

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being maternal uncle of the deceased has a place among his heirs. The maternal uncle and his nephew stand in the relation of bandhus to each other, and, as such, either inherit to the other in the absence of preferable heirs, *Gridhari Lall Roy* v. *The Bengal Government* (1), *Amrita Kumari Debi* v. [14] *Lakhinarayan Chuckerbutty* (2). *Krishnayya* v. *Pichamma* (3). The question here is whether the father's sister is a preferable heir?

The District Judge has ruled that she is entitled to inherit as a bandhu, and that, as the father's kindred are to be preferred to the mother's, she ranks as an heir above the maternal uncle. There is no doubt that in this Presidency the father's sister cannot, any more than a man's own sister, claim a place as his heir among his samanagotra sapindas. Any distinction that may be made between a man's own sister and his father's sister, must be in favour of the former, for, whereas there is a text recognizing the former, no text expressly recognizing the father's sister has been cited. *Rayaningaru* v. *Vencata Gopala Narasimha Rau* (4), *Lakshmanammal* v. *Tiruvengada* (5). It has been decided in this Court that while a sister had some place in the line of inheritance, she should be postponed to a sister's son (*Lakshmanammal* v. *Tiruvengada* (5) and the principle on which this decision is rested is that in the Mitakshara, except where females are specially mentioned, the rule is that priority is given to male heirs. There is authority for the larger proposition that succession under the Mitakshara is not open to any females other than those specially mentioned (*Gauri Sahai* v. *Rukko* (6), *Mari* v. *Chinna Ammal* (7), Mandlik, p. 365). It was suggested that as a son of a father's sister is mentioned among the cognates related to the man himself (Mitakshara, Chapter II, Section 6), his mother must equally be a bandhu of the same class. Not to mention the circumstance that the enumeration of bandhus, although not exhaustive, includes no females, this argument is obviously fallacious as there are numerous cases in which the offspring of a female parent has rights which that parent would not have. *Rayaningaru* v. *Vencata Gopala Narasimha Rau* (4) and Mayne's Hindu Law, 4th edition, §. 492. Adopting the principle mentioned above (*Lakshmanammal* v. *Tiruvengada* (5)), I think that as it cannot be shown either by texts or decided authority that the father's sister has a place in the line of succession above that of a man's own bandhu, the right of the latter being an undoubted male heir must prevail.

For these reasons I think the plaintiff's claim has failed and would dismiss the suit with costs.

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13 M. 15.

[15] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

RAMALINGA (*Defendant*), *petitioner v.* SAMI APPA (*Plaintiff*), *Respondent.** [1st May and 7th August, 1889.]

Court sale—Emblements—Crop standing land sold in execution of a decree obtained by a mortgagee in possession.

A mortgagee in possession sued on his mortgage and having obtained a decree brought the land to sale in execution; and the execution purchaser was placed in possession:

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* Civil Revision Petition No. 296 of 1888.

(1) 12 M.I.A. 448. (2) 2 B.L.R. F. B. 28. (3) 11 M. 287.
(4) 6 M.H.C.R. 278. (5) 5 M. 241. (6) 3 A. 45.
(7) 8 M. 107.

Held, the mortgagee was not entitled to recover from the execution purchaser the value of the then standing crop.

[R., 15 C.P.L.R. 141 (142) ; 10 M.L.T. 190.]

PETITION under Section 25 of the Provincial Small Cause Courts Act, 1887, praying the High Court to revise the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam.

Suit to recover the value of a crop raised by the plaintiff as mortgagee in possession on land which was purchased by the defendant at a Court sale held in execution of a decree obtained by the plaintiff on his mortgage. The Subordinate Judge passed a decree in favour of the plaintiff.

The defendant preferred this petition.

Subramanya Ayyar, for petitioner.

Bashyam Ayyangar, for respondent.

The further facts of this case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the

JUDGMENT.

MUTTUSAMI AYYAR, J.—The petitioner was defendant in small cause suit No. 74 of 1888, on the file of the Subordinate Judge at Negapatam, and the counter-petitioner was plaintiff in that suit. The question is whether the decision passed therein is contrary to law. The plaintiff was originally a mortgagee in possession of 1 veli, 4 mahs of land. He obtained a decree for sale of the land in liquidation of the mortgage, and the land was accordingly put up to sale in execution. The defendant purchased it, paid the purchase money and obtained a warrant for delivery of posses-[16] sion. At that time a crop was standing on the land and, in execution of the warrant, the standing crop as well as the land was placed in his possession. The mortgagee claimed the value of the crop on the ground that he had raised it, and the purchaser contended that it had passed to him with the land. The Subordinate Judge was of opinion that the defendant bought only the land and acquired no right to the standing crop. In this view he decreed that defendant do pay plaintiff the value of the crop, together with interest, and it is argued before me that the decision is bad in law and that the standing crop passed with the land by virtue of its sale.

I am of opinion that the decree cannot be supported. It does not appear that the right to the standing crop was expressly reserved at the sale or by the sale notice. The interest that passed by the Court sale was not simply that of the judgment-debtor or mortgagor as it stood at the date of the decree, but also included the interest of the mortgagee, the sale being ordered in execution of the mortgage and not subject to it. The ordinary rule is that the right to the growing crop will pass by a sale of the land without express mention, and this the Subordinate Judge has overlooked. Nor has the doctrine of emblements any application in this case. A mortgagee is not one of the persons entitled to emblements, and cannot as such rely either on Section 51 or Section 108, Clause I of the Transfer of Property Act, which only declared the pre-existing law on the subject. (See also Woodfall's Landlord and Tenant, 11th edition, 705.) Nor is this case within the equity of the rule of law concerning emblements which are not allowed even to tenants who either know when their term is to cease or by their own negligence or misconduct

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allow their interest to determine between the time of sowing and of harvest. It was open to the mortgagee in this case to have asked the Court to postpone the sale, so as to enable him to take the standing crop. This view is in accordance with the decision in *Land Mortgage Bank of India* v. *Vishnu Govind Patankar*(1). I set aside the decree of the Subordinate Judge and direct that the counter-petitioner's suit be dismissed with costs throughout.

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13 M. 17=2 Weir 620.

[17] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* RAMASAMI.* [21st August, 1889.]

Criminal Procedure Code, Section 488—*Liability of a Hindu not divided from his father to maintain his wife.*

A Hindu not divided from his father can be ordered to maintain his wife under Section 488 of the Code of Criminal Procedure.

CASE (being maintenance case No. 1 of 1889, on the file of the Deputy Magistrate of Coimbatore) reported for the orders of the High Court under Section 488 of the Code of Criminal Procedure, by J. H. A. Tremenheere, Acting District Magistrate of Coimbatore.

Rajarathna Mudaliar, for defendant.

The Court made the following

ORDER.

The Deputy Magistrate's opinion that a son not divided from his father cannot be ordered to maintain his wife cannot be supported. He must be taken to be able to utilize his joint interests as well for the maintenance of his wife as for his own when it is necessary to do so. The order of the Deputy Magistrate is set aside, and he is directed to restore the case to his file and dispose of it in accordance with the provisions of Section 488, Criminal Procedure Code.

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13 M. 18=2 Weir 44.

[18] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

QUEEN-EMPRESS *v.* MAHANT OF TIRUPATI.*
[22nd and 23rd August, 1889.]

Criminal Procedure Code, Section 96—*Search warrant—When a search warrant may issue.*

The accused was charged with the offence of criminal misappropriation of treasure belonging to a temple of which he was alleged to be the trustee. From the complaint, it appeared that some of the treasure belonging to the temple had been buried under a flagstaff in the temple, and the Magistrate was of opinion

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* Criminal Revision Case No. 226 of 1889.

† Criminal Revision Case No. 360 of 1889.

(1) 2 B. 670.

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that the nature of the property so buried had an important and material bearing on the case for the prosecution :

Held, the Magistrate had jurisdiction to issue a warrant to search for and produce such property upon information which he considered credible, since there was a complaint before him duly affirmed as prescribed by the Criminal Procedure Code; and that it was not incumbent on him to wait until the evidence for the prosecution should have been recorded in the presence of the accused.

[F., 11 Cr. L.J. 535=7 Ind.Cas. 895=8 M.L.T. 416; R., 22 B. 949 (956).]

PETITION under Sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order made by O. V. Bosanquet, Head Assistant Magistrate of North Arcot, on the 10th August 1889, on the application of the complainant, directing the issue of a summons to the accused for the production before the Court on the 19th August 1889 of the property buried underneath the dwajastambham pillar of the temple at Upper Tirupati.

Mr. *Nelson*, Mr. *Norton*, *Ananda Charlu* and *Ramachandra Rau*, for petitioner.

S. Subramanya Ayyar and *P. Subramanya Ayyar*, for counter-petitioner.

The facts of the case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.

This is an application for the revision of an order made by the Head Assistant Magistrate of the district of **[19]** North Arcot on the 10th instant. The order was to the effect that a summons do issue to the mahant (petitioner before us) "to cause to be produced before this Court (the Court of the Head Assistant Magistrate) on Tirumalay on Monday, the 19th August, the property buried underneath the dwajastambham pillar."

The circumstances under which the order was made are shortly these. In the year 1872, a gold treasure, consisting of ancient gold coins of the estimated value of one lakh and seventy thousand rupees, was found buried in a place inside the temple on the hill at Tirupati called the Homa Kundam. This treasure was taken to the District Court at Chittoor and returned to the then trustee of the temple under the orders of that Court. It since remained in the possession of the petitioner's predecessor until his death in August 1880, and then passed into the possession of the petitioner, the present mahant or trustee. In 1887 the flagstaff (dwajastambham) in the temple was renewed, the old dwajastambham being taken down and new one being put up in its place. On the 20th July last, Srirangachari, one of the seven Acharya Purushas and holders of other mirassi rights in the temple, preferred a complaint to the District Magistrate of North Arcot accusing the petitioner, the present mahant or trustee, of criminal misappropriation in respect of a portion of the gold treasure. The statement taken from him on solemn affirmation tended to show that the petitioner made it to appear that the gold treasure which remained in his custody as trustee of the temple was deposited beneath the new flagstaff or dwajastambham, which was put up in 1887, whereas he deposited under it only a small portion of it and dishonestly misappropriated the remainder. Certain affidavits were filed before the District Magistrate and the complaint was transferred by him to the Head Assistant Magistrate on the 24th July last.

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Before issuing process the Head Assistant Magistrate held an inquiry and made the order now sought to be revised in the course of that inquiry.

It appears from the order recorded by the Magistrate that he considered upon the affidavits and other information before him that a warrant should issue for the search and production of the property actually deposited under the flagstaff, that the petitioner's counsel then undertook that if a summons was issued under Section 94 of the Criminal Procedure Code the mahant [20] would have the necessary operations conducted in the presence of a responsible officer and would give notice of the day on which he intended to begin operations, and that on this understanding the Magistrate ordered that summons be issued instead of a search warrant. It is admitted that this was so, and stated that the undertaking was given without prejudice to the petitioner's right to apply to this Court for the revision of the Magistrate's order.

It is also conceded that, in dealing with this petition, we must take the real question to be, whether, upon the information before him, the Head Assistant Magistrate might lawfully issue a search warrant. It is urged, first, that no search warrant should be issued until the evidence for the prosecution was recorded in the presence of the petitioner and tested by cross-examination and a *prima facie* case was thereby established against him; secondly, that by excavating for the property deposited under the flagstaff, the flagstaff would be desecrated and that such desecration would be repugnant to the religious feelings of the general body of worshippers interested in the temple; and, thirdly, that there are physical difficulties in excavating for the property lying under the dwajastambham.

As to the first contention, we are of opinion that, under the provisions of Section 96 of the Code of Criminal Procedure, it is lawful for a Magistrate to issue a warrant for the search and production of anything before him when he considers that such production is necessary for the purposes of any investigation or inquiry under the Code. Nor is it obligatory upon him to wait until a preliminary inquiry is held and all the witnesses for the prosecution are examined and cross-examined. Such a restriction would often tend to defeat the object with which search warrants are authorized to be issued. The Magistrate is entitled, in our judgment, to act upon information which he considers credible, provided that there is a complaint before him and the complainant is examined by him on solemn affirmation in the manner prescribed by the Code of Criminal Procedure. On referring to the complaint, to the complainant's examination and to the affidavits on the record, we see no reason to doubt that there was a reasonable foundation laid in this case for the issue of a search warrant. We do not desire to express any opinion at this stage of the case as to the weight which may be due to the statements contained in the several affidavits. But we may say that upon the affidavit of [21] Kusal Doss and the letter produced by him and upon affidavits on the record relating to the contents of the mahazarnama prepared for the petitioner when the new dwajastambham was put up and to subsequent dealings in gold, to attempts to sell gold, and to sales of gold by the petitioner in Bombay, Bangalore and Madras, there was sufficient information before the Magistrate upon which he might issue a search warrant. It is then argued that even if the gold treasure were not found under the flagstaff, it would not follow that the petitioner is guilty of criminal misappropriation. But we consider it sufficient to observe that the nature of the property actually deposited under the flagstaff has an important and material bearing upon the accusation against the petitioner. The

weight due to the statements of several persons who made affidavits is a matter which it is ordinarily for the Magistrate to determine, and unless the proceeding is either illegal or vitiated by material irregularity, we do not think we ought to interfere on revision and prevent the collection of material evidence as well in the interests of the temple as in the interests of justice.

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APPELLATE CRIMINAL.

13 M. 18= 2 Weir 44.

[Their Lordships next proceeded to consider the other contentions in order, and having held them to be groundless, they dismissed the petition.]

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13 M. 21=1 Weir 767.

APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

QUEEN-EMPRESS *v.* SHEREGAR.* [1st May, 1889.]

Forest Act—Act V of 1882 (*Madras*), *Section* 26—*Canara Forest Rules, Nos.* 7, 12, 23.

The accused, not having a permit, cut certain classified trees on the *kumaki* adjoining his land and used the wood in his still as fuel; and upon these facts he was convicted of an offence against rules 7, 12 and 23.

Held, that the conviction was illegal.

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by S. H. Wynne, Acting District Magistrate of South Canara.

[22] The case was stated as follows:—

"The accused, two undivided brothers, set up a sandalwood still on their land and cut wood for fuel from the adjoining '*kumaki*' for feeding it without permit. One has been convicted of 'cutting, removing and burning' firewood for purposes of trade, namely, for 'use of sandalwood stills without permit,' Section 26, Forest Act, and Sections 7, 12 and 23 of Forest Rules."†

"The rules referred to are published in *Fort St. George Gazette* of May 20, 1884, Part I, pp. 313-322. The case turns upon the interpretation of rule 7, paragraph 2, and the meaning of the words 'for his own use.' I am unable to see why cutting fuel for a sandalwood still placed by a man on his own land is not cutting it 'for his own use.' The Magistrate has imported the words 'for purposes of trade' and (in his judgment) 'meant for sale and not for agricultural or domestic purposes' from the

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* Criminal Revision Case No. 73 of 1889.

† See as to rules 7 and 12, *Queen-Empress* v. *Sivanna*, I.L.R. 11 Mad. 139. The publication in the Gazette of the rules in question is headed as follows:—

Under Sections 26 and 33 (*b*) of the Madras Forest Act (V of 1882), His Excellency the Governor in Council is pleased to make the following rules for the regulation of the use of the pasturage and of the natural produce of lands at the disposal of Government and in lands known as "*kumaki*" in the district of South Canara and not included in a reserved forest, or within the limits of a municipality. Provided, however, that they shall apply to all sholas, plantations and reserves now existing within any such municipal limits, and to all lands at the disposal of Government, which may, from time to time, be notified as lands proposed to be constituted a reserved forest under Section 4 of the said Act, and until the date fixed in the notification (to be issued under Section 16 of the said Act) declaring the said lands to be a reserved forest. From that date, however, these rules shall cease to apply to, or be in force in respect of, the lands specified in such notification.

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preceding paragraph of the rule which relates to unreserved land which is not *kumaki*. But even if it were mere unreserved land and not *kumaki* from which the fuel was taken, I do not think the conviction could stand. The words 'the produce of these lands shall not be sold . . . . . . or in any way used for purposes of trade' do not imply that the produce may not be used as fuel in the manufacture of an article to be afterwards sold. The land, however, was *kumaki* and not mere ordinary unreserved land."

The provisions of Rules Nos. 7, 9, 10, 12, 23 (Canara) are as follows :—

7. In all unreserved lands the villagers shall continue to enjoy, free of charge, such privileges as they have hitherto exercised in the way of grazing cattle or of cutting, converting, and removing trees (other than reserved and classified trees) and timber and other forest produce for fuel or for building or agricultural or domestic purposes, or of burning charcoal. The produce of these lands, however, [23] shall not be sold or bartered, or in any way used for purposes of trade, nor shall any of the aforesaid privileges be in any way alienated except with the land to which they are attached.

In " *kumaki*" lands, that is, within 100 yards of assessed land in wargs formed prior to fasli 1276, the holder of the *kumaki* shall also have the exclusive privilege of cutting, converting, and removing for his own use classified trees at will, and reserved trees on application, for which a permit shall be given free of charge, but if it is found that the concession as regards reserved trees is abused in any village, and not brought to notice by the villagers, the Collector may, in addition to prosecuting the offender, direct that the concession shall be withdrawn as regards that village.

9. The cutting of grass and the pasturing of cattle on reserved lands shall only be permitted with the consent of the Collector and on payment of the prescribed fees. It shall not be lawful for any person to cut grass or to pasture cattle upon any lands in contravention of this rule.

10. All the trees and other natural produce of reserved and unreserved lands shall vest in the Forest Department subject to the following exceptions, *viz.* :—

(*a*) The pasturage and grass on unreserved lands.
(*b*) The toddy of palmyra, date, and other palm trees on unreserved lands.
(*c*) The trees growing by the side of roads (and commonly known as avenue trees) and all topes or trees belonging to Local Fund Boards, communities or individuals.
(*d*) All minerals.

12. Subject to the privileges, exceptions, and reservations specified in rules 7, 9 and 10, no person shall fell, girdle, mark, lop, top, uproot, or burn or strip off the bark or leaves from, or otherwise damage, any tree growing on any reserved or unreserved land, or remove the timber or collect the natural produce of such trees or land except as hereinafter provided.

23. Any breach or infringement of rules 8, 9, 12, 18, 19, 20, 21 or 22 will render the offender liable to imprisonment for a term which may extend to one month or to fine which may extend to Rs. 200, or to both.

The Acting Government Pleader (*Subramanya Ayyar*), for the Crown.
The Court delivered the following

JUDGMENT.

1889 MAY 1. APPELLATE CRIMINAL. 13 M. 21 = 1 Weir 767.

We concur with the District Magistrate that the conviction was illegal. The accused cut certain classified trees in *kumaki* land and used them as firewood for his still. It is argued that the words " for his own use" in clause 2 of rule 7 must be read in conjunction with the restrictive words in clause 1, and that therefore a raiyat may not use the wood cut in *kumaki* land in any way connected with his trade. We are unable to concede this. No doubt it would be illegal for a raiyat to sell wood cut in his *kumaki* land to another person as fuel for his still, but so long as he converts the wood to his own use, he is protected by rule 7. We set aside the conviction and sentence and direct the fine to be refunded.

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13 M. 24 = 2 Weir 610.

[24] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Wilkinson.

QUEEN-EMPRESS *v.* SESHAYYA.* [28th March, 1889.]

Criminal Procedure Code, Sections, 476, 477, 480 *and* 485—*Jurisdiction of Judges and Magistrates in respect of offences committed before themselves—Penal Code, Section* 175.

A Court other than the High Court, &c., can try persons for offences committed before itself only in cases to which Sections 477, 480 or 485 is applicable, and none of these sections is applicable when the accused is charged under Section 175 of the Penal Code.

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure, by C. A. Bird, Sessions Judge of Godavari.

The accused had been summoned as a witness to produce certain documents in calendar case No. 5 of 1888, on the file of the General Duty Deputy Magistrate, Godavari, but failed to produce them, saying that they were not in his possession. The Magistrate having found that the statement was incorrect and that the accused could have produced the documents in question, charged him with having committed an offence under Section 175 of the Indian Penal Code, and himself tried and convicted him.

The accused appealed to the Sessions Judge, who held that he had no jurisdiction to try the appeal, and accordingly reported the matter to the High Court.

Accused was not represented.

The Acting Government Pleader (*Subramanya Ayyar*), for the Crown.

The Court made the following

ORDER.

We are of opinion that the referring officer is right and that the Magistrate had no jurisdiction to try the accused for [25] the offence charged, such offence having been committed before himself or in contempt of his authority. The procedure to be adopted is that laid down in Section 476, Criminal Procedure Code. There are only three cases in

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* Criminal Revision Case No. 56 of 1889.

1889 MARCH 28. — APPELLATE CRIMINAL. — 13 M. 24 = 2 Weir 610.

which a Court, other than the High Court, &c., can try any person for certain offences when committed before itself. These are provided for in Sections 477, 480 and 485. Section 477 obviously does not apply to this case. Section 480 only refers to certain offences committed in the view or presence of the Court and taken cognizance of the same day. This section also is inapplicable in this case. For the same reasons Section 485 does not apply, and the Magistrate was, therefore, clearly precluded by the provisions of Section 487 from tryng the case himself. We set aside the conviction and sentence and direct the fine, if paid, to be refunded.

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13 M. 25.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RAMAYYA AND OTHERS (*Defendants Nos.* 7 *to* 16), *Appellants v.* SUBBARAYUDU AND OTHERS (*Plaintiff and Defendants Nos.* 1 *to* 6), *Respondents.** [29th March, 1889.]

Jurisdiction—Objection as to, first taken on appeal—Suit for partition.

Plaintiff sued in the District Court for partition of an one-seventh share purchased by him in an undivided agraharam, of which the total value was about Rs. 10,400, and obtained a decree. The defendants on appeal objected that the suit should have been filed in the District Munsif's Court :

Held, that the suit should have been filed in the District Munsif's Court. *Vydinatha* v. *Subramanya* (I.L.R. 8 Mad. 235), distinguished.

Per cur.: Though the objection was not taken in the Court below, yet it is apparent on the face of the plaint and has reference to the jurisdiction of the Court : we must therefore consider it.

[R., 22 B. 315 (316); 35 B. 24 (26) = 12 Bom. L.R. 712 = 7 Ind. Cas. 950; 20 M. 289 (291); 2 L.B.R. 193 (194).]

APPEAL against the decree of W. G. Underwood, Acting District Judge of Kistna, in original suit No. 9 of 1887.

The plaint alleged that the Ketumukkuvari agraharam was originally the property of the defendants, that one-seventh of the agraharam was sold in execution of the decree in original suit [26] No. 109 of 1883 and the plaintiff became the purchaser and obtained a sale certificate on 28th June 1886. The plaint also stated as follows :—

"As the value of the whole property out of which the plaintiff claims his portion is above Rs. 2,500, this suit has been filed in this Court. Stamp duty for Rs. 1,494-4-0, the value of plaintiff's share of acres 123-28½ of land, has been paid."

The prayer of the plaint was "that out of 862 acres of dry and wet land of Ketumukkuvari agraharam . . . . the plaintiff's one-seventh part be divided or given to him proportionately from the superior, middling and inferior land;" the plaint also prayed for mesne profits.

No plea to the jurisdiction of the Court was raised before the District Judge, who passed a decree for the plaintiff.

Defendants preferred this appeal against the decree of the District Judge on the ground *inter alia* that "the value of the share claimed being below Rs. 2,500, the suit should have been filed in the District Munsif's Court."

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* Appeal No. 15 of 1888.

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Mr. *Parthasaradhi Ayyangar*, for appellants.
Mr. *Gantz*, for respondents.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.

This was a suit brought by the first respondent to recover his share of an agraharam, of which the value was mentioned in the plaint as Rs. 1,494-4-0. The plaint stated that the suit was filed in the District Court, as the value of the entire property, of which a share was claimed, exceeded Rs. 2,500. No objection was taken by the defendants in the Court below to its jurisdiction to entertain the suit. The Judge decreed the claim. It is argued in appeal for defendants Nos. 7 to 16 that the subject-matter of the suit was the specific share claimed in the plaint and that the suit was cognizable by the District Munsif, the value thereof being below Rs. 2,500. The jural relation between the parties to the suit was not that of coparceners as in the case of *Vydinatha* v. *Subramanya* (1), but that of joint owners of an agraharam village.

[27] Having regard to the principle laid down in *Khansa Bibi* v. *Syed Abba* (2), we are of opinion that the subject-matter of the suit was the specific share claimed, and that the suit ought to have been brought in the Court of the District Munsif. Though the objection was not taken in the Court below, yet it is apparent on the face of the plaint and has reference to the jurisdiction of the Court. We must, therefore, consider it, though it is only raised in appeal.

We set aside the decree of the District Court and direct that the plaint be returned to the plaintiff for presentation to the Court of competent jurisdiction. As the objection was not taken at the earliest opportunity, we direct that each party do bear his costs both in this Court and in the Lower Court.

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13 M. 27 = 1 Weir 545.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* PERA RAJU.* [6th and 17th June, 1889.]

Penal Code, Sections 419, 420, 467 *and* 468 – *Cheating—Forgery—Use of a false name with intent to defraud.*

The accused was alleged by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was Rs. 2-4-0, and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta: to have then requested the Postal authorities at Calcutta by a letter signed Robert S. Wilson, to have the money orders re-directed to him as above at Rajam: to have similarly requested the Post Master at Rajam to pay the money orders to his clerk Seshagiri Rau: to have subsequently received the value of money orders made out in favour of Robert S. Wilson from the Post Master at Rajam, signing receipts as Seshagiri Rau: Robert S. Wilson and Seshagiri Rau were alleged to be fictitious persons, and it was also alleged that the accused had no book on English idioms ready to be despatched to purchasers:

Held, that the above allegations supported charges of cheating and forgery.

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* Criminal Appeal No. 114 of 1889.

(1) 8 M. 235. (2) 11 M. 140.

1889
JUNE 17.
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APPELLATE
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13 M. 27=
1 Weir 545.

APPEAL under Section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused by [28] J. Kelsall, Sessions Judge of Vizagapatam, in Sessions Case No. 28 of 1888.

The Acting Government Pleader (*Subramanya Ayyar*), for the Crown.

The accused was not represented.

The facts of this case appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.

This is an appeal from the judgment of acquittal recorded in Sessions Case No. 28 of 1888 on the file of the Court of Session at Vizagapatam. In that case the accused, one Pera Raju, was committed for trial by the Deputy Magistrate of Vizianagram on charges of forgery under Sections 467 and 468, and of cheating under Sections 419 and 420, Indian Penal Code. The Judge acquitted him without recording any evidence on the ground that the facts which the evidence before the Magistrate went to prove could not support a conviction for either of those offences. It is contended for the Crown in appeal that upon the facts stated by the Judge the acquittal was bad in law, and that the charges ought to have been amended, if necessary, under Section 226, Code of Criminal Procedure. We are of opinion that this contention ought to prevail. The facts stated by the Judge as likely to be established by the evidence recorded by the committing Magistrate are shortly these:—

In June 1887, the accused by advertisements and hand bills, notified throughout India, that a work on English idioms, designed specially for matriculates, by one Robert S. Wilson, M.A., was ready, that the price was Rs. 2-4-0, and that intending purchasers might remit it by money orders to Robert S. Wilson, M.A., Council House Street, Calcutta. About a month or two later the accused signing a letter as Robert S. Wilson, wrote to the Postal authorities at Calcutta, asking that all money orders received for Robert S. Wilson might be re-directed to him at Rajam in the district of Vizagapatam. Signing himsêlf again as Robert S. Wilson, he wrote to the Post Master at Rajam to say that his clerk Seshagiri Rau would call in a day or two for these money orders, and that their value might be paid to the clerk, who would bring a note from him. The accused since called in person at the post office at Rajam and representing that he was the clerk Seshagiri Rau induced the Post Master to pay him the value of 25 money orders. On this occasion he produced a writing authorizing pay-[29]ment to Seshagiri Rau and signed by himself as Robert S. Wilson, and he also signed receipts acknowledging payment of value of the money order as Seshagiri Rau. There was no person known to the Post Master either as Robert S. Wilson or as his clerk Seshagiri Rau, and the case for the prosecution was that both were fictitious persons. It is also urged for the Crown that no book on English idioms was ready as notified by the accused in his advertisements and hand bills.

The charge of cheating as framed by the Magistrate stated that the accused falsely personated Seshagiri Rau, clerk of S. Robert Wilson, and thereby deceived the Post Master and fraudulently induced him to deliver to the accused 25 money orders which the Post Master would not have paid if he had not been so deceived. The charge of forgery stated (*a*) that the accused wrote a false letter to the Post Master of Rajam in the fictitious name of Robert S. Wilson, requesting that the money orders might be

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retained and their value paid to his clerk Seshagiri Rau; (b) that the accused signed 25 money orders in the feigned name of Seshagiri Rau; (c) that the accused wrote a false letter to the Post Master at Rajam in the name of Robert S. Wilson, requesting that the money orders subsequently received might be retained until further orders; and (d) that the accused signed the writing authorizing payment to Seshagiri Rau in the name of Robert S. Wilson.

Adverting to these facts the Judge observed that assuming the case for the prosecution was proved in every detail, the offence of cheating the Post Master was not committed; that the money orders were admittedly for the accused by whatever name he chose to call himself; that the Post Master could not have refused to pay them; that there was no known Robert S. Wilson, except the accused, and that the senders of the money orders intended the money to be paid to him. With reference to the charge of forgery, the Judge remarked it is not forgery to call yourself Robert Wilson, to have money orders in that name sent to you, and in that name to give directions about cashing them.

We consider that the Judge is clearly in error in holding that if the facts stated above were proved at the trial, they would amount neither to the offence of cheating nor to that of forgery as defined by the Penal Code. The accused knew that Robert S. Wilson was a fictitious person that he had no clerk by the name [30] of Seshagiri Rau, and that he was also a fictitious person, and with this knowledge he intentionally produced generally a false belief by his advertisements and handbills that Robert S. Wilson was a person actually in existence, that he was a Master of Arts, that he wrote a book on English idioms, that it was ready to be despatched, and that the price might be sent to him and not to the accused Pera Raju. By causing such false belief he induced those who remitted the price by money orders to do so in the expectation that it would reach the hands of Robert S. Wilson through the Post office, and that in return the said Robert S. Wilson would send each of them a copy of the publication on English idioms, a publication which as alleged for the Crown the accused knew had no existence. It is clear, therefore, assuming for the purposes of this appeal the facts were as stated for the prosecution, they would sustain a charge of cheating those who remitted the money orders. Though the charge framed by the Magistrate did not refer to the deception practised on those who sent the money orders, yet it was open to the Judge to have amended it if the evidence before the Magistrate had tended to establish it.

As to the charge of cheating the Post Master, the Judge is mistaken in considering that the Post Master was bound to pay the value of the money orders to the accused Pera Raju. On the facts stated, the accused must be taken to have caused a false belief that Robert S. Wilson was a real person, that he had a clerk by the name of Seshagiri Rau, and that the accused was that individual. It appears further that but for such false belief the Post Master would not have paid the accused the value of the money orders. As those who remitted the money orders intended them for Robert S. Wilson, a person whom they believed to be a real and not an imaginary person, the Post Master was not bound to pay their value to the accused for the obvious reason that there was no such person as was designated by the remitters, and that it was not competent to him to pay it to any other unless it appeared (which is not the case) that the remitters gave credit to the accused Pera Raju as one known to them

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and not to Robert S. Wilson supposed to be alive. The deception practised on the Post Master seems to be a dishonest continuance to consummate the fraud practised on the public. The fallacy in the Judge's reasoning lies in overlooking the rule that in determining whether a person was actually deceived or not regard should be had to the [31] facts as they were made to appear to him and erroneously accepted by him and not simply to the actual facts known to the accused, but not known either to the persons who remitted the money orders or to the Post Master.

As to the charge of forgery it is wholly immaterial whether the name forged is that of a fictitious person who never existed or of a real person. It is as much a forgery in the one case as in the other provided the fictitious name is assumed for the purpose of fraud in the particular case under trial. Section 464, explanation 2 of the Indian Penal Code, provides that the making of a false document in the name of a fictitious person intending it to be believed that the document was made by a real person may amount to forgery (see also the illustration to the explanation). There is, however, no doubt that an intention to defraud is an essential ingredient; but it is sufficient to show that there was an intention to defraud generally. Whether there was an intention to defraud or not is a question of fact to be determined with reference to the special circumstances of each case. It is true that in *The Queen* v. *Martin* (1) it was held that though a document was signed in a fictitious name, yet such signing did not amount to forgery, as it appeared that credit was wholly given to the accused in that case as a known individual without any regard to the assumed name or to any assumed relation to a third person. But the facts as stated by the Judge tend to show that there is a wholly different case. There is apparently no pretence for saying that Pera Raju, the accused, was known to and accepted by either those who sent the money orders or the Post Master as the author or publisher of the work on English idioms, and that the money orders were intended for him.

We are therefore of opinion that the acquittal of the accused must be set aside, and a retrial ordered with reference to the foregoing observations.

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13 M. 32.

[32] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

THIRTHASAMI (*Defendant No.* 5), *Appellant v.* GOPALA AND OTHERS (*Plaintiff and Defendants Nos.* 2 *and* 3), *Respondents.**
[9th July, 1889.]

Civil Procedure Code, Section 32—*Joinder of new defendant.*

Suit upon a bond of which the obligor was therein described as the manager of a certain mutt. The defendants, who were the sons of the obligor (since deceased) pleaded that the debt was contracted by their father for the benefit of the mutt and as manager of the mutt. The Judge ordered that the representative of the mutt be joined as defendant in the suit under Section 32, and subsequently a decree was passed against him:

Held, that the order under Section 32 was right, although the plaint had prayed for no relief against the mutt.

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* Second Appeal No. 652 of 1888.

(1) 5 Q.B.D. 34.

1889 JULY 9. — APPELLATE CIVIL. — 13 M. 32.

SECOND appeal against the decree of J. W. Best, District Judge of South Canara, in Appeal Suit No. 176 of 1886, affirming the decree of A. Venkataramana Pai, District Munsif of Mangalore, in Original Suit No. 296 of 1884.

Narayana Rau, for appellant.

Ramachandra Rau Saheb, *Ramasami Mudaliar* and *Subba Rau*, for respondents.

The facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.

This was a suit upon a bond—Exhibit A—executed by one Appayachari, since deceased, who was *parpathegar* or manager of the Pejevar Mutt in South Canara. The plaint, as originally framed, prayed for a decree against property left by Appayachari. But defendants Nos. 2 and 3, his sons, contended that the debt was contracted by their father for the benefit of the mutt and in his capacity as manager or agent. The District **[33]** Munsif decreed the claim against Appayachari's property in the hands of defendants Nos. 2 and 3, but, on appeal, the District Judge directed that the fourth defendant, the representative of the mutt, be made a party, and that the suit be retried. At the retrial, the District Munsif exonerated defendants Nos. 1 to 3 from all liability and passed a decree in plaintiff's favour against the fifth defendant as the representative for the time being of the Pejevar Mutt. It is urged in appeal that the Judge was in error in directing that the fourth defendant be made a party and that the plaint prayed for no relief against the Pejevar Mutt. But it appears to us that the procedure followed by the Judge was warranted by Section 32 of the Code of Civil Procedure. Though the plaint did not pray for a decree against the mutt, yet the question whether the debt was one binding on Appayachari's assets in the hands of his sons was distinctly raised by them in their written statement. Under the provisions of Section 32 the Judge was entitled to make the representative of the mutt a party in order that he might be able effectually and completely to adjudicate on that question which arose on the pleadings so as to avoid a multiplicity of suits. The decision *Eshan Chunder Singh* v. *Shama Churn Bhutto* (1) proceeded on the ground that the High Court relied on a state of facts different from and opposed to what was alleged in the plaint and to what was attempted to be proved. But the case before us is not similar to it, and the decision under appeal rests on a state of facts which formed the subject of an issue and which was pleaded by the second and third defendants. In dealing with the question of variance between what is alleged and proved, regard should always be had not only to the averments in the plaint, but also to the questions arising for decision on the pleadings, and on which the parties proceed to trial. Though the plaint was not formally amended at the settlement of issues with reference to the question raised by the second and third defendants, yet it was a mere omission which occasioned no failure of justice. Further, it does not appear that the plaintiff insisted in the Courts below on his right to proceed against Appayachari's property, on the ground that document A did not show on its face that he borrowed only as agent of the mutt.

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(1) 11 M.I.A. 7.

1889 JULY 9. — APPELLATE CIVIL. — 13 M. 32.

[34] Another objection urged upon us is that the debt sued for did not appear in the accounts of the mutt, and that the Judge was not entitled to pass a decree against the mutt. The absence of an entry in the accounts was only a fact in evidence, and the Judge has considered it together with the other evidence in the case in coming to a finding on the question whether the debt was contracted by Appayachari on his own account or on account of the mutt. Nor do we consider that the Judge was in error in holding that upon the facts found, the recital in document A in regard to Rs. 200 raised a presumption that "the sundry expenses" mentioned therein were those of the mutt. If the documents were executed, as is found by the Judge, on account of the mutt and by its agent, the recital was clearly *prima facie* evidence against the principal in the circumstances of this case.

On these grounds we are of opinion that the decision of the Judge is right, and that the second appeal must be dismissed with costs. There will be two sets of costs, one in favour of the first respondent and the other in favour of the second and third respondents.

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13 M. 34=13 Ind. Jur. 378.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Wilkinson.

SOUTH INDIAN RAILWAY COMPANY (*Defendants*), *Appellants v.* RAMAKRISHNA (*Plaintiff*), *Respondent.**
[25th March and 1st May, 1889.]

Defamation—Expression of suspicion—Slander by a railway guard—Suit against Railway Company—De minimis non curat lex.

Suit for damages for defamation. A railway guard, having reason to suppose that a passenger travelling by a certain train from Madras to Chingleput had purchased his ticket at an intermediate station, called upon the plaintiff and others of the pasengers to produce their tickets. As a reason for demanding the production of the plaintiff's ticket, he said to him in the presence of the other pasengers "I suspect you are travelling with a wrong (or false) ticket," which was the defamation complained of. The guard was held to have spoken the above words *bona fide*;

Held, the plaintiff was not entitled to a decree for damages.

[35] SECOND appeal against the decree of S. T. McCarthy, District Judge of Chingleput, in Appeal Suit No. 295 of 1888, modifying the decree of C. Sury Ayyar, District Munsif of Chingleput, in Original Suit No. 217 of 1887.

Action for Rs. 250, damages for insulting and defamatory words spoken by a railway guard, in the employ of the defendant Company, of the plaintiff in the presence of various other persons whereby the plaintiff was injured in reputation, &c. No special damage was alleged.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

The District Munsif passed a decree in favour of the plaintiff for Rs. 100. On appeal the District Judge modified the decree of the District Munsif reducing the damages awarded to plaintiff to Rs. 10.

The defendant preferred this second appeal.

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* Second Appeal No. 1742 of 1888.

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Mr. *Johnstone*, for appellant.

The words complained of are not actionable *per se*: they only express suspicions, which appear to have had a certain justification; or at the worst they were mere vulgar abuse. *Parvathi* v. *Mannar* (1), *Dawan Singh* v. *Mahip Singh* (2), *Tozer* v. *Mashford* (3).

It would be absurd to hold the Company liable for vulgar abuse by its servants which it did not authorize. In fact the guard was acting on his own authority—*Bank of New South Wales* v. *Owston* (4), Odger on Libel, 2nd edition, pp. 411, 416.

Ramachandra Rau Saheb, for respondent.

The words are actionable *per se* even judged by the English rule, because they imputed conduct punishable both under the Railway Act, Act IV of 1879, Section 32, but also under the Penal Code; but in India the test is hurt to the plaintiff's feelings.

As to the liability of the defendant's Company, see *Tozer* v. *Mashford* (3), *Hamon* v. *Falle* (5). Calling for tickets was within the scope of the guard's authority: the test of the liability of the employer is—was the servant acting independently on his own behalf, or consulting the interest of the employer at the time? When the discretion vested in him by the employer is abused, the employer is liable. There is no question of express authority: **[36]** if there were express authority the defendant would have been directly liable and not merely liable as an employer. *Bayley* v. *Manchester, Sheffield,* and *Lincolnshire Railway Company* (6), *Moore* v. *Metropolitan Railway Company* (7), *Limpus* v. *London General Omnibus Company* (8), *Goff* v. *Great Northern Railway Company* (9). In *Seymour* v. *Greenwood* (10) as here, the wrong was done by the servant who, in exercising the authority derived from the employer, exceeded its bounds. See Underhill on Torts, p. 51. Thus a Statute was necessary to protect the proprietors of newspapers from even criminal liability. *Dawan Singh* v. *Mahip Singh* (2) is in my favour and I only seek to establish civil liability. I rely also on *Parvathi* v. *Mannar* (1).

Mr. *Johnstone* in reply cited *Allen* v. *The London and South-Western Railway Company* (11).

JUDGMENT.

COLLINS, C.J.—This is an action brought by the plaintiff against the South Indian Railway Company for defamatory words alleged to have been used by a servant of the Railway Company. The plaintiff complains that he has suffered both in mind and body by reason of the words spoken by the servant of the Company, and that although the plaintiff sent a letter through his vakil to the Railway Company, demanding Rs. 250 as compensation for loss of his reputation and for pain of mind and body, no answer was received from the Railway Company. Hence this action.

The District Munsif came to the conclusion that defamatory words had been uttered by the servant of the Company and awarded the plaintiff Rs. 100. On appeal to the District Judge he reduced the damages to Rs. 10. The Railway Company appeal. The material facts of this case are as follows:—The plaintiff was travelling by the railway from

(1) 8 M. 175. (2) 10 A. 425. (3) 6 Exch. 539.
(4) 4 App. Cas. 270. (5) 4 App. Cas. 247. (6) L.R. 7 C.P. 415-419.
(7) 8 Q. B. 36. (8) 1 H. & C. 526. (9) 3E. & E. 672.
(10) 6 H. & N. 359. (11) L.R. 6 Q.B. 65.

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Madras to Chingleput. According to the plaintiff's evidence, a friend of his, Subramania Sastri, and a Christian College student, Raghava Rao, were in the third class carriage with him. The District Judge finds as a fact that a ticket for Chingleput was purchased at Vandalore by some one then a passenger in the train and who had already come by it, and it is also found as a fact that the ticket so purchased was delivered up at Singaperumalkoil by some one in the same compart-[37]ment as the plaintiff, and it appears clear that this arrangement was made with intent to defraud the Railway Company. At Singaperumalkoil the guard of the train came to the carriage wherein the plaintiff was travelling and asked plaintiff to produce his ticket, stating that he, the guard, suspected the plaintiff of travelling with a wrong (or false) ticket; the exact words are not proved. The plaintiff produced a ticket, which was in order. These are the defamatory words complained of, and it may be taken as law in this country that if defamatory expressions are used under such circumstances as to induce in the plaintiff reasonable apprehension that his reputation has been injured and to inflict on him pain consequent on such belief, the plaintiff is entitled to recover damages without actual proof of loss sustained. The District Judge is of opinion that the guard said the words complained of without malice, but with what he calls simple carelessness.

The Counsel for the appellant contends, 1st, that the words are not actionable; 2ndly, that the guard was justified in uttering the same under the circumstances of the case; and, 3rdly, that in any event the Railway Company are not liable.

It appears to me that this action cannot be maintained. The words used by the guard of the train were not in my opinion under the circumstances of the case defamatory in the sense that an action would lie either against the guard or the Railway Company. It is clear that these were spoken *bona fide*. The guard was justified in requesting each passenger to produce his ticket, and he gave as a reason that he suspected passengers were travelling with wrong tickets. The words he is said to have used to the plaintiff, "I suspect you are travelling with a wrong ticket" given as a reason for demanding the production of the ticket would not induce the plaintiff reasonably to apprehend that his reputation had been injured and could not and did not inflict upon him any damage. If, as it is suggested, the guard's manner was insolent, a complaint should have been made to the Railway Company.

Upon the evidence there is no reason to believe that the plaintiff was in league with others to defraud the Railway Company, or that he knew any of the passengers were travelling with wrong tickets. I allow the appeal and set aside the decrees of both the Lower Courts and dismiss the suit, and I direct that each party pay their own costs throughout.

[38] WILKINSON, J.—The facts of the case are as follows:—The plaintiff was a passenger from Madras on the South Indian Railway on the 12th March 1887. At Vandalore a ticket for Chingleput was purchased by a person who had travelled in the train from Madras to that station. As the train was starting the guard observed the said ticket being handed to some one in the same compartment as that in which plaintiff was travelling. At the next station the guard, whose suspicions had been aroused, went to the door of the carriage and demanded to see the tickets. Tickets were shown and the ticket taken at Vandalore was, the Judge finds, shown by some one in the compartment in which plaintiff was seated. An altercation ensued between plaintiff and the guard who told

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plaintiff he suspected him of travelling with a wrong ticket. The lower Courts have held the Railway Company liable for the words used by the guard, being of opinion that such words were defamatory. In my judgment the words used do not amount to defamation, and, even if they did, the Railway Company could not be held responsible. It appears from the evidence of the plaintiff himself that the guard at first "politely" asked plaintiff where he was going, and that when plaintiff objected to give the information sought, the guard said that he suspected that there was something wrong with his ticket, or words to that effect. What the exact words used were, has not been found, and plaintiff himself is not prepared to swear what words the guard did use. There appears to have been an altercation, because the plaintiff refused to give the information he was bound to give, and, in the heat of the moment, the guard having grounds for suspecting that a ticket had been surreptitiously obtained at Vandalore did state that he suspected plaintiff was in possession of that ticket. It seems to me very doubtful whether under any circumstances the expression of a mere suspicion is actionable, and under the circumstances of the present case, I am of opinion that no action would lie against the guard, much less can an action against the Railway Company be maintained. Undoubtedly the Railway Company is responsible for the manner in which their servants do any act which is within the scope of their authority and is answerable for any tortious act of their servants, provided such act is not done from any caprice of the servant, but in the course of the employment. But it would be straining this principle of law to an unprecedented extent to hold that, because the guard of a train in the execution of his duty expressed a **[39]** suspicion not altogether unfounded that a passenger was travelling with a wrong ticket, the Company was liable in damages to that passenger for slander. *De minimis non curat lex*, or, as the authors of the Penal Code have expressed it, "nothing is an offence by reason that it causes or that it is intended to cause or that it is known to be likely to cause any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm." The harm, if any, caused to plaintiff's reputation by the imputation that he was travelling with wrong ticket was so slight that he might well have contented himself with reporting the guard for incivility.

I would reverse the decrees of the Courts below and dismiss the plaintiff's suit. Each party must bear his own costs throughout.

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13 M. 39.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RAIRU NAYAR (*Plaintiff*), *Appellant* v. MOIDIN AND OTHERS (*Defendants*), *Respondents*.* [20th and 26th August, 1889.]

Limitation Act—Adverse possession.

In a suit in 1887 to redeem a kanom for Rs. 62 of 1835, it appeared that in 1862 the mortgagee had received a renewal of his kanom for a larger amount, and that the defendant had produced the document of renewal in 1864 to the knowledge of the plaintiff in a suit to which the plaintiff was party:

* Second Appeal No. 1813 of 1888.

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Held, that the suit was not barred by limitation. *Madhava* v. *Narayana* (I.L.R., 9 Mad., 244) distinguished.

[R., 35 M. 114 (120) = 9 Ind. Cas. 289 = 21 M.L.J. 169 = 9 M.L.T. 286 = (1911) 1 M.W.N. 113.]

SECOND Appeal against the decree of A. F Cox, Acting District Judge of North Malabar, in appeal suit No 263 of 1888, confirming the decree of S. Ragunatha Ayyar, District Munsif of Tellicherry, in original suit No. 482 of 1887.

Suit to redeem a kanom of Rs. 62 granted by a former karnavan of the plaintiff's tarwad to the father of defendant No. 1 in 1835. Defendant No. 1 set up a kanom interest for Rs. 192 over the property alleging that he had made a further advance of **[40]** Rs. 100 in 1862 in which year the subsisting kanom interest in his favour was Rs. 92, and had received a further kanom deed, filed in the suit as Exhibit A, for the whole amount. This document had been produced by the present defendant at the instance of the present plaintiff, and put in evidence by the latter in a suit instituted by him in 1864.

The plaintiff now said it was a forgery, or even if genuine, invalid as against his tarwad.

Both the District Munsif and on appeal the District Judge held that the above allegations of the defendant were established. The suit was dismissed by the District Munsif after a trial of the whole case: the District Judge on appeal affirmed the decree of the District Munsif holding "on the principle which appears to have been followed in *Madhava* v. "*Narayana* (1) that the first defendant's possession of the land became "hostile as soon as the plaintiff was aware of the claim now put forward" —which was in 1864 at the latest—and consequently that the suit was barred by limitation.

The plaintiff preferred this second appeal.

Sankara Menon, for appellant.

Sankaran Nayar, for respondent No. 1.

JUDGMENT.

The Acting District Judge has dismissed the appeal on the ground that first defendant's possession became hostile from the date of plaintiff's knowledge of Exhibit A, and has relied upon *Madhava* v. *Narayana* (1) in support of this finding. We are not able to agree that the case applies, for in that case the alienation, which the plaintiff sought to set aside, was the original alienation, whereas in this case the plaintiff merely ignores a renewal on an increased fee, which he says is not binding on the tarwad.

In a similar case unreported (S. A. 676 of 1886), it was held by Collins, C.J., and Brandt, J., that the decision in *Madhava* v. *Narayana*(1) did not apply.

We must therefore reverse the decree of the Lower Appellate Court and remand the appeal for determination on the other points which arise.

The costs will abide and follow the result.

(1) 9 M. 244.

13 M. 41.

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APPELLATE CIVIL.

13 M. 41.

[41] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

RAVUTHA KOUNDAN (*Defendant No.* 2), *Appellant v.* MUTHU KOUNDAN AND OTHERS (*Plaintiffs*), *Respondents.**
[4th September 1889.]

Regulation VI of 1831, *Section* 3—*Suit for a declaration as to land alleged to be nattamai maniyams—Jurisdiction of Revenue Courts*—Res judicata—*Civil Procedure Code, Section* 13.

Suit to establish plaintiffs' title to certain land alleged by the defendants, who were the Secretary of State for India in Council and the nattamaigar of a certain village, to be maniyam land attached to the office of the second defendant, and previously held to be such by a Revenue Court :

Held, the Court was not precluded either by Regulation VI of 1831, Section 3, or by the decision of the Revenue Court from granting the declaration prayed for.

[**R.**, 17 M. 302 (303) (**F.B.**) ; 16 Ind. Cas. 18 (20) = 23 M.L.J. 728 (731) = 12 M.L.T. 266 = (1912) M.W.N. 807 ; **D.**, 30 M. 126 (133) = 16 M.L.J. 514 = 1 M.L.T. 381 ; 30 M. 320 (321).]

SECOND Appeal against the decree of T. Weir, District Judge of Madura, in appeal suit No. 57 of 1886, reversing the decree of P. S. Gurumurthi Ayyar, District Munsif of Tirumangalam, in original suit No. 40 of 1885.

The plaint alleged that certain land therein referred to was the ancestral property of the plaintiff's family, and that the Deputy Collector in Suit No. 3 of 1883 under Regulation VI of 1831 decided that they were maniyam lands attached to the office of nattamaigar which was the office of defendant No. 2, and prayed for a declaration of the plaintiffs' title.

The District Munsif dismissed the suit. On appeal the District Judge reversed the decree of the District Munsif and granted the declaration prayed for.

Defendant No. 2 preferred this appeal against the decree of the District Judge.

Rama Rau, for appellant.

Mahadeva Ayyar and *Rangacharyar*, for respondents.

JUDGMENT.

Regulation VI of 1831, Section 3, bars the right of the ordinary Courts to investigate claims to the possession of, [42] or succession to, certain hereditary offices and their emoluments, but otherwise does not interfere with the ordinary jurisdiction of the regular Courts. This is not such a suit, and we see no reason to hold that by that Regulation the ordinary Courts are debarred from entertaining a suit to declare what are the emoluments of the office.

Nor will the plea that this point has already been decided by a Revenue Court of concurrent jurisdiction avail, for the Revenue Courts have not authority under Regulation VI of 1831 to determine such a suit as the present.

[Their Lordships next proceeded to dispose of various other questions raised on this second appeal and passed a decree dismissing the second appeal with costs.]

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* Second Appeal No. 547 of 1887.

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13 M. 42.

13 M. 42.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

SAMINATHA (*Plaintiff*), *Appellant v.* VIRANNA (*Defendant*), *Respondent.** [12th, 13th and 20th August, 1889.]

Rent Recovery Act—Act VIII of 1865 (*Madras*), *Section* 9—*Tender of patta by post.*

A landlord sent a patta by post to his tenant, who declined to receive it:

Held, the tender of the patta by post was not sufficient to support a suit under Section 9 of the Rent Recovery Act.

[R., 18 M. 30 (31).]

SECOND appeal against the decree of T. Weir, District Judge of Madura, in appeal suit No. 532 of 1887, affirming the decree of M. Tillainayakam Pillai, Deputy Collector of Madura, in summary suit No. 31 of 1887.

Suit by a landlord under the Madras Rent Recovery Act, Section 9, to compel the acceptance of a patta by the defendant. The lower Courts decreed in favour of the defendant, and the plaintiff preferred this second appeal.

Subramanya Ayyar, for appellant.

Bhashyam Ayyangar, for respondent.

[43] The facts of this case appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.

This is a suit under Section 9, Act VIII of 1865, by a landlord to enforce the acceptance of a patta. The patta enclosed in a registered cover bearing the tenant's address and a superscription that the letter contained a patta for the tenant's acceptance was offered by the postman to the tenant, who declined to receive it. Both the lower Courts have held that the landlord has not complied with the requirements of Act VIII of 1865 and have dismissed his suit. It is argued in second appeal that the landlord has done all that is required of him in that he has made a demand which has been refused. We are of opinion that the lower Courts are right and that tender of a patta by post is not sufficient. What a landlord suing under Section 9, Act VIII of 1865, is bound to prove is (1) tender of such a patta as he is entitled to impose, accompanied by (2) a demand to accept, and (3) refusal. Tender of a patta can only be properly effected when it is presented to a person formally by the landlord or some one acting for him, and in such a manner that the tenant is at once able to ascertain whether or not it is of such a nature as the landlord is entitled to impose; the tenant must be put in a position to say whether or not he will accept the patta tendered. What the tenant in this case refused to accept was, not a patta, but a cover said to contain a patta. He was not legally bound to accept the cover tendered to him by the postman, and as we cannot impute to him knowledge of the contents of the cover, we are unable to hold that he refused to accept such a patta as the landlord was entitled to impose. Such a demand as was made in this

* Second Appeal No. 884 of 1888.

case, if a demand at all, was a mere indefinite demand, which as was held in *Sayud Chanda Miah Sahib* v. *Lakshmana Aiyangar* (1) is not sufficient to maintain a suit.

This second appeal therefore fails and is dismissed with costs.

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13 M. 44.

[44] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

NAGATHAL (*Plaintiff*), *Appellant v.* PONNUSAMI (*Defendant*), *Respondent.** [13th August, 1889].

Civil Procedure Code, Section 13—Res judicata—*Cause of action—Limitation Act—Act XV of* 1877, *Schedule II, Article* 91—*Suit to cancel a document.*

On 23rd March 1878 plaintiff executed to defendant a document purporting to be a deed of gift. In 1886 plaintiff sued to cancel the document alleging that defendant on 11th May 1881 had agreed to execute a release but had not done so: that suit was dismissed for non-payment of duty due under the Court-Fees Act.

The plaintiff now sued in 1887 for a declaration that the document "was executed for nominal purposes and was not intended to take effect:"

Held, (1) that since the cause of action in the suits of 1886 and 1887 were not the same, the claim in the latter suit was not *res judicata*;

(2) that the suit was not barred by limitation.

[R., 23 B. 406 (412); 18 M. 189 (192).]

SECOND appeal against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 204 of 1888, affirming the decree of S. Subbayyar, District Munsif of Negapatam, in original suit No. 62 of 1887.

The plaintiff was a Hindu widow, and the defendant, her daughter's husband. On 23rd March 1878, the plaintiff executed in the defendant's favour a deed of gift, which confirmed an oral gift of certain property she had made to him at the marriage of her daughter in 1866, and recited that he has been in possession of the property from the date of gift.

In original suit No. 12 of 1886, the plaintiff had sued the defendant for the cancellation of the deed of gift. She then alleged that the possession of the property never passed to the defendant, and that, on 11th May 1881, he had agreed to execute a release, but that he failed to do so. The cause of action was stated to have arisen on 12th May 1881. The plaint had been stamped with a Court-fee stamp of Rs. 10; and the Court directed the plaintiff to pay the Court-fee on the value of the [45] property, which was Rs. 1,500. She failed to pay this amount and the suit was dismissed under Clause II, Section 10, of the Court-Fees Act.

This suit was brought by the plaintiff against the defendant to obtain a declaration that the deed of gift was "nominally executed and was not intended to take effect." She alleged in the plaint that the deed of gift was cancelled, the defendant having returned the same to her; that since the beginning of December 1885, he had been setting up his right to the property on the strength of the deed being registered and denying her title to the same, &c.

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* Second Appeal No. 1728 of 1888.

(1) 1 M. 45.

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Defendant contended that the claim was barred; that the deed of gift was not cancelled, and that this second suit was brought in the present form in order to evade the Court-fee.

The District Munsif dismissed the suit holding that the claim was barred under Sections 13 and 43 of the Code of Civil Procedure, and the Subordinate Judge affirmed his decree. The plaintiff preferred this second appeal.

Subramanya Ayyar, for appellant.

Sadagopa Charyar, for respondent.

The Court delivered the following

JUDGMENT.

Though the relief sought in both suits is substantially the same, the cause of action put forward is different. In the former suit the cause of action was alleged to be the refusal in 1881 of defendant to execute a document; in the latter, the claims to the property advanced by the defendant in 1885. The relief sought is not the cancellation of the document (as to which Article 91 of the Limitation Act would apply,) but a declaration that the document was only nominally executed. The plaintiff was in possession of the document and the property, and could only want a declaration. There is no *res judicata*, and it is admitted, on appeal, that Section 43 of the Code of Civil Procedure does not apply, nor will the dismissal of the former suit for non-payment of Court-fees bar this suit.

We must reverse the decrees of the Courts below, and remand the suit to the Court of first instance for disposal on the merits.

The costs will abide and follow the result.

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13 M. 46.

[46] APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

HUSSAIN (*Defendant No. 1*), *Appellant v.* SHAIK MIRA (*Plaintiff*), *Respondent.** [25th March and 30th April, 1889.]

Muhammadan law—Gift by a father—Undivided share—Delivery of possession.

A Muhammadan made a gift in writing to his daughter on her marriage of an undivided moiety of his share in certain buildings, which were the property of the donor's wife. On the death of the donee, her husband married her sister, and the donor thereupon similarly made a gift to her of the remaining undivided moiety. The donees were minors at the dates of their respective gifts. The husband now sued to recover the share of his first wife, of which delivery had not been made.

Held, that the gift was not invalid, either for indefiniteness or for want of delivery of possession.

[R., 24 M. 513 (521) = 11 M.L.J. 227; 30 M. 519 (521) = 17 M.L.J. 562.]

SECOND Appeal against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in appeal suit No. 759 of 1887, affirming the decree of S. Subbayyar, District Munsif of Negapatam, in original suit No. 179 of 1886.

Mr. *Wedderburn*, for appellant.

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* Second Appeal No. 1655 of 1888.

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Pattabhiramayyar, for respondent.

The facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.

The only question argued in second appeal is the validity of the gift of items 2 and 3. The plaintiff's first wife was the eldest daughter of defendant No. 1. On her marriage, on 30th May 1883, Exhibit A was executed whereby defendant No. 1 gave to his daughter a moiety of the property described in Schedules 2 and 3 of the plaint. She died on the 14th June, and on the 15th the plaintiff married her sister, and to her defendant No. 1 gave as dowry the other half of her mother's tiled house and building. The plaintiff now sues for the share of his first wife in the house and lands. These houses were the properties of the wife of defend- **[47]** ant No. 1, and he, therefore, was, at the time of the gift, a co-sharer with his daughters, being entitled only to a one-quarter share. It is argued that the gift by defendant No. 1 to his eldest daughter was invalid (1) because an undivided share cannot be given, and (2) because the donor retained possession and user of the gift. With reference to the latter objection it is sufficient to say that where there is on the part of the father of a minor a *bona fide* intention to make a gift to the minor, the Muhammadan law is satisfied without actual change of possession, and it will be presumed that the subsequent holding of the father is on behalf of the minor. According to the Shurhi Viqaya "a gift made by a father to his child is perfected by the mere declaration of it. (1)." Nor do we think that the former objection should be allowed to prevail. The doctrine of Muhammadan law that a gift of an undivided share in property is invalid because of *musha* or confusion only applies to such objects of gift as are capable of partition. The shares of the father and his minor daughters in the house were defined, but the house was not capable of being divided into three shares consisting of $\frac{1}{4}$, $\frac{3}{8}$, and $\frac{3}{8}$ respectively. The father gave to his minor daughters on their marriages a moiety of the share to which he was entitled, and the gift was not in our judgment void for indefiniteness. This second appeal fails and is dismissed with costs.

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13 M. 47.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

GNANAMMAL AND OTHERS (*Defendants*), *Appellants* v. MUTHUSAMI (*Plaintiff*), *Respondent*.* [6th February, 1889.]

Court sale—Decree against Hindu father—Interest of undivided son—Certificate of sale—Civil Procedure Code, Section 316—*Grounds of second appeal.*

In execution of a decree for sale passed on a hypothecation bond, all the land comprised in the security was attached. The judgment-debtor was a member of an undivided family; his son put in no claim in execution, but on a claim put in by his nephew it was ordered that the right, title and interest of the judgment-debtor **[48]** be sold. The decree-holder became the purchaser, and having

* Second Appeal No. 70 of 1888.

(1) Macnaghten, p. 213 (Ed. iv).

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13 M. 47.

obtained a sale certificate which recited that "all the interest of the judgment-debtor" was sold, he was put in possession of all the land, part of which he leased to the son. Subsequently the nephew obtained a decree for his share against the decree-holder and then purchased the rest of the land from him. In a suit by the son against the nephew to recover his share, the plaintiff having failed to prove that the judgment-debt had been incurred for purposes not binding on him:

Held that the entire estate less the interest of the nephew was sold to the decree-holder and consequently the son's interest had passed to him.

The question what is actually bargained and paid for at an execution sale is a mixed question of law and fact, and the High Court on second appeal is not bound by the finding of the Court of first appeal with regard to it.

SECOND Appeal against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 827 of 1886, reversing the decree of W. Gopalachariar, District Munsif of Trivadi, in original suit No. 31 of 1886.

One Muthu Ayyan, having obtained a decree on a hypothecation bond against the father of the present plaintiff, attached the land comprised in the hypothecation. The present first defendant, an undivided member of the judgment-debtor's family, intervened in execution asserting a claim to a moiety of the land, but at the sale held in execution Muthu Ayyan became the purchaser and was put in possession of the whole property. The present first defendant then obtained a decree against Muthu Ayyan for his share and subsequently purchased from him the remainder of the property.

This suit was brought to recover the plaintiff's share in the land purchased by Muthu Ayyan on the ground that the debt secured by the hypothecation bond was not incurred for his benefit, that he was not a party to the suit, and that the interest of his father alone was sold. The defendant No. 1 pleaded that the sale was binding on the plaintiff, that the plaintiff had signed the delivery account prepared with reference to the land delivered to Muthu Ayyan, and had subsequently taken a lease of part of it from him.

The District Munsif held that the last-mentioned allegation was established, and that taken with the fact "that the plaintiff never came forward with a claim petition," it imposed on the plaintiff the burden of proving that the judgment-debt was not incurred for purposes binding on him, and holding that the plaintiff had failed to prove this, he dismissed the suit. On appeal the Subordinate Judge concurred in the finding that the [49] plaintiff had not proved the judgment-debt to have been incurred for purposes not binding on him, but reversed the decree on the ground that his interest had not been purchased, observing—

"The first question is whether plaintiff's share also passed to the purchaser. That plaintiff's father mortgaged the entire land is not disputed. There is also no dispute that the land mortgaged was charged with the payment of the decree debt. It is allowed that the land attached in execution was the full extent of land covered by the decree. When the first defendant put in his claim for the release of his half share, the Subordinate Judge of Tanjore, instead of allowing his claim and ordering the sale of the other moiety, made an order that the judgment-debtor's right, title and interest should be sold as stated in the plaint. Defendants do not contend that the order did not run to that effect. What is stated in the plaint must therefore be taken as correct. The Subordinate Court of Tanjore believing that besides the first defendant there might be some other claimants to property attached seems to have passed the order in question in view to protect the interest of all. That the order directed

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the sale of plaintiff's father's interest alone is not open to question. The sale certificate recites that *all the interest of the judgment-debtor* was sold Reading it with the light thrown by the order, there can be no doubt that the sale did not extend beyond the interest of plaintiff's father."

The defendants preferred this second appeal.

Rama Rau, for appellants.

Pattabhiramayyar, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.

On the 3rd November 1870 the plaintiff's father hypothecated certain property to one Muthu Ayyan, who, in Original Suit No. 99 of 1876, obtained a decree rendering the property liable. On his proceeding to realise the decree by attachment, defendant No. 1, an undivided nephew of the judgment-debtor, applied for and obtained the release of his share in the attached property. Muthu Ayyan purchased the property in Court-sale, and the plaintiff was for some time a tenant under Muthu Ayyan. Subsequently Muthu Ayyan conveyed his right to defendant No. 1, and the plaintiff now seeks to recover his share of the [50] lands on the ground that he is not concluded by the decree against his father nor by the sale.

The Munsif dismissed the suit, holding that the plaintiff was estopped by his own conduct in taking a lease from Muthu Ayyan from asserting his title, and that he had failed to prove that the debt was contracted for illegal or immoral purposes.

On appeal the Subordinate Judge sent down an issue to determine whether Muthu Ayyan bargained and paid for the whole land.

The Munsif returned a finding in the affirmative, but the Subordinate Judge, on the ground that only the right, title and interest of the judgment-debtor had been ordered to be sold, held that the father's interest alone had passed, and that the plaintiff's share did not pass to Muthu Ayyan. He therefore reversed the Munsif's decree and decreed for the plaintiff.

In Original Suit No. 90 of 1885, the present first defendant sued Muthu Ayyan for possession of a house and ground purchased from him. The present plaintiff intervened (as second defendant) as the party in possession and claimed a half share as his ancestral property. The Court of first instance and the Lower Appellate Court both found that all that passed to the purchaser (Muthu Ayyan) in the Court-sale in execution of the decree in Original Suit No. 99 of 1876 was the right, title and interest of his judgment-debtor (the present plaintiff's father). On second appeal this Court, remarking that the case had not been decided in accordance with the principles laid down by the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (1) and *Simbhunath Panday* v. *Golab Singh* (2), remanded the case for a finding on two points—(1) whether Muthu Ayyan bargained and, in point of fact, paid for the whole or for the father's interest only as contradistinguished from that of the son, and (2) if for the whole whether the debt was immoral or vicious. The Subordinate Judge (Kumbakonum) found that the purchaser bargained and paid for the whole property and that the debt was neither immoral

(1) 13 I.A. 1=13 C. 21.

(2) 14 I.A. 77 (82).

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nor vicious. This Court accepted the finding, set aside the decrees of the Courts below, and gave the present first defendant a decree.

There are thus two diametrically opposite findings by two Subordinate Judges on one and the same question, and it is argued in [51] second appeal that the finding of the Subordinate Judge in the present case being on a question of fact, it cannot be questioned in second appeal. In our judgment the question as to what the purchaser actually bargained and paid for is not a mere question of fact but a mixed question of law and fact, and we think that, looking at all the circumstances, the Subordinate Judge erred in holding that plaintiff's share did not pass.

There can be no doubt that by the bond on which the suit was brought the property was charged. The decree directed the entire mortgaged property to be sold, and the whole property was attached. Then the first defendant, the undivided nephew of the judgment-debtor, advanced his claim, and his interest was released from attachment. The plaintiff put in no claim. The property was sold and the sale confirmed as to the property itself, Muthu Ayyan being declared the purchaser of the immoveable property specified. We have no doubt that the interest brought to sale was the entire estate less the interest of the first defendant.

We therefore reverse the decree of the Subordinate Judge and restore that of the Munsif. The plaintiff will pay appellant's costs both in this and the Lower Appellate Court.

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13 M. 51.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

CHINNAYYA (*Plaintiff*), *Appellant* v. PERUMAL AND OTHERS (*Defendants*), *Respondents*.* [5th April, 1889.]

Hindu law—Alienation by father when binding on son—Burden of proof.

The father of an undivided Hindu family has no power to alienate the son's co-parcenary share in land in the absence of any debt. One claiming merely as the father's vendee must therefore give evidence that the alienation was made for some purpose which would bind the son, or that it was made with his consent.

[Appr., 29 M. 200 (203) = 16 M.L.J. 69 = 1 M.L.T. 28 (F.B.); R., 21 M. 28 (29) = 7 M.L.J. 96; 4 Bom. L.R. 587 (601); 14 M.L.J. 181 (182).]

SECOND APPEAL against the decree of C. Venkobacharyar, Subordinate Judge of Madura (West), in Appeal Suit No. 264 of [52] 1887, reversing the decree of P. S. Gurumurthi Ayyar, District Munsif of Madura, in Original Suit No. 451 of 1886.

The plaintiff in execution of a personal decree obtained by him in Original Suit No. 42 of 1884 against defendant No. 3 attached the judgment-debtor's interest in a certain house. Defendant No. 1 intervened in execution claiming title under a sale-deed executed to him in 1883 by defendant No. 2, who was the father of defendants Nos. 3, 4 and 5. The attachment was released by an order made under Section 278 of the Code of Civil Procedure and the plaintiff brought this suit to set aside

* Second Appeal No. 1373 of 1888.

the above order and to obtain a declaration that his judgment-debtor's interest therein was liable to be sold in execution of his decree.

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The District Munsif passed a decree in favour of the plaintiff, but on appeal this decree was reversed by the Subordinate Judge who said :—"Half of this house is ancestral property and the other half had been "purchased by Minatchi Naidu in Court sale under Exhibit II. On the "date of attachment, the sons of Minatchi Naidu had no interest in the "house as he had disposed of the property long before the attachment. "Although in the sale-deed I, Minatchi Naidu is not described as the "manager, yet the evidence on record shows that he was, and is still, "the family manager. The father has a disposing power, and, by reason "of it, he represents his sons also in transactions and suits provided "that the power is properly exercised. The District Munsif finds that "the transaction in question is *bona fide*. The vendee has had posses-"sion following his purchase, and till the present moment Minatchi "Naidu's sons have not raised objections to first defendant's purchase. "According to the principles enunciated in the case of *Kunhali Beari* v. "*Keshava Shanbaga* (1) it is quite clear that the sons cannot set aside "the alienation unless they show that the transaction was immoral or "illegal. Plaintiff, who is the son's creditor, cannot be in a better "position than the son himself. The Lower Court's view is not, therefore, "tenable."

The plaintiff preferred this second appeal.

Bhashyam Ayyangar, for appellant.

The only question is whether the sale by defendant No. 2 to defendant No. 1 passed the whole property. It was not an [53] alienation in satisfaction of a debt, so *Kunhali Beari* v. *Keshava Shanbaga* (1) and other authorities as to Court sales are inapplicable, for the obligation on a Hindu to pay his father's debt is independent of the existence of family property ; nor was this shown to have been an alienation made for any family purpose. The plaintiff therefore is entitled to attach and sell the share of defendant No. 3 in execution of this decree. The case is governed by *Subramanya* v. *Sadasiva* (2).

Subramanya Ayyar and *Desikacharyar*, for respondents.

The law as to the father's power of alienation and as to the burden of proof when that power is called in question is correctly stated by West, J., in *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas* (3) which case was followed in *Kunhali Beari* v. *Keshava Shanbaga* (1) ; see also *Nanomi Babuasin* v. *Modhun Mohun* (4). Moreover the presumption is that alienations made by the father as managing member of a Hindu family are made for family purposes. *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (5).

Bhashyam Ayyangar, in reply. The presumption does not go so far as is contended for. If the purchaser says "I do not know what caused the father to sell, all I know is that I bought or paid for the land, " the sons could intervene. *Arunachala* v. *Munisami* (6).

JUDGMENT.

The Subordinate Judge has misunderstood the decision in *Kunhali Beari* v. *Keshava Shanbaga* (1). Although the son or the son's creditor cannot set up his vested interest in ancestral property for the purpose

(1) 11 M. 64. (2) 8 M. 75. (3) 11 B. 37.
(4) 13 I A. 1=13 C. 21. (5) 7 B. 467. (6) 7 M. 39.

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of denying the father's power to alienate it *for a debt*, the father has no power to alienate the son's co-parcenary share in the absence of any debt.

It was for the purchaser therefore to give evidence that the alienation was for some purpose which would bind the son, or that it was made with his consent.

We must reverse the decree of the Lower Appellate Court and remand the appeal for rehearing.

The costs will follow and abide the result.

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13 M. 54.

[54] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

KRISHNA AND OTHERS (*Defendants Nos.* 1—4), *Petitioners v.* AKILANDA AND ANOTHER (*Plaintiffs*), *Respondents.**
[2nd May and 9th August, 1889.]

Specific Relief Act—Act I of 1877, *Section* 9 *—Immoveable property—Right of ferry.*

A rigbt of ferry is immoveable property or an interest therein within the meaning of Specific Relief Act, Section 9.

[**Appr.**, 5 M.L.J. 95 (97); **R.**, 19 C. 544 (549) (**F.B.**); 12 C.P.L.R. 52 (54).]

PETITION under Section 622 of the Code of Civil Procedure praying the High Court to revise the decree of T. Dorasami Pillai, District Munsif of Salem, in Original Suit No. 2 of 1887.

Suit to recover the use of a certain ferry. The plaint alleged that the right of ferrying boats from the Pallipalayam inam agraharam on the bank of the Cauvery to the opposite bank belonged to the agraharamdars from time immemorial, that the plaintiffs leased the said right from the agraharamdars and enjoyed it up to 12th September 1886, and that while the plaintiffs were plying boats on that date, the defendants unlawfully interfered with them, prevented their boats from plying, and that since then the defendants continued to ply their own boats.

The District Munsif passed a decree in favour of the plaintiff; and the defendants preferred this petition.

Rama Rau and *Sadagopacharyar*, for petitioners.

Subramanya Ayyar and *Bhashyam Ayyangar*, for respondents.

The further facts of the case appear sufficiently from the judgment of the Court.

JUDGMENT.

There is a ferry established from time immemorial across the river Cauvery within the limits of the Pallipalayam agraharam in the Sankagiri division of the Salem district. It is conceded by both parties that the agraharamdars have by custom the exclusive right of managing the ferry, of maintaining and providing necessary ferry boats, and of taking the nett collections of tolls to their own use. Under a registered [55] lease (Exhibit A) granted by the agraharamdars on 6th October 1875 for a term of 10 years, the counter-petitioners had enjoyed that right for 10 years. In September 1886 the petitioners dispossessed them and set

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* Civil Revision Petition No. 280 of 1888.

up a subsequent lease from the agraharamdars in their own favour for the next 10 years. On the other hand, the counter-petitioners asserted that there had been an extension of the prior lease for 10 years and instituted the present suit under Section 9 of the Specific Relief Act to recover the use of the ferry. The District Munsif finding upon the evidence in the case that petitioners dispossessed the counter-petitioners of their ferry otherwise than in due course of law, decreed the claim and directed that the use of the ferry be restored to them. The petitioners contend that the right of ferry is neither immoveable property nor an interest therein within the meaning of Section 9 of the Specific Relief Act, and that the decree passed by the District Munsif was one which he had no jurisdiction to pass. We are unable to accede to this contention. According to the General Clauses Act, the term 'immoveable property' includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. It includes as well *incorporeal* rights in immoveable property as *tangible* immoveable property.

1889 AUG. 9. — APPELLATE CIVIL. — 13 M. 54.

In *Maharana Futtehsangji Jaswantsangji* v. *Desai Kullianraiji Hakoomutraiji* (1) the Privy Council say: "Immoveable property "comprehends certainly all that would be real property according to "English law and possibly more. In some foreign systems of law in "which the technical division of property is into moveables and immoveables, as, *e. g.*, the Civil Code of France, many things which the law of "England would class as incorporeal hereditaments fall within the latter "category." In *Bhundal Panda* v. *Pandol Pos Patil* (2) the exclusive right of fishing in a creek within certain limits between high and low water mark was held to be immoveable property within the meaning of Section 9 of Act I of 1877. The Registration Act III of 1877 includes ferries in the definition of immoveable property and places them in the same category with fisheries and ways and other benefits to arise out of land. The Code of Criminal Procedure, Section 145, shows that, whenever the intention was to designate im-[56]moveable property which is capable of physical possession, the Legislature indicated that intention by the word "tangible." In Act I of 1877 there is neither a special definition of immoveable property nor other indication of an intention to restrict the summary remedy to tangible immoveable property. We are of opinion that the District Munsif had jurisdiction to entertain the suit and to deal with it under Section 9 of the Specific Relief Act and dismiss this petition with costs.

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13 M. 56.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

RAMAKRISHNAMMA (*Defendant*), *Appellant v.*
BHAGAMMA (*Plaintiff*), *Respondent.** [9th and 15th August, 1889.]

Court Fees Act—Act VII of 1870, *Section* 7, *cl.* 5—*Civil Court Act—Act III of* 1873, *Sections* 12, 14—*Suit to enforce registration—Jurisdiction.*

Suit in the Court of a District Munsif to enforce registration of two instruments of gift. The property purported to be conveyed was the same in each instrument

* Second Appeal No. 1548 of 1888.

(1) 13 B.L.R. 254 (265). (2) 12 B. 221.

1889 AUG. 15. — APPELLATE CIVIL. — 13 M. 56.

and its value was found to be less than Rs. 2,500, but the earlier instrument comprised also an assignment of the right to manage a charity. The later instrument was found to have been executed in supersession of the former, and the District Munsif passed a decree directing its registration alone :

Held, that the District Munsif had jurisdiction to entertain the suit.

[F., 31 M. 89 (96) = 17 M.L.J. 573 = 3 M.L.T. 73 (F.B.); R., 13 Ind. Cas. 903 = 11 M. L.T. 155 = (1912) M.W.N. 199.]

SECOND APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Cocanada, in Appeal Suit No. 20 of 1888, affirming the decree of Y. Janakiramayya, District Munsif of Cocanada, in Original Suit No. 81 of 1887.

The plaintiff was the widow of Srinivasa Rau, who, on the day of his death, executed two documents, filed as Exhibits B and A, respectively, by which he conveyed certain land by way of gift to the plaintiff. The property expressed to be conveyed was the same in Exhibits A and B, but Exhibit B (unlike Exhibit A) purported further to assign to the plaintiff the right to manage a [57] certain charity. The plaintiff in this suit sought to enforce the registration of these documents.

The defendant denied the genuineness of the documents and pleaded that, as each document purported to deal with property of the value of Rs. 2,000, the District Munsif had not jurisdiction to try the suit.

The District Munsif overruled the plea to his jurisdiction and he held that both documents were genuine, but that as Exhibit A superseded Exhibit B, Exhibit A alone should be registered, and passed a decree accordingly. The Subordinate Judge, on appeal, affirmed this decree.

The defendant preferred this second appeal.

Subba Rau, for appellant.

Bhashyam Ayyangar, for respondent.

The further facts of this case, and the arguments adduced on this second appeal, appear sufficiently for the purpose of this report from the judgment of MUTTUSAMI AYYAR, J.

JUDGMENT.

MUTTUSAMI AYYAR, J.—The appellant is the son of one Srinivasa Rau and the respondent is his widow. On the 5th January 1887, Srinivasa Rau executed two documents, Exhibits A and B, in favour of the respondent, and died on the same day. Shortly after his death, the respondent presented Exhibit A to the Registrar at Cocanada for registration, which however was refused by that officer. Thereupon she brought the present suit to enforce its registration and that of Exhibit B in the Court of the District Munsif of Cocanada. The appellant denied the genuineness of those documents and the jurisdiction of the District Munsif. Both the Courts below found that Exhibits A and B were genuine and held that the suit was cognizable by the District Munsif. They were also of opinion that both were not intended to have independent operation and that Exhibit A superseded B. On this ground they passed a decree declaring that Exhibits A and B are genuine, but directing the registration of A alone; hence this second appeal.

It is urged on behalf of the appellant that the inquiry, as regards the execution of Exhibit A was imperfect, and that there is no evidence to show that the interpolations in Exhibit B were made *bona fide*. Exhibit A, which is found to be genuine, is, though signed and attested, but a copy of Exhibit B as corrected and interlined, and there is ample evidence to the effect that [58] Srinivasa Rau executed Exhibit A, in which the corrections

and alterations to be found in Exhibit B are adopted. The next objection is that the Court of first instance declined to summon certain witnesses and issue warrants for others as requested by the appellant in C.M.P. No. 1713. It appears that nine witnesses were examined for him, and that the District Munsif refused his application for additional witnesses by reason of laches on his part. It appears likewise that the Lower Appellate Court refused to admit certain documents tendered in evidence on appeal on the ground that they might have been produced in the Court of first instance if the appellant had exercised due diligence. It is not shown that the grounds on which the additional evidence was refused are not tenable. Nor is there any affidavit to the effect that the evidence was not offered in time from circumstances over which the appellant had had no control. On the merits, this second appeal must fail.

The substantial question for determination is whether the District Munsif had jurisdiction to entertain the suit with reference to its value. On this point the contest in the first Court was whether the value of the property affected by the documents should be taken to be Rs. 2,000, as mentioned in Exhibit A, or computed with referecne to Section 7, Clause 5 of the Court Fees Act of 1870. The District Munsif observed (1) that the property comprised in the documents was *not* the subject-matter of the suit, and that its value did not depend on the value of the property; (2) that, if it did, by analogy to suits for the specific performance of a contract of sale, Rs. 2,000 should be treated as the proper value; and (3) that, even if it were computed in the mode urged for the appellant, it would not be more than Rs. 2,012½. On appeal, the Subordinate Judge remarked that, if the two Exhibits, A and B, were independent of each other and were both intended to have legal operation, each of them must be taken to be an instrument of Rs. 2,000, but that as Exhibit A superseded B, the District Munsif had jurisdiction. It is argued before us that there is no evidence that Rs. 2,000 was interlined in Exhibit B as the proper value, that each document being for Rs. 2,000, the proper value of the suit is Rs. 4,000, and that in computing the value of the inam land the market value should have been taken, instead of 15 times the annual produce as prescribed by Section 7, Clause 5 of the Court Fees Act. As to the first [59] contention, the insertion of Rs. 2,000 in Exhibit A, which is found to be genuine, is evidence that the value was interlined in Exhibit B by Srinivasa Rau's direction, when he decided to execute a fresh document on a stamped paper in accordance with Exhibit B as altered. As to the mode of valuing the suit, regard should be had to the provisions of the Civil Courts Act—Act III of 1873. It is provided by Section 12 that the jurisdiction of District Munsifs shall extend to all suits of which the value of the subject-matter does not exceed Rs. 2,500, and by Section 14, that, when the subject-matter is land or house or garden, the value shall, for the purposes of the jurisdiction conferred by the Act, be fixed in manner provided by the Court Fees Act, Section 7, Clause 5. What is the subject-matter of this suit? Is it the transaction evidenced by the document, or the interest in property created by it, or its usefulness as evidence of the transaction? In ordinary parlance registration is but a form of authentication, and its value is nothing more than that of pre-appointed evidence, but its juridical value is higher. As regards instruments of which registration is compulsory, it is of the essence of the transaction, since though it may be valid in other respects, it cannot acquire without registration legal efficacy or the power of affecting the property comprised therein. It is important

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here to bear in mind the distinction between a registered document and the act of registration, the former is only evidence, and, if it is lost, the transaction may be proved otherwise, but without the latter there can be no legal transaction at all. The object of the suit is to secure legal efficacy to the transaction evidenced by the documents and not simply a mode of proving them, and the value of the transaction must therefore be taken to be the value of the suit. As Exhibit A is a deed of gift, it can bear no analogy to a contract of sale of which specific performance is claimed, there being no consideration in the one case whilst there is consideration in the other. The value of the present suit is in my judgment that of the interest created by the document sought to be registered. Both Courts concur in finding that it is below Rs. 2,500. It is then urged that the plaint prayed that both documents be registered, and that as each relates to property of Rs. 2,000 value, the value of the suit is Rs. 4,000. Both Courts find that the appellant's father superseded Exhibit B by Exhibit A, and circumstances to which they refer warrant the **[60]** finding. Though the postscript found in B relating to the right of managing Nallacheruvu choultry and its endowment is not to be found in Exhibit A, yet it may be that Srinivasa Rau changed his mind about it when he executed Exhibit A in supersession of B. I must hold that, when two documents are executed by one and the same person and they create the same interest in the same property standing to each other in the relation of an operative and a superseded document, the value of the suit for the purposes of jurisdiction is the value of the interest intended to be created by the operative instrument. The only contention which remains to be noticed is that, in determining the value of the subject-matter when it is land, house or garden, the market value should be considered instead of the value prescribed by Section 7, Clause 5 of the Court-Fees Act. I do not think that the value of a suit to have a document registered and thereby give it legal efficacy can be higher for purposes of jurisdiction than that of a suit to recover the property itself.

I am of opinion that this second appeal cannot be supported, and I would dismiss it with costs.

SHEPHARD, J.—I concur.

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13 M. 60.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

APPA RAU (*Plaintiff*), *Appellant v.* SUBBANNA AND OTHERS (*Defendants*), *Respondents.** [10th July and 20th August, 1889.]

Transfer of Property Act—Act IV of 1882, *Sections*, 106, 108—*Landlord and tenant—Assignability of tenancy—Suit by zamindar to set aside a Court-sale of his raiyat's interest—Burden of proof.*

A zamindari raiyat mortgaged the land comprised in his holding, and the mortgagee, having sued and obtained a decree on his mortgage, attached the mortgagor's interest in the land and purchased it at the Court sale held in execution of his decree. The zamindar, who had intervened unsuccessfully in execution, now sued to set aside the sale and to eject the decree-holder and the judgment-debtor from the land. Neither party adduced evidence:

* Second Appeal No. 1086 of 1888.

[61] *Held*, that as the burden of proof lay on the plaintiff, and had not been discharged, the suit must be dismissed. 1889 AUG. 20.

[F., 15 M. 95 (96) ; R., 20 M. 299 (303) ; 23 M. 318 (323) ; 30 M. 155 (157) = 17 M.L.J. 64 = 2 M.L.T. 25 ; D., 25 C. 896 (906).]

APPELLATE CIVIL. 13 M. 60.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, Appeal Suit No. 80 of 1886, affirming the decree of E. Subharayudu, District Munsif of Bezvada, in Original Suit No. 173 of 1885.

Suit by a zemindar to set aside the sale of the interest of defendant No. 2 in certain land held by him of the plaintiff, in execution of a decree obtained by defendant No. 1 against defendant No. 2, and to restrain the defendants from obstructing the plaintiff from taking possession of the land.

No evidence was adduced. The District Munsif and, on appeal, the District Judge held that the burden of proof lay on the plaintiff and decreed for the defendants.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar, for appellant.

Narayana Rau, for respondents.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following

JUDGMENT.

MUTTUSAMI AYYAR, J.—The appellant is the owner of a portion of the Nuzvid estate in the district of Kistna. Respondent No. 2, a raiyat in the zemindari, mortgaged the land under his cultivation to respondent No. 1, who obtained a decree upon the mortgage and purchased the mortgagor's interest in the land at the court-sale held in execution. When the land was attached prior to the sale, the appellant objected that the tenant had no saleable interest, but his objection was disallowed on the ground that what was intended to be sold was such interest, if any, as the tenant had. The appellant then brought this suit to eject the respondents, alleging that respondent No. 2 had no saleable interest, but they contended that they had a permanent occupancy right. Neither party went into evidence. On appeal the Judge held that the appellant having failed to show how the tenancy was determined, the sale of such interest as the tenant actually had did not entitle him to eject the respondents. It is argued in second appeal that it lies on the tenant to prove that he had a saleable interest either from contract or usage as mentioned in Section 38 of Act VIII of 1865, and that in the absence of proof of such interest, the court-sale gave the appellant a right to re-enter. [62] I am unable to accede to this contention. In the absence of a covenant not to assign, a tenancy is presumably a saleable interest, and it lies on the plaintiff in ejectment to show what was the nature of the tenancy, how it ceased by virtue of the court-sale, and how his right to present possession accrued. It is no doubt for the tenant to prove a permanent occupancy right when the plaintiff makes out a *prima facie* case for his eviction, but it does not follow from his failure to prove such right that such other interest as he really had was not saleable. As to Section 38 of Act VIII of 1865, on which reliance is placed for the appellant, it only specifies the sources from which a saleable interest is derived, but it was not intended to deal with presumptions on which the onus of proof rests in suits for ejectment. According to Sections 106 and 108

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of the Transfer of Property Act, which only declare the law as previously administered in this presidency, the presumption as to the duration of an agricultural tenancy is that it is a tenancy from year to year, and that it is an assignable interest in the absence of an agreement or local usage to the contrary.

In *Venkataramanier* v. *Ananda Chetty* (1), decided by this Court in 1869, it was held that the tenancy of an ordinary pattadar (raiyat) in a mitta was assignable. This Court then observed: "We apprehend the established general rule of law in this presidency to be that such a tenancy, when properly created, entitles the tenant to the right of occupancy for the purpose of cultivation until default in the payment of the stipulated rent at the time it becomes due, and that it may be determined upon such default under Section 41 of Madras Act VIII of 1865, or at any time by the landlord's acceptance of a surrender by the tenant which is required to be in writing by Section 12 of the same Act." This shows that even in cases in which a permanent right of occupancy may not be shown to exist, there may be a right to continue in possession so long as rent is punctually paid.

In *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (2), the landlord sued to eject the tenant under a muchalka. The Court then held that neither the Rent Recovery Act nor the Regulations operated to extend a tenancy beyond the period of its duration secured by the express or implied terms of the contract creating [63] it. Holloway, J., observed there was nothing in any existing written law to render a tenancy once created only modifiable by a revision of rent, but not terminable at the will of the lessor exercised in accordance with his obligations. It was also observed that the decision in *Venkataramanier* v. *Ananda Chetty* (1) went too far in laying down the rule as to a pattadar's right of occupation in the broad terms that it did. This decision is an authority for the position that when there is a contract, express or implied, the duration of the tenancy and the right to evict the tenant are governed by it and that to that extent the rule laid down in *Venkataramanier* v. *Ananda Chetty* (1) is inapplicable. Again, in *Krishnasami* v. *Varadaraja* (3), which was a Full Bench decision, this Court observed that the case of *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (2) did not derogate from any customary right. The Court discusses the nature of custom on the subject and observes that "where there is so much evidence to show that by the custom of the country and of the district in which the lands are situated permanent cultivators are entitled to permanent occupancy, we do not see how this privilege can be refused to the defendants whose ancestors have cultivated the lands they now cultivate for at least 70 years. This case shows that the general custom of the country and of the district in which the land in suit is situated may materially add to the value of the tenants' length of enjoyment or of other circumstances as *prima facie* evidence of a right of permanent occupancy. In *Venkan* v. *Kesavalu* (4), in which the plaintiffs failed to prove the letting alleged, and the defendants who admitted that the land belonged to the plaintiffs failed also to establish the occupancy right set up by them, this Court held that the plaintiffs were not entitled to a decree in ejectment. This negatives the view that there is a presumption in favour of a tenancy at will. According to the course of decisions, therefore, in this presidency, the landlord may determine the

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(1) 5 M.H.C.R. 120. (2) 6 M.H.C.R. 164.
(3) 5 M. 354. (4) S.A. 1078 of 1887 unreported.

tenancy if there is a contract, express or implied, by exercising his will in accordance with his obligations; that there is no presumption in favour of a tenancy at will; that an occupancy right may exist by custom; that a pattadar or raiyat in a mitta is entitled to continue in possession so long as he regularly pays rent and has a saleable interest, and that by reason of special [64] circumstances in evidence the onus of proof may be shifted, even in regard to a permanent occupancy right, from the tenant to the landlord.

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The appellant's pleader draws our attention to the case of *Kripamoyi Dabia* v. *Durga Govind Sirkar* (1), and to the decisions cited in it. In that case the land formed part of a *patni* belonging to the plaintiffs and the Court held that the onus lay upon the tenant to show that his holding under the plaintiffs was of a transferable character. The holding was on a *patni* tenure, and it may well be that, as a customary incident of that tenure, the landlord may be entitled to *khas* possession unless the tenant made out the special right set up by him. But in *Doya Chand Shaha* v. *Anund Chunder Sen Mozumdar* (2), another Divisional Bench of the Calcutta High Court held that there was no presumption that any tenure on which land was held was not transferable. In the Privy Council case of *Perhlad Sein* v. *Doorgapershad Tewarree* (3), which was relied on in *Kripamoyi Dabia* v. *Durga Govind Sirkar* (1), the defendant set up an intermediate tenure, a mokurrari tenure, which derogated from the *prima facie* right of the zemindar (plaintiff) to the gross collections from the mauzas within his zemindari. Adverting to this *prima facie* right of the zemindar, their Lordships of the Privy Council held that the onus lay on the defendant of proving the intermediate tenure. In *Sumbhoolall Girdhurlall* v. *Collector of Surat* (4), the question was whether the right to levy a *huk* called, "*tara garas*" was alienable. The Privy Council observe, apart from any evidence in that case, that the onus lay upon the Government to prove that there was something in the nature of the payment which made it incapable of alienation.

It seems to me that the foregoing cases show that unless the landlord has a *prima facie* right to evict the tenant, he must start his case and show how such right accrued. It may be that the tenant is bound to prove a permanent occupancy right by custom or contract and fails to do so. I do not see, however, how this failure gives the landlord a right to evict the tenant from the land, and shows that the tenant has no other interest in the land which though not a permanent occupancy right, may be alienable. Such a right of eviction could only arise either because there is a [65] presumption that every zemindari raiyat is a tenant at will, unless and until he shows the contrary, or because the liability to eviction must, unless the special case set up by the tenant is proved, be taken to be admitted upon the pleadings or by the mode in which the parties conducted their case. It would be monstrous to hold that every tenant in a zemindari is presumably a tenant at will. Such a presumption is at variance with Section 106 of the Transfer of Property Act and with the course of decisions in this presidency. Nor is there a presumption that a tenancy is not a saleable interest. Such presumption is contrary to Section 108 and to the previous course of decisions. In the case before us there was no admission that defendant No. 2 was a tenant at will or that he had no saleable interest. I am therefore of opinion that the plaintiff is not entitled to a decree until he starts his case and shows by evidence

(1) 15 C. 89. (2) 14 C. 382. (3) 12 M.I.A. 322. (4) 8 M.I.A. 1 (39).

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how the tenancy of defendant No. 2 ceased by the court-sale. The decision of the Judge is right, and I would dismiss this second appeal with costs.

WILKINSON, J.—I think the Lower Courts were right in holding that the burden of proof lay upon the plaintiff. He seeks to set aside a sale of his tenant's right and to obtain possession of the land. It is evident that if neither side gave any evidence, plaintiff could not recover, for, admittedly defendant No. 2 was at the time of the sale a tenant of the plaintiff, and it has not been shown that the tenancy has terminated or that by law or custom a tenant is prohibited from assigning his tenant right. In execution of the decree obtained by defendant No. 1, the second defendant's rights in the land were sold and purchased by defendant No. 1. He then stepped into the shoes of defendant No. 2 as a tenant of plaintiff, and, before ejecting him, plaintiff must show that he has put an end to the tenancy. This he has failed to do, and the Lower Courts have rightly dismissed his suit. This second appeal fails and is dismissed with costs.

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13 M. 66.

[66] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Shephard.

PATHUKUTTI (*Plaintiff*), *Appellant v.* AVATHALAKUTTI AND OTHERS (*Defendants*), *Respondents.**
[30th July, 1888, and 26th April, 1889.]

Muhammadan law—Wakf—Conditional and revocable dedication—Conditions of a valid dedication.

A Muhammadan by an instrument revoking a previous trust deed conveyed her property to her husband on trust as follows :—(1) to maintain the settlor and her children out of the income ; (2) to hand over the property to the children on their attaining majority ; (3) in the event of the settlor's death without leaving children, with the income of the property to have *Kathom* recited in a mosque, give food to the Mollahs who come there for reciting the same and get the *moilu* performed. The settlor reversed to herself and her representatives an option of dealing with the property as a special fund for the maintenance of her children, if any.

The settlor died leaving no children. In a suit by her half-sister against her husband and others to recover her share of the property :

Held, per MUTTUSAMI AYYAR and PARKER JJ., that the plaintiff was entitled to recover her proportionate share of the property, notwithstanding the provisions of the above instrument.

Per SHEPHARD, J.—There has been no complete dedication of the property, and, except so far as regards the income required for the three specific objects named by the donor, her property is undisposed of.

Conditions of a valid *wakf* considered.

[Appr., 18 C. 399 (413) ; R., 24 A. 257 (270) ; 20 C. 116 (166) ; 18 M. 201 (211) ; 8 Bom. L.R. 245 (250) ; 8 O.C. 379 (387).]

SECOND APPEAL against the decree of the District Judge of South Malabar in Appeal Suit No. 381 of 1887 confirming the decree of the Subordinate Judge of South Malabar in Original Suit No. 79 of 1885.

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* Second Appeal No. 1082 of 1887.

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The parties to this suit were Moplahs. The plaintiff sued defendants Nos. 2 and 3 (her brothers), defendant No. 4 (her half-sister), and defendant No. 1 (the husband of her late half-sister, Kuttiyachamma) to recover from them her share of the property of the late Kuttiyachamma and of her late half-brother, Kammali Kutti.

It was pleaded that the plaintiff's claim on the estate of Kammali Kutti was barred by limitation, and this plea prevailed in both the Subordinate Court and the District Court. With [67] reference to the plaintiff's claim on the estate of Kuttiyachamma the defence was that she had by an instrument which was filed as Exhibit I, conveyed her property including certain property which she held under the will of Kammali Kutti, to defendant No. 1 on certain charitable trusts which were described in the will of Kammali Kutti, and that the plaintiff accordingly had no right to share in it. Both the Subordinate Judge and the District Judge held that Exhibit I, of which the material portions appear *in extenso* in the judgment of MUTTUSAMI AYYAR, J., was a valid *wakf* deed, and prevailed against the claim of the plaintiff, and they accordingly passed decrees for the defendants.

The plaintiff preferred this appeal.

Ramasami Mudaliar and *Sankara Menon*, for appellant.

Narayana Rau, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following judgments.

JUDGMENTS.

PARKER, J.—I am of opinion that the District Judge clearly intended to express his agreement with the Subordinate Judge that the plaintiff's allegation that she had shared in the income of her late brother's property was untrue, and hence that the suit with respect to that was barred. As to item No. 1 (the house), the District Judge found that the alleged gift to Biyachu Kutti and her daughters was not proved.

The remaining point is whether Exhibit I is a wakfnama and valid against the plaintiff, and the sole difficulty in construing it has arisen from paragraph 5.

It must be remembered that Exhibit I refers to two distinct properties —(1) those of the executant (Kuttiyachamma) herself, (2) those which she held under the will of her late brother, Kammali Kutti. Kammali Kutti would appear to have dedicated all his property to charitable purposes for which his sister was the trustee, and she provides (paragraph 6) that the holder of her property in the future shall continue to conduct the charities founded by her brother.

With respect to her own property, Kuttiyachamma revokes a former deed and provides (paragraph 2) that her husband shall take possession of it. He is to pay the Government kist, &c., with the surplus income and maintain her and any childern that may be born to her. If any children attained majority the husband was then to make over the property to them.

[68] Paragraph 3 provides that if the lady have no offspring or they die after birth, her husband is, after the lady's death, to spend the whole income in prayers and charities which may be beneficial to her, and after his death the senior male and senior female of the tarwad are jointly to conduct these charities.

Paragraph 4 provides that if the children survive their parents the above-mentioned members of the tarwad (the senior male and senior

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female) shall be guardians of the children and shall render account to them and make over the property to them on attaining majority. Then follows a declaration that if the husband predecease the lady, she will, whether with or without children, conduct *these charities* until her death. I apprehend that the charities here referred to must be Kammali Kutti's charities, since the lady apparently intended (paragraph 2) that she was to have the income of her own property during her life and that, after her death, it should go to her children (if any).

This construction is borne out by paragraph 5 by which I understand the lady to mean that no charities are to be conducted out of her own property till her death, and that if she has children who survive, the property is to go to them absolutely, unburdened by any dedication for charitable purposes, though of course they would have to perform Kammali Kutti's charities.

Taking this view of the document, I think that Exhibit I was only a conditional dedication of the lady's property for religious and charitable purposes, —conditional upon the event which has happened, *viz.*, the death of the lady herself and the failure of any issue which attained majority.

Is such a conditional deed a *wakfnama*? It appears to me that it is not.

In *Jugatmoni Chowdrani* v. *Romjani Bibee* (1) the essentials of *wakf* grant were discussed, and they are defined to be four in number—(1) the ultimate application must be to objects not liable to become extinct; (2) the appropriation must be *at once* complete; (3) there must be no stipulation for sale and expenditure of the price on the appropriator's necessities; (4) perpetuity is a necessary condition.

Conditions number 1 and 2 do not apply in the present case. Had one of the lady's children lived to attain majority, he would [69] have taken an absolute interest, and the religious and charitable appropriation would have altogether failed. This condition being interposed, the appropriation as *wakf* was not at once complete.

In *Fatmabibi* v. *The Advocate-General of Bombay*(2) it was held that a *wakf* must be unconditional and not subject to an option; this is not the case here (paragraph 5 of Exhibit I), and Exhibit I itself revokes a former deed. (See Baillie's Moohummudan Law, p. 556). In the Bombay case the *corpus* of the property could never absolutely revert, and the interposed private interests, which might or might not endure, were held not to avoid the ultimate charitable trust. In this case the trust, as far as the children were concerned, was certainly revocable.

The decision in *Amrutlal Kalidas* v. *Shaik Hussein* (3) differs from the present case: in that case the *corpus* of the property was irrevocably dedicated to charitable and religious purposes, though as to the income there was a perpetuity created in favour of the descendants of the founder as long as any should exist.

For these reasons, it appears to me that Exhibit I is invalid as a *wakf* deed and that the provisions of paragraph 3 as to the appropriation of the income of Kuttiyachama's own property for religious and charitable purposes wholly fail.

I would ask the District Judge to return a finding on the issue, "To what proportionate share in the properties described in Exhibit I is the plaintiff entitled?"

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(1) 10 C. 533. (2) 6 B. 42 (3) 11 B. 492.

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SHEPHARD, J.—The plaintiff seeks to recover her share of the property left by her half-brother Kammali who died in 1868 and her half share of the estate of her sister who died in 1882. The first part of the plaintiff's claim the Subordinate Judge held to be barred by limitation, finding that it was not proved as alleged by the plaintiff that she had enjoyed any part of the income of the property since 1868 and that there was no admission to take the case out of the statute. The District Judge concurred in this finding, and, though he did not say so in express words, clearly meant to agree with the Subordinate Judge in holding that the suit was barred; and in their holding I think the Courts below were right, inasmuch as the plaintiff was entitled to her share immediately on the death of her brother Kammali, and more than twelve years intervened between the date of his death and the [70] filing of the suit (Article 123 of the Second Schedule to the Limitation Act). The District Judge also found, agreeing with the Subordinate Judge, that the alleged gift by Maria Kutti to Biyachu and her daughter was not proved. So far therefore the appeal must be dismissed. To the rest of the claim, that is, to the claim in respect of Kuttiyacha's estate the Courts agreed in thinking that the instrument executed by her in 1881 afforded a complete answer.

In both Courts this instrument (Exhibit I) was construed as an instrument constituting the property dealt with *wakf* with a condition attached that, if children were born to Kuttiyacha, they were to take the property. In this instrument, executed by Kuttiyacha when pregnant, she directs her husband to take possession of the property specified, and with the surplus income to support her children and conduct the charities according to the will of Kammali. He is to hand over the property to the children on their attaining majority.

Then follows the clause which is supposed to make the instrument an instrument of *wakf*. In this clause the trustee is directed in the event which has happened, *viz*., of Kuttiyachamma leaving no children, with the income of the properties to have *kathom* recited in Jumath mosque at Ponnani, give food to the Mollahs who come there for reciting the same, and get the *moilu* performed. It was not present to her mind that then those objects would exhaust the income of the properties, for she proceeds to direct the trustee to conduct "other charities beneficial to me for ever."

If the further direction had been so framed that any effect could be given to it, it might be said that there was a complete dedication of the property, no part of the income being left undisposed of. But the direction is expressed in such general terms as to give the trustee no sort of guidance. In order that a gift for a charitable purpose or indeed for any purpose should be operative and take effect, the object which the giver proposes must be defined with certainty. The requisite certainty is here wholly wanting and therefore no effect can, in my opinion, be given to the final direction of Kuttiyachamma. It follows that there has been no complete dedication of the property, and that, except so far as regards the income required for the three specific objects named by the donor, her property is undisposed of. [71] Taking this view of the instrument, I think that no question of *wakf* arises and that the plaintiff as one of the Kuttiyachamma's heirs is entitled to the share of her property burdened with the charges she has imposed upon it.

I would reverse the decree of the Lower Court except so far as relates to the estate of Kammali and grant the plaintiff a decree for the recovery of her share of the estate of Kuttiyacha, the decree being made, however,

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without prejudice to the rights of the trustee in respect of the three specific duties imposed upon by Clause 3 of Exhibit I.

This second appeal was referred under the provisions of Section 575 of the Civil Procedure Code to MUTTUSAMI AYYAR, J., who delivered the following

FINAL JUDGMENT.

MUTTUSAMI AYYAR, J.—This second appeal has been referred to me under Section 575 of the Civil Procedure Code owing to a difference of opinion between the learned Judges who heard it.

The appellant, a Mopla lady in South Malabar, sued for her share under Mahomedan law in the property of her deceased half-brother Kammali Kutti and half-sister Kuttiyachamma. The claim was considered by the Courts below to be barred by limitation so far as it related to the property of Kammali Kutti. Their decision rested on the ground that the half-brother died more than twelve years before suit and that the appellant's averment that she participated in the enjoyment of his property within twelve years was not true. Upon the facts found, the decision is correct, and on this point, there is no difference of opinion between the Judges who first heard this appeal. They also agreed that upon the finding that there was no moveable property of which partition could be decreed, the claim regarding a share therein was properly dismissed. They concurred further in holding that the appeal must fail in regard to item No. 1 of the immoveable property. It is only necessary for me for the purposes of this reference to mention the nature of the contest with reference to items 2 to 6 which belonged to the appellant's deceased half-sister Kuttiyachamma. The appellant's case was that the settlement made by that lady under Exhibit I was inoperative and that the property forming the subject of the settlement was liable to be divided. Both the Courts below considered the settlement to be valid. In this Court Mr. Justice Parker held that Exhibit I was a *wakfnama* and no effect could be given to it as the dedication to charitable and [72] religious use it provided for was not unconditional and complete. Mr. Justice Shephard was of opinion that the instrument was not a *wakfnama*, and that even if it were the gift, was complete in the sense that the giver reserved no power of revocation. The question I have to consider is whether the instrument is a *wakfnama*, and whether effect can be given to it in part or in whole. The material portions of the document are paragraphs 2 to 5, and they run in these terms:—

"2. You shall from this day onwards keep in possession the properties specified in the schedule along with the above-mentioned documents, defray the customary expenses and pay the Government revenue, and with the surplus income you shall until death maintain me who am pregnant and the children I may bring forth, and conduct the charities according to the testamentary instrument of the deceased Kummali Kutti. Besides, when the children I may bring forth attain majority, you shall make over the properties to them along with the documents.

"3. If either I have no offspring, or if they die after birth, with the income from the properties, you shall, after my death, have *kathom* recited in the Jumath mosque at Ponnani, give food to the Mollahs who come and live there for reciting the same and get the *moilu* performed, and you shall, with due regard to time and propriety, conduct other charities beneficial to me for ever without any default. But you, till your death, and after your lifetime, the senior male member and the senior female member of my tarwad for the time being jointly, shall

be responsible for the management of the charities. The Mahadur Tangal for the time being of Ponnani shall have the superintendence of the charities conducted by my tarwad and the power to conduct them without default.

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"4. If children be born and they survive us, the aforesaid members of my tarwad, who have been appointed to conduct the charities, shall have the liberty and power to be the guardian of the children and to render account and make over the (properties) in case (they) have to be transferred on their attaining majority. If you die after children are born and I be alive, or if there be no children and I survive, I shall, in the capacity of the guardian of the children (in the former case), be prepared to conduct these charities, and I shall in accordance with the provisions of the above paragraphs conduct the charities until my death.

[73] "5. Nothing in this shall be considered to affect my arrangement that the charities cannot be conducted until my death, and that the properties cannot, [?] at any time during the lifetime of the children, be taken up as special property for their maintenance."

There appears to me to be sufficient ground for holding that the document in question is a *wakfnama*. The event that has arisen was anticipated by the settlor, and by paragraph 3, she dedicated the property permanently and exclusively to religious and charitable use if the contingency anticipated should arise. It may be that the creation of *wakf* subject to a contingency is either valid or invalid, in part or in whole, but this cannot affect the construction which ought to be placed on the instrument. The criterion is whether from the contents of the document it could reasonably be inferred that a *wakf* or an endowment for religious and charitable use was intended. It should also be borne in mind that the creation of a perpetuity except for and in connection with the ultimate destination of property to such use would be open to objection. The instrument being a *wakfnama*, the further question arises, whether it is valid, and I am of opinion that it is not. The dedication should not depend on a contingency and the appropriation must at once be complete and not suspended on anything. Baillie, at page 556, gives an illustration, observing if one were to say "my mansion is a charity appropriated to the poor if my son arrives," and the son should arrive, the mansion does not still become *wakf*. He adds, if one should say this, "my land is charity if such a one pleases," and if the person referred to should indicate his pleasure, still the *wakf* would be void. I take the reason to be that at the time of settlement there was no absolute or complete appropriation in the sense that no proprietary interest was reserved and that the property was effectually constituted to be charity property. I do not desire to be understood as saying that the interposition of an intermediate estate limited in duration would invalidate the creation of a *wakf*, provided that there was an out and out appropriation at the time of the settlement. In that case, the appropriation to religious use would only be deferred so long as the interposed estate continued and there would be no reason for saying that the religious appropriation might fail altogether. In the present case there is also another objection as observed by Mr. Justice Parker. In paragraph 5, the settlor **[74]** reserved an option to her during her life and an option to her representatives even after her death, to the extent of dealing with the endowment as a special fund for the maintenance of her children, if any. Seeing that she revoked a former settlement, I cannot say that she did not desire to have an option to do the same in regard to the settlement before me. As to

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the decided cases to which my attention was called, the ground on which the decision rested in *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan* (1) was that the settlor did not understand in making the settlement that she was creating a tenure in the nature of a *wakf*. The decision in *Mahomed Hamidulla Khan* v. *Lotful Huq* (2) is an authority in support of the view which I take, and the facts of that case were similar to this, inasmuch as a contingency was indicated by the creation of an intermediate estate which might prevent the ultimate dedication to religious use from ever taking any effect at all. Nor does the case in *Luchmiput Singh* v. *Amir Alum* (3) support this appeal. The case in *Jewun Doss Sahoo* v. *Shah Kubeeroodeen* (4) did not decide the question which is here raised for decision. As for the case in *Fatma Bibi* v. *The Advocate-General of Bombay* (5). Mr. Justice West observes that the direct ownership of the property was completely parted with, whilst in the case before us the settlor reserved an option. The *ratio decidendi* in *Mahomed Hamidulla Khan* v. *Lotful Huq* (2) is that the principle underlying a *wakf* is charity and the ultimate application of property, the subject of *wakf* must be certain and to objects which never become extinct and those objects must be all of religious and charitable character. This is in accordance with Hedaya as read by Hanifa, "that to constitute a *wakf*, there must be a dedication solely to the worship of God or to religious or charitable purposes." It seems to me that unless the ultimate application of the property to religious or charitable use can be predicated with certainty from the deed of the settlement, it cannot be said that one essential ingredient, *viz.*, application to charity is not wanting and that a valid *wakf* is created. For these reasons, I come to the same conclusion to which Mr. Justice Parker has come. The result is that the order proposed by him [75] will be the order of the majority of the Judges who took part in this appeal.

[In compliance with the above order the District Judge returned a finding which was accepted by the High Court, and the decree appealed against was accordingly modified by awarding to the plaintiff $\frac{9}{84}$ of items Nos. 2—5 described in Exhibit I.]

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13 M. 75.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

KOMBI (*Plaintiff*), *Appellant v.* AUNDI AND OTHERS (*Defendants*), *Respondents.** [8th and 30th July, 1889.]

Specific Relief Act—Act I of 1877, *Section* 42—*Suit for declaration of title as holder of a stanom to which a malikana allowance is attached—Pensions Act—Act XXIII of* 1871, *Section* 6.

Suit to declare plaintiff's title to the stanom of fifth Raja of Palghat; the first Raja (defendant No. 1) received a malikana allowance from Government payable to the various stanomdars, but had refused to pay to plaintiff the fifth Raja's share:

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* Second Appeal No. 744 of 1888.

(1) 15 B.L.R. 167. (2) 6 C. 744. (3) 9 C. 176.
(4) 2 M.I.A. 390. (5) 6 B. 42.

Held, the plaintiff being entitled to sue for further relief than the declaration of his title and having omitted to do so, the suit must be dismissed under Specific Relief Act, Section 42. 1889 JULY 30.

Per cur: Pensions Act, Section 6, was not applicable to this case. APPELLATE CIVIL.

[F., 10 M.L.J. 251 (252); R., 29 B. 480 (491)=7 Bom. L.R. 497; 18 M. 187 (188); 15 Ind. Cas. 552 (553); 2 O.C. 57 (58).] 13 M. 75.

SECOND Appeal against the decree of L. Moore, Acting District Judge of South Malabar, in Appeal Suit No. 25 of 1888, reversing the decree of S. Subbramanya Ayyar, District Munsif of Temelprom, in Original Suit No. 8 of 1887.

Suit for a declaration that the plaintiff was entitled to the stanom of the fifth Raja of Palghat. Defendant No. 1 was the first Raja, and as such he received from Government a *malikana* to distribute among the other Rajas, being the stanomdars of the kovilagom. The plaint stated that defendant No. 1 refused to pay the fifth Raja's share to the plaintiff, who accordingly brought this suit to establish his title.

[76] The District Munsif passed a decree for the plaintiff, but it was reversed on appeal by the District Judge, who held that the suit was not cognizable by the District Munsif.

The plaintiff preferred this second appeal against the decree of the District Judge.

Sankaran Nayar, for appellant.

Rama Rau and *Ramachandra Ayyar*, for respondents.

The further facts of this case and the arguments adduced on second appeal appear sufficiently for the purpose of this report from the following

JUDGMENTS.

WILKINSON, J.—The plaintiff, one Kombi Achan, instituted this suit to obtain a declaration that he was the fifth Raja of Palghat. The Munsif decreed for the plaintiff, but on appeal the District Judge dismissed the suit on the grounds—(1) that the suit was not cognizable by the Munsif, the certificate required by Section 6, Act XXIII of 1871 not having been obtained, and (2) that the plaintiff was entitled to further relief and could not therefore maintain a suit under Section 42 of the Specific Relief Act. I am of opinion that the Judge was in error on the former point. The suit was not a suit relating to any pension or grant of money or land-revenue conferred by the British or any former Government, but merely a suit for a declaration as to the plaintiff's status. No doubt malikana is paid by Government on behalf of the stanom of the fifth Raja, but this suit did not seek a declaration that the plaintiff is entitled to anything so payable. Act XXIII of 1871, being in derogation of the rights of the subject to resort to the ordinary Civil Courts, must be construed strictly. But the suit is barred by the provisions of Section 42, Specific Relief Act. The malikana payable to the fifth Raja is in the hands of the first Raja. There being a dispute between the male members of the family as to who is, in virtue of seniority, entitled to succeed to the vacant post, the first Raja refused to pay any malikana until the claimants have made good their title. The plaintiff was entitled to seek further relief than a mere declaration of his status. Being entitled to an executory decree he cannot seek a mere declaratory decree. The decree of the Lower Appellate Court must therefore be affirmed and the appeal dismissed with costs.

MUTTUSAMI AYYAR, J.—This was a suit to have it declared that the appellant (plaintiff) was entitled to the stanom of the

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[77] fifth Raja of Palghat. The plaint stated that his status as such was denied by the defendant No. 4 and that defendant No. 1, who drew from the Government the malikana allowance payable to the several stanoms and edoms in the kovilagom, refused to pay the appellant the share due to the fifth Raja. The District Judge considered that the suit was not cognizable by the District Munsif under the provisions of Section 4 of Act XXIII of 1871 and of Section 42 of Act I of 1877. Hence this second appeal.

I am also of opinion that the Pensions Act has no application in this case. The suit was not brought against the Government, nor was any relief claimed within the scope of the Act. As soon as the pension was paid by the Government to the first defendant, it ceased to be a pension payable by the former and became money had and received by the latter for the use of persons entitled to the several stanoms and edoms for whose benefit the payment was made. The decision in *Babaji Hari* v. *Rajaram Ballal* (1) is not in point. It proceeded on the ground that Act XXIII of 1871 was intended not only to guard the executive Government against responsibility to the Civil Courts in respect of pensions, but also to keep the distribution of what is regarded as a bounty of Government in the hands of its executive officers. This view is consistent with the decision of this Court in regard to suits for partition of inams mentioned in Regulation IV of 1831 (Madras) and may be accepted as sound.

But this was not a suit brought to obtain a declaration that the fifth Raja was entitled to a share of the malikana which the Government paid the first defendant professedly on his own account. On the other hand it was admitted that the malikana was paid by the Government to the first defendant to be distributed among the fifth Raja and others, the only matter in controversy being whether the appellant was the fifth Raja. This differs therefore from the Bombay case in that the money received by the first defendant was paid by the Government and received by him avowedly for distribution among the fifth Raja and others of his family, and it is not necessary to determine for the purposes of this suit that the fifth Raja is entitled to a share in the malikana.

Though the Pensions Act does not bar this suit, yet the [78] decision appealed against must be supported under Section 42 of the Specific Relief Act. It provides that no declaration shall be made when the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The arrears of malikana payable to the fifth Raja and already paid to the first defendant, being monies had and received by the one for the use of the others, their recovery was the further relief which the appellant was at liberty to claim and which he omitted to claim or abandon. The object of the proviso to Section 42 is to avoid multiplicity of suits and to prevent a person getting a declaration of right in one suit and immediately after, the remedy already available in another. On this ground the appeal must fail and be dismissed with costs.

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(1) 1 B. 75.

13 M. 78.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

MUNICIPAL COUNCIL OF TUTICORIN (*Defendants*), *Petitioners v.* SOUTH INDIAN RAILWAY COMPANY (*Plaintiffs*), *Respondents*.* [7th August and 3rd September, 1889.]

Municipal tax—District Municipalities Act—Act IV of 1884 (*Madras*), *Sections* 49, 50, 53, 101—*Wrongful assessment of profession tax – Jurisdiction of Small Cause Court —Provincial Small Cause Courts Act—Act IX of* 1887, *Schedule II, paragraph* 1—*Order of a Local Government.*

The Municipality at Tuticorin demanded Rs. 50 as profession tax from the South Indian Railway Company which had already paid profession tax to the Municipality at Negapatam. The company complied with the demand under protest and sued the Municipality for a refund of the amount paid on the Small Cause Side of the District Munsif's Court:

Held, (1) the Court had jurisdiction to hear and determine the suit;

(2) the Municipality at Tuticorin had no right to levy the tax on the Railway Company and the decree directing the amount levied to be refunded was correct.

[R., 24 M. 205 (218); 4 Ind.Cas. 951 (953) = 2 P.R. 1910, Cr. = 109 P.L.R. 1909 = 23 P.W.R. 1909; 16 Ind.Cas. 449 (452) = 8 N.L.R. 107; D., 19 M. 10 (13).]

[79] PETITION under Act IX of 1887, Section 25, praying the High Court to revise the decree of S. Krishnasami Ayyar, District Munsif of Tuticorin, in Small Cause Suit No. 1041 of 1887.

Subramanya Ayyar, for petitioners.

Burton, for respondents.

The facts of this case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the following

JUDGMENT.

The petitioners in this case are the Municipal Council at Tuticorin and the counter-petitioners are the South Indian Railway Company. The question for decision is whether the Railway Company who exercise their profession or carry on their business as such Company as well within the limits of the Municipality at Tuticorin as within the limits of the Municipality at Negapatam are liable under Act IV of 1884 (Madras), to pay the profession tax to both Municipalities. The facts upon which the question arises are shortly these. In 1884, when Act IV of 1884 was passed, Negapatam was the head-quarters in India of the South Indian Railway Company. The Company's profession tax was paid for that and the subsequent year to the Negapatam Municipality. In April 1885, the Company's head-quarters were transferred from Negapatam to Trichinopoly, but the Negapatam Municipality continued to demand and the Railway Company continued to pay them the profession tax due for 1886-87 and for the first half of 1887-88. On 6th August 1887, the Municipality at Tuticorin gave notice to the Railway Company that Rs. 50 was payable to that body as the Company's profession tax for the first half of the year 1887-88. This demand was made after the Company had paid Rs. 50 as their profession tax to the Municipality of Negapatam for the same half-year. On the 31st August 1887, the Railway Company paid Rs. 50 to the Municipality at Tuticorin under

* Civil Revision Petition No. 173 of 1888.

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protest and preferred an appeal against the assessment on the ground that the profession tax had been previously paid to the Negapatam Municipality. Their appeal was rejected and they then sued for a refund on the Small Cause Side of the District Munsif's Court at Tuticorin. The Tuticorin Municipality resisted the claim on three grounds, *viz.*, (1) that the suit was barred by Act IV of 1884 (Madras), (2) that the District Munsif had no jurisdiction to entertain it on the Small Cause Side, and (3) that the tax, of which a refund was [80] claimed, had been lawfully levied. The District Munsif disallowed their objections and decreed the claim with costs and the contention before me is that the decision is contrary to law as regards each of those objections.

As to the first objection, *viz.*, that the suit cannot be maintained in a Civil Court, I am unable to support it. It is taken with reference to Section 101 which provides that the adjudication of an appeal by the Municipal Council shall be final. Section 97 allows an appeal from the decision of the Chairman to the Municipal Council in regard to (i) any classification or revision under Section 54, (ii) any valuation or assessment under Section 65 and any revision thereof under Section 71, and (iii) any tax on any vehicle or animal demanded on behalf of the Municipal Council. Act IV of 1884 came into force on the 2nd July 1884, and according to the previous decisions of this Court in *Kamayya* v. *Leman* (1) and in *Leman* v. *Damodaraya* (2) a distinction was made between a suit contesting the incidence of a tax *lawfully* imposed and a suit to recover back money wrongfully levied on the ground that the so called tax had no *legal* existence. Section 85 of Act III of 1871 to which those decisions referred provided that "no person shall contest any assessment in any other manner than by an appeal as hereinbefore provided." Section 85 of the Act III of 1871 and Section 101 of the present Act appear to me to be substantially the same, and the jurisdiction which the Civil Courts had under Section 85 of the former Act was not taken away by Section 101 of the Act now in force. Again, Section 87 of Act III of 1871 provided a rule of decision impliedly for the guidance of Civil Courts and enacted that no tax shall be impeached by reason of any mistake in the name of any person liable to pay the tax, or in the description of any property liable to the tax, or in the amount of assessment, provided that the directions of the Act be in substance and effect complied with. Section 262 of the present Act re-enacts in substance Section 87 and provides further by clause 2 that "No action "shall be maintained in any Court to recover money paid in respect of "any tax, &c.," levied under this Act, "provided that the provisions of this "Act relating to the assessment and levy of such tax and to the collection "of payments have been in substance and effect complied with." There can therefore be no doubt [81] that a suit will lie when the provisions of the Act have not been complied with in substance and effect in regard to the assessment and levy of such tax and the tax cannot be considered to have legal sanction.

The second objection argued before me is that a Court of Small Causes has no jurisdiction to entertain this suit. It is conceded that under Section 15 of Act IX of 1887 it would have jurisdiction if the suit were not specially exempted by the second schedule attached to that Act, but it is argued that it is so exempted and reliance is placed on paragraph 1 of the schedule which is in these terms:—"A suit concerning an act or order "purporting to be done or made by the Governor-General in Council or a

(1) 2 M. 37. (2) 1 M. 158.

"Local Government, or by the Governor-General or a Governor or by a "Member of the Council of the Governor-General or of the Governor of "Madras or Bombay, in his official capacity, or concerning an act pur- "porting to be done by any person by order of the Governor-General in "Council or a Local Government."

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It is urged that the sanction and approval of the Governor in Council are necessary under Sections 49 and 50 of Act IV of 1884 and that the levy of the tax with such sanction is an act done by the order of the Local Government within the meaning of the above cited paragraph. The Act contemplated by paragraph 1 is an act done or ordered to be done by the Local Government in its executive or administrative capacity and the sanction or approval contemplated by Sections 49 or 50 of Act IV of 1884 is not in my judgment within the purview of paragraph 1 of the second Schedule.

The third objection is that the tax of which the refund was claimed was lawfully levied under Section 53. After directing the Municipal Council to notify that a profession tax shall be levied, it provides that every person, who, within the Municipality, exercises any one or more of the arts, professions, or trades or callings specified in Schedule A, shall, subject to the provisions of Section 59, pay in respect thereof the sum specified in the said Schedule, as payable by the persons of the class in which such person is placed. Section 60 provides that no person shall be liable to the payment of the tax under Section 53, who shall prove that he has paid the tax for the same half-year in any other Municipality. It is not disputed in this [82] case that the South Indian Railway Company had paid their professsion tax to the Municipality at Negapatam when the Municipality at Tuticorin called upon them to pay their profession tax. The intention which the two sections suggest when they are read together, is that the person liable to pay a profession tax has to pay it but once, and that when he lawfully pays it in any one Municipality he is not liable to pay another profession tax for the same period in any other Municipality. Any other construction would lead to this result,—that the South Indian Railway Company would have to pay as many profession taxes as there are Municipal towns through which their Railway passes, though they exercise but one profession. The tax seems to be regarded as being in the nature of a license or registration fee, and when it is paid and the exercise of the profession is once licensed, no second license or registration fee is intended by the Legislature to be required for the same half-year. In this connection I may refer to the proviso of Section 58 of the old Act. It was in these terms: " No person, who shall prove that he has paid the tax prescribed in this section in any one Municipality, shall be required to pay the same for the same half-year in any other Municipality, *unless it shall appear that he has exercised in both Municipalities, within the same half year the art, profession, trade or calling in respect of which he has been taxed.*" The omission in the present Act of the last clause is significant, and appears to confirm the view which I take.

The decision of the District Munsif is right, and I dismiss this petition with costs.

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[83] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

VISVANATHAN (*Defendant*), *Petitioner v.* SAMINATHAN (*Plaintiff*), *Respondent.** [26th July and 12th August, 1889.]

Contract Act—Act IX of 1872, *Section* 23—*Unlawful consideration—Marriage brokage agreement—Hindu law.*

Plaintiff agreed to give his daughter in marriage to defendant's nephew in consideration of a payment of Rs. 400. It was not alleged that the money was to be a dowry or settlement for the bride. Rs. 200 were paid and defendant executed a bond for the balance. The marriage took place in the *asura* form. The plaintiff now sued on the bond:

Held, the consideration for the bond was not unlawful.

[**Overruled**, 18 M.L.J. 403=4 M.L.T. 1 (**F.B.**); **F.**, 10 A.L.J. 159=16 Ind. Cas. 1004; **R.**, 23 A. 495 (496); 1 C.L.J. 261; 15 C.W.N. 447=9 Ind. Cas. 652; **D.**, 17 M. 9 (10)=3 M.L.J. 132.]

PETITION under Section 25 of the Provincial Small Cause Courts Act, 1887, praying the High Court to revise the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in Small Cause Suit No. 725 of 1888.

Suit on a bond. The bond was admitted, but the defendant pleaded that the consideration was unlawful, and also that the consideration had failed. The Subordinate Judge held that neither of these pleas was established, and passed a decree for the plaintiff.

The defendant preferred this petition.

Desikacharyar, for petitioner.

Sivasami Ayyar, for respondent.

The facts of the case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the following.

JUDGMENTS.

WILKINSON, J.—This is a petition under Section 25, Act IX of 1887, to set aside the decree of the Subordinate Judge of Kumbakonam in Small Cause Suit No. 725 of 1888 as contrary to law.

The parties to the suit are Brahmans. The plaintiff's daughter was given in marriage to the defendant's brother's son. As a consideration for the marriage, the defendant paid the [84] plaintiff Rs. 200 and executed a bond for Rs. 200. The plaintiff now sues to recover the money due under the bond. The defendant pleaded that the bond was executed for cash to be a actually advanced and denied consideration. He further pleaded that the consideration, if such as was alleged by the plaintiff, was illegal. The Subordinate Judge found that the bond was executed under the circumstances alleged by the plaintiff, and that the consideration was not illegal.

Before us, it is argued that the coniract was not enforceable, being (1) against public policy and (2) contrary to Hindu law.

No doubt it has been long held in England that all contracts or agreements for promoting marriages for reward (usually termed marriage brokage contracts) are utterly void. The principle on which the decisions have proceeded is that every contract relating to marriage ought to be free

* Civil Revision Petition No. 325 of 1888.

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and open, whereas marriage brokage contracts necessarily tend to a deceit on one party to the marriage, or on the parents and friends, and to the promotion of marriage by hirelings, instead of by the mediation of friends and relatives. Now I very much doubt whether these principles can be made applicable to this case. In this country marriages take place while the contracting parties are infants incapable of making any choice of their own, and the consideration may often be received by the father for the use and benefit of the child. That, as remarked by the Subordinate Judge, marriages in the *asura* form are widely prevalent in Southern India was observed by Strange so long ago as 1830 and is not denied at the bar. The paucity of decisions is in favour of the contention that the moral consciousness of the people is not opposed to the practice. In consideration of the father of a girl giving his consent to the betrothal of his daughter, a sum of money is paid by the relatives of the would-be bridegroom to the father. Is this immoral or opposed to public policy? Under all circumstances I see no reason for so holding. Where the wife is immature, as is the case in nearly every marriage in this country, it is the custom that she should reside with her parents, and they maintain her as a matter of affection, but not of obligation. If the father is poor and the relatives of the husband well to do, what immorality can there be in the latter giving to the former a sum of money for the maintenance of the girl-bride? It is true that in the passage quoted by **[85]** the Subordinate Judge* Manu prohibits a father from receiving a gratuity for giving his daughter in marriage, but the prohibition appears to be based on the necessity which then existed of commanding fathers not to sell their offspring. In the present case there is no question of sale, and there is nothing to show that the plaintiff "through avarice" accepted the money in order to spend it on himself only. In the present state of society, I am not prepared to hold that the receipt by a Hindu father of money in consideration of his giving his daughter in marriage is in every case without distinction immoral or contrary to public policy. Each case must be decided on its own merits. I may remark that the facts in *Dulari* v. *Vallabdas Pragji* (1) are not on all fours with this case, and that the dictum of Garth, C.J., in *Ram Chand Sen* v. *Audaito Sen* (2) was unnecessary for the decision of the case and opposed to the opinion of Beverley, J., who sat with him.

As to Hindu law, we have been referred to no authority by which the *asura* form of marriage is condemned. In his Commentary on Hindu law, Siromani † points out that the *asura* form is the same as the *arsha* (which he classes as one of the approved forms), the only difference being that the form is called *asura*, if any other property than cattle is taken by the father of the bride. In the absence of any authority that the *asura* form of marriage is contrary to custom and so is not binding, I would hold that the marriage of the plaintiff's daughter was not contrary to Hindu law. The relationship of husband and wife is created, not by the form of marriage, but by the recitation of mantras prescribed by the holy scriptures. There is, says Siromani, no difference of opinion among Hindu jurists as to the necessity of mantras and ceremonies in order to create the relation of husband and wife.

This petition, therefore, fails and is dismissed with costs.

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* *See* Mayne's Hindu Law, 4th ed., § 78. † See page 80.

(1) 13 B. 126. (2) 10 C. 1054.

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PARKER, J.—The facts found are that the plaintiff agreed to give his daughter in marriage to the defendant's nephew in consideration of a payment of Rs. 400. Rs. 200 was paid in cash and a bond for the balance given by the defendant. The marriage took place. The plaintiff now sued on the bond for the balance due to him. It is not alleged that the money was pro-[86] mised as a dowry or settlement for the bride. The marriage was in the *asura* form.

The defendant pleaded that the consideration was illegal, but the Subordinate Judge decreed the claim. He held that, though the practice was prohibited by Manu, and though it was sinful for rich parents to receive a price for a daughter, it was otherwise with poor parents who had not means otherwise to meet the necessary expenses which they had to incur.

The *asura* form of marriage was in its origin simply a marriage by purchase. The *arsha* form, which is one of the approved forms, is a survival from the *asura*, and in it the price paid for the girl dwindled down to a gift of nominal value or to a present received by the parents for the benefit of the bride. The present marriage is not alleged to be in the *arsha* form. The *asura* form is absolutely forbidden by Manu and Narada, though, as a matter of fact, it is admittedly prevalent in Southern India.

I do not doubt as to the existence of the custom, and it is significant that there should be so few cases in which the legality of the consideration has been called in question in the Courts.

In *Juggessur Chuckerbutty* v. *Panchcowree Chuckerbutty* (1) a small cause suit was brought by the plaintiff to recover a sum of money paid to the defendant in consideration of a promise made by the latter to give the former his sister in marriage, which contract had been broken and the girl married to another. The Subordinate Judge, in referring the case, held that, according to English law, the contract would be invalid and contrary to public policy, and was further of opinion that in India the practice of demanding from the suitor a "pun," the amount of which goes entirely to the parent's benefit, none of it being in the nature of a settlement upon the wife, must undoubtedly tend to induce the exercise of parental influence from corrupt motives and encourage the buying and selling of women. The High Court of Calcutta did not discuss the question, but merely observed that, under the circumstances stated, an action to recover back the money paid to the defendant will lie.

In *Ranee Lallun Monee Dossee* v. *Nobin Mohun Singh* (2) a Hindu contracting a second marriage agreed to confer on the party whose sister was to be his second wife, a taluk which was to [87] be carved out of his estate, and, until it was carved out, to make a yearly payment of a fixed sum. The High Court observed that the document on which the plaintiff's case was based having been executed more than fifty years ago, it was a great deal too late to inquire whether there was consideration for the deed, and even if there was any, whether the agreement was not contrary to public policy. The Judges intimated an opinion that the special agreement made was not without consideration or contrary to public policy, but, observing that the moneys stipulated for under the agreement having been paid for the last fifty years, the defendants were not at liberty at that late period to attack the origin of the contract and ask the Court to allow them to repudiate it.

(1) 14 W.R. 154. (2) 25 W.R. 32.

The case of *Ram Chand Sen* v. *Audaito Sen* (1) is similar to *Juggessur Chuckerbutty* v. *Panchcowree Chuckerbutty* (2) and the Judges followed that decision. It was, however, intimated by Garth, C.J., that had the action been by the father to recover money promised as "pun" by the bridegroom he would have been disposed to hold that such a contract (even in this country) would be incapable of being enforced by the rules of equity and good conscience. Beverley, J., however held that there was nothing immoral in such contracts since they were recognized by the customs of the country and not prohibited by law.

These decisions were considered by Jardine, J., in *Dulari* v. *Vallabdas Pragji* (3) in which the plaintiff prayed for leave to sue as a pauper to recover Rs. 2,500, which the defendant had agreed to pay her for giving him a girl in marriage, whom however he had subsequently seduced without marriage. The learned Judge held that the plaintiff was not a pauper and under Section 407, Clause (*c*), that her allegation did not show a right to sue, since such contracts were immoral and against public policy even in the present state of matrimonial relations in India, and should not be enforced in the Courts of Law. A similar decision by Scott, J., in 1884 was referred to and followed.

None of these decisions are exactly on all fours with the present. *Juggessur Chuckerbutty* v. *Panchcowree Chuckerbutty* (2) and *Ram Chand Sen* v. *Audaito Sen* (1) were actions brought by the bridegroom to recover money paid, the consideration for which **[88]** had failed, and the remarks of Garth, C.J., which would bear upon the present case were extra-judicial; the decision in *Ranee Lallun Monee Dosee* v. *Nobin Mohun Singh* (4) proceeded upon the ground that lapse of time had made the origin of the contract immaterial; in the case before Jardine, J., though the plaintiff did stand in *loco parentis*, the decision proceeded upon the double ground that plaintiff was not a pauper, while the case before Scott, J., was really a suit by a matrimonial agent.

The *asura* form of marriage, though disapproved by Hindu writers, is still recognized as a valid form, and the practice of parents taking money from the bridegroom or his family in consideration of the marriage is not prohibited by law. The question is, ought the Courts to treat it as immoral or opposed to public policy (Section 23, Indian Contract Act). Having regard to the customs of the country, it appears to me impossible to lay down a hard and fast general rule. No doubt there may be cases in which such contracts might be held immoral and opposed to public policy, *e.g.*, for the payment of money as a consideration for the marriage of very young children to old and debauched men. But in many cases the payment may really tend to facilitate the marriage in a legitimate way. Each case must, I think, be judged on its own merits and according to its special circumstances, and it is for the defendant to allege and prove those special circumstances which will invalidate the contract. There is no such allegation or proof in the present case.

On these grounds, I concur in dismissing the petition with costs.

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(1) 10 C. 1054. (2) 14 W. R. 154. (3) 13 B. 126. (4) 25 W. R. 32.

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[89] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

SECRETARY OF STATE (*Defendant No.* 1), *Appellant v.* ASHTAMURTHI (*Plaintiff*), *Respondent.**
[26th November 1888 and 19th September, 1889.]

Revenue Recovery Act—Act II of 1864 (*Madras*), *Sections* 1, 39, 42—*Rights of jenmi in Malabar—Grant by Government of waste land on a cowle—Sale of land for arrears of revenue.*

The Collector of Malabar in 1869 let defendant No. 2 into possession of certain waste land under a cowle, and in 1872 granted to him a patta for it. The cowledar brought the land into cultivation, but subsequently left it uncultivated and failed to pay the assessed revenue; the land was accordingly attached in 1885 for arrears of revenue under the Revenue Recovery Act, 1864, and sold to defendant No. 3. The plaintiff, who was the jenmi of the land, had no notice of the grant of either the cowle or the patta: he asserted his right to jenmibhogam in a petition presented to the Collector at the time of the sale, but the sale proceeded without reference to his claim. The present suit was brought to set aside the sale:

Held the interest of the jenmi did not pass by the sale.

[R., 21 M. 169 (170) = 8 M.L.J 117; 28 M. 526 (537) = 15 M.L.J. 419; 34 M. 231 (243) = 7 Ind. Cas. 321 = 20 M.L J. 640 = 8 M.L.T. 173; 34 M. 520 (521) = 9 Ind. Cas. 643 = 21 M.L.J. 662 = 9 M.L.T. 367 = (1911) M.W.N. 257.]

SECOND Appeal against the decree of F. Wilkinson, District Judge of South Malabar, in appeal suit No. 803 of 1886, reversing the decree of V. Raman Menon, District Munsif of Ernad, in original suit No. 498 of 1885.

Suit to set aside the sale for arrears of revenue of certain land. The plaintiff as uralen of a certain devaswam was the jenmi; defendant No. 2 was the defaulter who had held under a cowle and a patta granted to him by the Collector without the knowledge of the jenmi; defendant No. 3 was the purchaser at the revenue sale: defendants Nos. 2 and 3 were *ex parte* throughout this suit.

The cowle (Exhibit XIII, dated 28th June 1870) stated that permission was thereby granted to defendant No. 2 to improve the undermentioned immemorial waste land and to cultivate paddy thereon; and after providing that the revenue therein assessed should be remitted for two years on certain conditions, proceeded as follows:—"You are further "informed that, as this cowle refers to cultivation of the plot and Government revenue [90] only and as the right, if any, possessed by any body "and the dues thereunder are not comprised therein, they will be governed "by usage of the country."

Defendant No. 2 brought the land into cultivation and in due course received a patta for it from the Collector, which like the cowle was granted subject to the right of the jenmi, if any. But a short time previous to the year 1885 he ceased to cultivate it and failed to pay the revenue to which it was assessed. In January 1885 the land was attached under the Revenue Recovery Act, 1864, for the arrears accrued due, being described in the notice of attachment addressed to defendant No. 2, as "the "under-mentioned landed property belonging to you." On 1st June 1885 the plaintiff presented a petition to the Collector (Exhibit A), asserting his

* Second Appeal No. 78 of 1888.

jenm title to the land, and praying "that as the said lands lie waste "without cultivation even now, either the assessment of revenue as per "the cowle may be cancelled and removed from the account and the at- "tachment set aside, or it may be ordered that the petitioner is entitled to "realize the jenmibhogam in the lands and the sale held after alteration "of the auction notification." The order on that petition was that the attachment would be set aside on payment of the arrears of revenue. This payment was not made and the land, as such, was sold, defendant No. 3 being, as stated, the purchaser.

Upon the above facts, the District Munsif dismissed the suit. On appeal the District Judge reversed the decree of the District Munsif and set aside the sale as prayed. He said:—It is laid down in "The standing information regarding the official administration of the Madras Presidency," complied under the orders of Government, that "A cowle is an agreement to "hand over land without payment for a certain period, the assessment being "payable after that time. It is usually granted to induce cultivators to "break up unpromising waste land. Each party is subject to the terms "of the contract contained in the cowle. If the Government have good "grounds under the contract for dispossessing the cowledar, they can do "so." By grant of cowle the Government do not undertake to confer any title to the land beyond that of occupancy. The cowle confers no title against the jenmi who is at liberty to eject the cowledar on payment of the value of improvements effected by him. If, therefore, the cowledar fail to pay the revenue due according to the terms of the cowle, **[91]** the mode of recovering the arrears due will, I am of opinion, be in accordance with the terms of the cowle and not under the provisions of Act II of 1864. The proprietary right of the landlords of Malabar to their estates has been recognized by Government ever since 1800. To quote the words of the judgment of the High Court in *Zamorin of Calicut* v. *Sitarama* (1) "According to Section 2 of Act II of 1864 it is the pro- "prietary right that is liable to be sold. According to Section 1, it is the "person in whom such right rests, that is the landholder. According to "Section 3 it is the proprietor that is liable for the payment of the revenue. "According to Section 39 it is his right and property that passes by the "revenue sale." But this has reference only to land which is within the knowledge of the jenmi assessed land. Where a jenmi allows a patta for assessed land to stand in the name of a third person and through such person's neglect to pay the revenue punctually, the land is sold, the jenmi cannot maintain a suit to set aside the sale, because he has permitted such person to appear as ostensible owner. But the case is very different where Government, without issuing any notice to the jenmi, permits a third person to occupy the waste lands of a jenmi.

The more important of the Exhibits filed in the case were the following:—

Exhibit XIV.

Extract (p. 127) from a printed volume entitled Reports of a Joint Commission from Bengal and Bombay, appointed to inspect into the state and condition of the Province of Malabar, in the years 1792 and 1793. (Reprinted by H. Smith, at the Fort St. George Gazette Press 1862.)

* * * *

Section 196. * * * * It must be noticed that, as the Namboory Brahmins and Nayars (the primary landholders of Malabar) had been

(1) 7 M. 405.

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usually in the habit of leasing out the greatest part of their estates (called jenms, jemies or jelms), to cultivating farmers, called kanumkars or kanoomar (the termination "mar" being the Malabar plural), who were thus in the ostensible and immediate occupancy of the greatest part of the soil at the period of Hyder's conquest; and as the terror of his and his son Tippoo's subsequent administration prevented the major part of these Brahmin landholders, as well as many of the Nayars, from ever trusting their persons at the Mahomedan cutcherries of their new sovereigns; when, therefore, the system of establishing a general money rental payable to these latter was to be carried into execution the local delegates of the Mysore Government had in general [92] no other choice than to settle the assessment on each portion of territory with these kanoomar or kanumkar.

Why the revenue settlements of Malabar have been made for the most part between Government and these cultivators instead of the landholders.

Exhibit XV.

Extract from Proceedings of the Board of Revenue, dated 12th February 1827.

Paragraph 1. Read again letter from the Principal Collector of Malabar, reporting on the settlement of the Land Revenue of his district for fasli 1235.

From the Principal Collector, dated 15th September 1826.

* * * *

Paragraph 13. The measures adopted by Mr. Sheffield for reclaiming waste appear judicious, and the number of proposals which he reports in the postscript of his letter to have already received for cultivating waste seem to justify the expectation he entertains of a successful result. But before passing any definite orders on this subject the Board wish the Principal Collector to explain, with reference to the different periods for which waste has been given exempt from assessment, the precise terms on which the cowles are regulated; a copy of the cowlenamah should also be forwarded

* * * *

Exhibit XVI.

Extract from Collector's Jamabandi Report to the Board of Revenue for fasli 1236, dated 20th September 1827.

* * * *

Waste Lands. Para 18. With reference to para. 13 of your Board's Proceedings on the Settlement of this district for 1235, I do myself the honor of herewith transmitting a translation of a cowlenamah granted by me exempting waste land from assessment, and in order that your Board may be enabled to judge of the expediency of my arrangements I likewise forward a detailed statement of waste lands which I have succeeded during fasli 1236 in persuading the ryots to cultivate by exempting them from assessment for certain periods of from 1 to 12 years, with reference to the expenses incurrable for constructing sluices, raising embankments, and other works required for repelling encroachments of the sea and salt water rivers, the whole cost

No. 8.

No. 9.

of which is to be defrayed by the occupant; the period for which waste land is given exempt from assessment is also regulated with reference to the number of years required for bringing each spot of land into such an improved state of cultivation as to enable the occupant to make good the full assessment from his returns; in some cases half the assessment is exempted for one or more years according to circumstances. A full explanation of the grounds on which each spot of land has been temporarily exempted from the payment of rent to Government is given in statement No. 9. I venture to hope that the measures therein detailed will be approved of.

* * * *

Gentlemen, &c.,
(Signed) W. SHEFFIELD,
Principal Collector.

EXHIBIT XVII.

[93] Enclosure No. 8 to Collector's Jamabandi Report to the Board of Revenue for fasli 1236, dated 20th September 1827.

Translation of a cowlenamah such as is usually granted to those who undertake to bring waste land into cultivation.

From

WILLIAM SHEFFIELD, ESQ.,
Principal Collector of Malabar,

To

MANANTALA ANANTHA KOORPOO,
Inhabitant of Payatoor Deshum, Erramala Umshom, Eddasherry Hobly in the Kartenad Talook.

Whereas you have proposed to cultivate the rice land known by the name of Kay kandom, situated at Hayara kadon, which hitherto has never been brought on the assessment, measuring from north to south 55 kolls, and from east to west 120 kolls, capable of receiving 300 dangalies of seed and which has been lying waste for upwards of 40 years, and is overgrown with jungle trees, and moreover inundated with salt water, by felling and removing the trees and underwood and constructing dams to repel the encroachment in future of salt water; and whereas the Sirkar officers who were deputed by me to inspect the said land have confirmed the account you gave of its devastated state, you are hereby permitted to undertake the cultivation of the aforementioned land and in consideration of the outlay which will be required to enable you to clear the ground of the jungle trees and underwood, also to construct the necessary works to prevent the encroachment of salt water, and to prepare and render the soil productive, the above land is hereby given to you exempt from the payment of any rent to Government for a period of seven years, namely, from fasli 1237 to 1244, both inclusive. From the year 1244 you will pay to Government such revenue as may be fixed according to an actual inspection of the land, which inspection will be made prior to the expiration of the above period of exemption. You will be held accountable for the Jenmakars or proprietor's share of the produce of the said land. You are however hereby given to understand that in the event of your abandoning the land in question at any period prior to the expiration of the above term of exemption, you will hereby render yourself liable for the due

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payment of the full assessment according to the present established rate for the whole period during which it shall have been possessed and cultivated by you.

(True Translation).

(Signed) W. SHEFFIELD,
Principal Collector.

EXHIBIT XVIII.

Extract from Proceedings of the Board of Revenue, dated 19th May 1828.

Read again the Report of the Principal Collector of Malabar on the settlement of the Land Revenue of that Province in fasli 1236.

* * * *

[94] Paragraph 15. In their proceedings on the settlement of fasli 1235 the Board requested the Principal Collector to submit a copy of his cowlenamah for the cultivation of waste and with reference to the different periods for which waste had been given exempt from assessment to explain precisely the terms on which the cowles are regulated. The Principal Collector has now submitted a translation of a cowle such as is usually granted to persons undertaking to bring waste into cultivation, and a detailed statement of waste lands for which cowles were granted in fasli 1236 explaining particularly the grounds on which exemption from assessment was allowed in each case. The Principal Collector observes, that the periods for which exemption is allowed are from 1 to 12 years, with reference to the expenses which must be incurred for constructing sluices, raising embankments, and other works required for repelling encroachments of the sea and salt water rivers, the whole cost of which is to be defrayed by the occupant. He explains that "the period for which waste land is given exempt from assessment is also regulated with reference to the number of years required for bringing each spot of land into such an improved state of cultivation as to enable the occupant to make good the full assessment from his returns." The Board approve generally of the grounds upon which the cowles issued last year were allowed and of the principles upon which they were regulated. It seems only requisite to add to the statement of lands given on cowle, columns showing the produce expected from the land and its value, and where the land is not already assessed the amount of tax it will eventually be liable to.

Para. 18.

16. The Board conclude that the form of Cowle which the Principal Collector has forwarded is intended for unclaimed lands considered as belonging to the Sircar; and that the expression "you will be held accountable for the Jenmakar's or Proprietor's share of the Produce" is only meant to intimate to the occupant, that when his assessment comes to be fixed he will be regarded as a mere tenant, not as a proprietor and will have to pay the whole of the landlord's rent to the Sircar. If it means, however, that a claimant to the land may one day appear, or that the occupant will in that case, have to account to him for a certain portion of the produce termed the "Jenmakar's share" some explanation of this provision is necessary. The Principal Collector should state whether, according to the ancient custom of the country, a proprietor who may have deserted his land or the heirs of such proprietor is entitled at any future period, however distant, to resume his rights, or whether there is in Malabar as in most other Provinces a certain period, after which the land if unclaimed is considered to

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have lapsed to the State. He should also explain on what conditions a proprietor, who may claim his land within the limited period, is allowed to resume possession, and what indemnity is secured to the person who may have occupied and improved the lands on cowle. It is probable that the rights of proprietors in Malabar were analogous to those in Canara, and they might be still further illustrated by a reference to the state of rights in Cochin and Travancore. According to Sir Thomas Munro,* a proprietor in Malabar or Canara who may have failed to cultivate his land is not entitled to demand a proprietor's share from the person who may have been allowed by the Government to occupy it.

* See minute, 31st December 1824. paras. 6 and 7, vol. III, Revenue and Judicial Selections

17. With respect to the right of a proprietor to re-claim possession of his land, it is also stated by Sir Thomas Munro that the rules, Malabar and Canara, respecting [95] private landed property differ very little from those of the Deccan regarding meeras according to which "the Meerasadar gets back his land when his absence has not been long, and when it has been given in temporary lease to another person, but not after a long absence and its having been granted in meeras to another and that though he is supposed to have a right even for a century, usage does not allow so long a period. He adds that "the Sircar from ancient times has everywhere, even in Arcot as well as in other provinces, granted waste in Enam free of every rent or claim, public or private, and appears in all such grants to have considered waste as being exclusively its own property." It is desirable to come to a clear understanding on these points; and the cowles which may be issued in Malabar in the meantime may be so worked as not to commit the Government on any doubtful question. To mention a jenmakar's share when it is uncertain whether or not there be a jenmakar claiming the land for which the cowle is granted, and if there be, whether or not he be entitled to a share, is very likely to give raise to claims which would otherwise not have been thought of and by lessening the security of the occupant is adverse to improvement.

Para. 7.

Para. 8.

* * * *

(Signed)————————,

Secretary.

EXHIBIT XIX.

Extract from Collector's Jamabandi Report to the Board of Revenue for Fasli 1237, dated 14th April 1829.

* * * *

Paragraph 36. With reference to the orders conveyed in paragraph 16 of your Board's Proceedings directing me to inform you "whether according to the ancient custom of the country a proprietor, who may have deserted his land or the heir of such proprietor, is entitled at any future period, however distant to resume his rights, or whether there is in Malabar as in most other provinces a certain period after which the land is unclaimed, is considered to have lapsed to the State, and to explain likewise on what conditions a proprietor who may claim his land within the limited period is allowed to resume possession and what indemnity is secured to the person who may have occupied and improved the lands on cowle," I do myself the honour to state that Major Walker in his account of landed tenures and of the state of property in Malabar observes that "should a jenmakar disappear or should there be a paramba without any known owner and a Kudian, believing that it was without a master, settle on it,

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and make considerable improvements; on the return of the jenmaker or any one producing sufficient proofs that he was the owner of the paramba, the Kudian must in that case, without dispute, accede to the demand provided the jenmaker pays Koowye canom or the value of the improvements" and that "the jenmaker possesses the entire right of the soil and no earthly authority can with justice deprive him of it" and it is universally admitted throughout the province to be the peculiar right of the jenmakar or proprietor, established by usage from time immemorial, to resume his land at any period whatever, however [96] long it may have been deserted by himself or his ancestor and so far from its having a tendency to check the spirit of industry which now pervades the population, scarcely a single individual who obtains a cowle for waste land omits at the same time obtaining from the jenmakar, if any be forthcoming, akoowye canom lease for the same, which is in fact advantageous to both; for by obtaining such a document the ryot secures to himself the unmolested possession of the land for a long period and the granting of it ensures to the jenmakar his share of the produce after the land shall have become productive; and also the option, with less probability of any one presuming to question his title to the land, of redeeming it at the expiration of the lease by reimbursing the occupant for his improvements, which however is very rarely done; for the lease, which generally runs from 10 to 12 years, is usually extended for a further period on varom pattom tenure, and very often where the improvements introduced are considerable, the occupant obtains a kanom or mortgage bond from the jenmakar for the amount value of those improvements, which is in all cases adjusted by the deshom people.

Paragraph 37. The occupant, when the jenmakar chooses to resume possession of a garden land which may have been enclosed and planted by the former, must be fully indemnified by the latter's paying him the value of fences, wells and in fact for all improvements which he may have made at the established rates the sum so paid, after the occupant shall have possessed it for some years, is apparently inadequate, though it is not so in reality, for during that period the occupant or koowye canomkar will have enjoyed the land rent free and the produce is not only that of the trees which alone are assessed though not until after they arrive at maturity, but consists also of rice or grain, raised in the intervals of the trees and also plantains and vegetables of various descriptions.

Paragraph 38. Moreover in elucidation of this subject and in order to show that the jenm of freehold right was at once acknowledged and respected during the period that Malabar continued under the dominion of Hyder and Tippoo, I beg to add that there are a few Mahomedan priests enjoying enams in this district, to whom the Sircar revenue on particular tracts of land has been remitted under grants from both those sovereigns, and which have been continued to them by our Government, but those grants convey nothing beyond an entire exemption of the revenue, the lands themselves remaining the rightful property of the jenmakers who cannot be deprived of the shistom or proprietor's share of the pattom (net rent). The revenue on certain pagoda lands has been remitted in a similar manner.

* * * *

Gentlemen, &c.,

(Signed) W. SHEFFIELD,

Principal Collector.

EXHIBIT XX.

Extract from Collector's Jamabundi Report for Fasli 1250, dated 10th November 1841, to the Board of Revenue.

* * * *

23. The nature and condition of cowles seem to be generally understood and appreciated by the inhabitants of this district, and to this may be ascribed the [97] increased applications for them, and the very few instances of unassessed lands being cultivated without cowles. The statement in the margin shows that during the last eight years no less than 2,250¾ cawnies of immemorial waste have been reclaimed; and since the commencement of the present Fasli numerous further applications have been received, which are in course of inquiry.

Omitted in the margin.

24. Referring to para. 38 of the Board's Proceedings, I would beg to observe that, however questionable it may at first sight appear for the Government to issue cowles for the cultivation of lands which are not their property, the practice of issuing such documents seems to be attended with advantage to both Government and proprietor. It affords the Government servants a knowledge of what new lands are under cultivation, and when and what they are to demand for them, whilst the exemption of revenue allowed in consideration of the expense and labour attending the rendering of the lands productive, has the tendency of encouraging agricultural pursuits. But in point of fact, the cowle is no more than a writing expressive of the condition under which the land is to be cultivated, its principal object being to guarantee to the cultivator the temporary immunity allowed him, and to assure him of the amount he will have to pay to Government for revenue at the expiration of the cowle. Where the cowle is not in the name of the proprietor himself, a clause is invariably introduced holding the cultivator or occupant accountable to the proprietor for his share of the produce. Generally speaking the cultivator at the time of obtaining a cowle from the Sirkar makes his own arrangements with the proprietor by obtaining a varum pattom or kuykanom lease, which secures both parties in their respective rights.

* * * *

I have, &c.,

(Signed) H. V. CONOLLY,

Collector.

EXHIBIT XXII.

Extract from report written by the Collector of Malabar to the Board of Revenue.

CALICUT, 9*th January*, 1846.

To

T. PYCROFT, ESQ.,

Secretary to the Board of Revenue,

Fort Saint George.

6. * * * *

The Government have nowhere so thoroughly relinquished their claims as sovereigns as to leave it in the power of any proprietor to leave his ground waste to the detriment of the public interest. In Lower Malabar even where proprietary right has been more thoroughly and invariably admitted

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than in any other part of India this has not been done. If a landholder will not cultivate his waste the Government consider themselves at liberty to get some one who will, reserving always to the said landlord the share of the produce which his right as proprietor entitles him to according to the usage of the country.

[98] 7. In peculiar illustration of this point I would beg to observe it would be quite contrary to the practice of the country for the landlord to prevent any native from cutting down jungle in his land for the purpose of Ponam (hill paddy) cultivation. The cultivator cuts it no doubt with the landlord's permission and pays him the immemorially fixed proportion of the produce he may obtain as a rent, but what I mean to say is that no landlord would be held justified in preventing his forest being so cut merely to please a fancy—the Government who would lose by his doing so would interfere.

I allude of course to jungle land which bears no valuable produce.

* * * *

I have, &c.,

(Signed) H. V. CONOLLY,

Collector.

EXHIBIT XXIV.

Hookumanamah containing rules for granting remissions when waste lands are reclaimed either for the purpose of rice or garden cultivation.

* * * *

Application for reclaiming wastes.

9. Parties desirous of reclaiming tracts of waste lands—whether assessed to the revenue or not—are to present darkasts (as hitherto done) either at the Huzzoor, Subordinate or Talook Cutcherries. They would save themselves much trouble and annoyance if, previous to making such applications, they were to obtain the consent of the parties who may hold proprietary or mortgage right to the land, to their reclaiming it. Proprietors are of course to have the choice of reclaiming such lands themselves, but should they refuse to do so on insufficient grounds, the Government will take the offer of any other party who comes forward. A clause will always be inserted in cowles given to such parties to the effect that they have to account to the proprietor for his share of the produce, and are to pay the Sirkar merely the usual revenue. The party claiming proprietary or mortgage right to the land will however have himself to recover his share by a suit in the Civil Court, if it cannot be effected by a mutual amicable settlement between the parties.

* * * *

(Signed) H. V. CONOLLY,

Collector.

EXHIBIT XXV.

From M. R. Ry. Conolly Avergal, Collector of the Province of Malabar, to the Tahsildar of the Calicut Taluk

Circular Order No. 3.

In the list of waste lands, now being prepared with a view to grant cowle thereon, in order to reclaim them it is now the practice to enter the name of the jenmi of each item of such lands.

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[99] As the cowle is granted for the sole purpose of legally doing a favour to the individuals assiduous in reclaiming the waste lands and in paying Government revenue, the Government gains nothing in recording name of the jenmi also besides the particulars necessary to serve the above purpose.

It is therefore not necessary, in future, to enter, in the list, who the jenmi of the land is when on measurement of the land such list will be prepared to grant cowle.

But in all cases where there is reason to believe that the Government is the jenmi, it is to be distinctly shown in the said list that the land is jenm property of the Government. The list must also contain the stipulations made with a view to ensure payment of the Jenmabhogam to the Government.

Dated 31st Karkidagom 1025.
13th August, 1850.
Calicut.

The order was sent to Betutnad, Kutnad and Chavakad Taluk authorities, to the Head Assistant Collector in charge of Palghat, Temelprom, and Nedunganad, to the Sub-Collector in charge of Kottayam, Kothathnad, Chirakel, Kavai, and Wynad, to the Assistant Collector of Ernad and Walluvanad, and to Mr. Platel, the Assistant in charge of Kurumbranad and Shernad.

(True extract).

Seal.

(Signed). E. G. WRICKETTS,
Deputy Collector.

EXHIBIT XXVI.

Extract from printed volume entitled "Correspondence on Moplah Outrages in Malabar for the years 1853-59." Published by Authority. Vol. II, Madras, 1863.

No. 18-A.

Extract from the proceedings of the Sudder Udalut under date the 13th February 1854.

* * * *

Paragraph 9. Adverting to the remark in the Extract from the Minutes of Consultation under date the 23rd August last, that "it may possibly be desirable to interfere by legislative enactment, so as to fix some terms to the landlords indefinite paramount rights over the tracts of waste land and forest, to which he now lays claim"; the Collector observes that "the injury which these paramount rights have certainly a tendency to produce is in a measure neutralized by the universally acknowledged practice of the country. All land in Malabar, as I remarked in a memorandum drawn up for Government in 1840, is strictly private property and the rights of the jenmakar or proprietor are held to be inalienable, whether it be cultivated or whether it be left waste. So far is this carried that it is laid down by the standard authority on all matters relating to the land

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tenures of Malabar (Major Walker), that should a person bring into cultivation a piece of [100] waste ground which appeared to have no claimant, the owner, on making his appearance after any lapse of time, would have a right to resume his property, paying for the improvements that had been made. Extensive and bounded indeed, as these rights at first appear, they have their limits. A man is not allowed to keep his land waste, unless he agree to pay the Government the tax they would derive from its cultivation. Should he decline to do this, the land is delivered over to any person who will undertake to till it; a specification being made, that out of the profits deducible from its cultivation a certain portion (about 15 per cent.) shall be given to the proprietor as the landlord's share."

That is, if A, a stranger applies to the authorities for leave to reclaim waste (as is constantly done), B, the landlord of that waste, cannot bar its purpose, except by taking the responsibility himself.

"The only practical difficulty which has presented itself in this matter is that alluded to in my letter to Mr. Strange of the 10th September 1852, in which I have shown that Hindoo landlords have at times attempted to hinder the location of Moolah cultivators on waste by preventing them from acquiring in fee simple so much ground as would suffice for a mosque and burial ground.

"But such cases are not frequent, and I would fain hope that the personal representations of the European local authorities will be found sufficient to induce the landlords to listen to reason without the necessity of any extraordinary interference on the part of Government."

Paragraph 10. The Court of Sudder Udalut fully concur with the late Special Commissioner, and the officers whose views have been stated in the foregoing paragraphs as to the inexpediency of any departure by the Courts from the ancient usages which regulate the relations of landlord and tenant and the liabilities of families governed under the law of Maroomakatayam in Malabar, and they resolve to enjoin upon the several judicial authorities in that province that they be careful to give effect to all such usages in their decisions.

* * * *

The Secretary of State, defendant No. 1, preferred this second appeal against the decree of the District Judge.

The Advocate-General (Hon. Mr. *Spring Branson*) and the Acting Government Pleader (*Subramanya Ayyar*), for the appellant.

The plaintiff does not dispute the right of Government to grant a cowle; and, clearly, on the grant of the cowle the cultivator becomes liable in respect of both the claims of Government and of the jenmi. As to this right see Logan's Treaties and Engagements, pp. 21, 82, 86. If the jenmi does not choose to cultivate his waste and a cowle is granted for it, the land, having once been assessed, becomes a security for the payment of the revenue which may accordingly be collected, if necessary, by the sale of the land. This position has been maintained by the Government in Malabar for a long time, see p. 240 of the work already referred to, and Logan's District Manual, Vol. II, App. XV; and it is both reason- [101]able in itself, and in accordance with the recognized claims of Government on mirasi and other lands. A landholder for revenue purposes is taken to mean the person registered as such. See as to Madras Regulation II of 1802, *Secretary of State* v. *Vira Rayan* (1), and as to the Revenue Recovery Act, 1864, *Zamorin of Calicut* v. *Sitarama* (2),

(1) 9 M. 175. (2) 7 M. 405.

and *Secretary of State* v. *Narayanan* (1). Compare also as to the origin and precedence of the right of Government to land revenue, *Bhaskarappa* v. *The Collector of North Canara* (2), *Vyakunta Bapuji* v. *Government of Bombay* (3), *Thakooranee Dossee* v. *Bisheshur Mookerjee* (4), *Secretary of State for India* v. *Bombay Landing and Shipping Company* (5), *Abdul Gani* v. *Krishnaji Bhikaji* (6), *Gundo Shiddheshvar* v. *Marden Saheb* (7), *Ghelabhai Bhikaridas* v. *Pranjivan Ichharam* (8), and see also Fifth Report, Vol. II, p. 440.

Moreover here the jenmi appears to have had notice of the issue of the cowle, or at any rate of the occupancy of defendant No. 2 whom he allowed to appear as ostensible owner, as to which see *Zamorin of Calicut* v. *Sitarama* (9). The Lower Courts did not consider either of these points, nor did they frame an issue upon the question whether the plaintiff's claim was or was not barred under the Limitation Act.

Bhashyam Ayyangar, Sankara Menon and *Govinda Menon*, for respondent.

The argument of the learned Advocate-General leads to the extreme conclusions that Government without consulting or warning the land-owner can (1) give his land to another for cultivation and (2) then extinguish that right if that other fails to comply with the revenue demands. But in the right view of the law, Government cannot so dispose of the jenmi's property; or if it can, the sale must be subject to his right to jenmibhogam.

There is no question in this case as to the Government's right to levy revenue; but the respondent says that he as jenmi should have the option of paying it and that his land should not be taken away without his being consulted. Compare *Rajagopala* **[102]** *Ayyangar* v. *Collector of Chingleput* (10), a case where land was abandoned. Moreover under Madras Regulation XXVI of 1802 notice should be given to the jenmi before another is registered as owner.

The rights of the jenmi are not those of an incumbrancer only, they are certainly not less than those of a mirasidar; and a purchaser under a revenue sale is liable for the dues payable to a mirasidar, *Sakkaji Rau* v. *Latchmana Gaundan* (11), nor is a mirasidar's right affected when land is sold for the Government's share of the melvaram, see *Ragava* v. *Parthasaradhi* (12). Thus a sale under the circumstances of the present case would be legal only if made subject to the right to jenmibhogam; that right stands on a higher footing than a mere incumbrance which in the sense in which the word is used in the Revenue Recovery Act means some burden resulting from the act of the defaulter or of the owner, see *Yellaya* v. *Viraya*(13).

In the right view of the law all that the Government can do by a cowle is to fix the revenue and by the grant of a patta no fresh estate is created.

The Acting Government Pleader (*Subramanya Ayyar*) in reply.

As to want of notice to the jenmi, the land-owner, under the regulations, should have his name registered, if he omits to avail himself of this means of securing himself, he does so at his own risk. Moreover the Revenue Recovery Act II of 1864 does not require any registration any

(1) 8 M. 130. (2) 3 B. 452 (547). (3) 12 B.H.C. App. 1 (40, 41).
(4) B.L.R. Sup. Vol. 202 (295). (5) 5 B.H.C.R. 23 (48). (6) 10 B. H.C.R. 416.
(7) 10 B. H.C.R. 419 (422). (8) 11 B. H.C.R. 218. (9) 7 M. 405.
(10) 7 M.H.C.R. 98. (11) 2 M. 149.
(12) S A. 43 of 1885 (not reported). (13) 10 M. 62.

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more than it requires any contract to pay. See *Ghelibhai Bhikaridas* v. *Pranjivan Ichharam* (1). However it is not contended for the appellant that the cowle creates any estate, but that the land is a security for the revenue which accrues due subject to the remission which the cowle grants ; the claim of Government to that revenue could be enforced even against a trespasser, such as the respondent claims defendant No. 2 to have been. But if defendant No. 2 was a trespasser the respondent's claim to jenmibhogam falls to the ground. Here, as in the case of a zemindari, there are various admitted interests in the land, the question is as to their priority. The jenmi's position is that of a raiyat with a preferential right to the waste land. The claim of Government comes first, see *Zamorin* [103] *of Calicut* v. *Sitarama* (2), *Bhaskarappa* v. *The Collector of North Canara* (3) and with the liability of land to be assessed to revenue, the Courts have nothing to do, *Vyakunta Bapuji* v. *Government of Bombay* (4); that claim being satisfied, Government is not concerned about the rest.

The Court made the following

ORDER The plaintiff, the uralen of the devaswam, which is the jenmi of the land in suit, sues to set aside the sale of certain land belonging in jenm right to the devaswam which has been sold for arrears of revenue under Madras Act II of 1864.

It appears that in 1869 the first defendant, Collector of Malabar, granted a cowle to second defendant for the land in suit, and it is stated that the land was cultivated until two years before suit and a patta was granted to second defendant by the Revenue authorities. As second defendant did not pay the assessment, the land was attached and sold, third defendant being the purchaser. A petition by the plaintiff to release the attachment was dismissed as he did not pay the arrears of revenue due. The plaintiff now sues to have the sale of his jenm right set aside on the ground that the cowle was granted and the tax imposed without his consent as jenmi. The first defendant—the Secretary of State for India in Council represented by the Collector of Malabar—maintained that the land was liable to be sold for the arrears of public revenue due upon it. Defendants Nos. 2 and 3 allowed the suit to proceed *ex parte*.

The District Munsif dismissed the plaintiff's suit holding that no authority was shown for the proposition that the Collector was bound to give notice to the jenmi when a revenue patta was granted to a tenant in possession, and that the land was doubtless liable to be sold as security for the public revenue. On appeal, the District Judge reversed this decision, holding that, though a jenmi could not maintain a suit to set aside a revenue sale when he had permitted a pattadar to appear as ostensible owner, it was otherwise when the Government, without notice to the jenmi, had granted the jenmi's waste lands on cowle. The Judge held that the Collector's remedy against second defendant could only be under the terms of the cowle, that the cowle did not render the [104] land liable to be sold, and that the Collector was not authorized to grant cowles for the reclamation of private property without notice to the jenmi.

Against this decree the Secretary of State appeals.

(1) 11 B.H.C.R. 218.
(2) 7 M. 405.
(3) 3 B. 452 (547).
(4) 12 B.H.C.R. App. 1.

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It appears to us that the District Judge has overlooked the fact that the cowle set forth in his judgment was one for two years only and that the District Munsif found that a patta had been since issued. The cowle reserves the right of the jenmi, and there is nothing before us to show whether the subsequent patta also reserved those rights, or whether the Government then purported to set up an adverse title in themselves.

If the land was legally at the disposal of Government to allot to the second defendant for cultivation, there could be no doubt that it is liable to be sold for arrears of revenue free of all incumbrances; but if it was not, *i.e.*, if it was private property not at the disposal of Government and which the jenmi could deal with at his pleasure without reference to Government, it may be doubted whether a sale for arrears of revenue could carry with it the jenmi's right. It is contended that the "incumbrances on the land" alluded to in Act II of 1864, Section 42, refer only to incumbrances created by the parties, and does not mean that all rights are destroyed.

It is contended for the appellant that the Government right to assessment is based upon a right to receive a share of the produce of all land which is brought under cultivation, but this right is not necessarily inconsistent with the rights of private individuals to decide whether their own lands shall or shall not be cultivated.

The second defendant is *ex parte* in the suit, and it is clear that he at all events can have no defence to the Government claim to sell whatever interest he may have in the land for an arrear of public revenue due by him. He however has set up no jenm title, and it is obvious from the cowle that he came into possession with the rights of the jenmi reserved, so that if he still holds under the same tenure he may not be able to deny the jenmi's title. If, however, in granting the patta to him the Government have set up an adverse title for themselves, it may be that the plaintiff has lost his title by adverse possession, or he may also have lost his right to object by having allowed second defendant to appear as ostensible owner.

[105] We will ask the District Judge to return findings upon the following issues :—

I. When was the land granted on patta to the second defendant, and was such grant made adversely to the plaintiff's title?

II. Has the plaintiff allowed second defendant to appear as ostensible owner and for how long?

III. Had the Collector legal power to grant the plaintiff's lands for cultivation without his consent, and if not, can he legally bring the plaintiff's title to sale under Act II of 1864?

Further evidence may be taken.

The District Judge having returned findings on the issues remitted to him to the effect summarized at the beginning of the judgment of Parker, J., the second appeal came on for rehearing.

The Advocate-General (Hon. Mr. *Spring Branson*), for appellant.

The finding that the patta was not granted adversely to the plaintiff's title is erroneous. The jenmi must have known of the cultivation and he received no jenmibhogam: moreover if he had chosen, he might have come in, see the Proclamation of 1799, Logan's Treaties and Engagements and Exhibits XX, XXIV, XXVI.

There is no difference between this case and that of a trespasser. But whatever may be the title of the holder, the revenue must be paid.

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(PARKER, J.—The question is, is he the landholder within the meaning of the Revenue Recovery Act, see Section 39? The tenant was let in subject to the jenmi's right; how can you sell independently of that right?)

The owner must see that he is recognized as such and can if he chooses be registered under Madras Regulation XXVI of 1802; it is not for Government to seek him out. A man may be liable for the whole revenue though he may have parted with half of the land. Government can only look to the cultivator—the man in possession; but this does not prejudice the jenmi who may come in, demand his jenmibhogam or eject. As to the jenmi being thus put to the assertion of his right, see Exhibit XXV. There might be disputes between the owner and the cultivator for instance as to title or the crop raised might have [106] no marketable value, but the claim of the crown cannot be affected thereby, see Rent Recovery Act, 1864, Sections 35 and 58, and the circumstance that this case arose in Malabar does not make any difference. *Secretary of State* v. *Vira Rayan*(1).

Sankara Menon, for respondent.

There is no doubt that Government, if it choose, can levy assessment on waste land after giving notice to the jenmi. But notice ought to have been given, for undeniably the proprietary right is in the jenmi. Further it is an important fact in this case that at the time when the sale for revenue actually took place, the land on which the revenue was assessed was lying waste.

As to the jenmi's proprietary right and the obligation to give notice to him, compare *Secretary of State* v. *Vira Rayan*(1) and see the Joint Commission Report.

The customary right of Government contended for in this appeal to sell land without notice to the jenmi has been exercised as appears from the evidence of the Collector only rarely. Moreover, the custom set up is unreasonable, see Exhibit XXVI, with which compare Munro's Minutes, 16th July 1822.

With regard to the contention that the plaintiff's claim is barred, it was advanced for the first time in second appeal and could not in any case be supported, as there was not adverse possession by either the tenant or the Government for twelve years if at all.

The Acting Government Pleader (*Subramanya Ayyar*), in reply.

The admission of the proprietary right of the jenmi has always been subject to certain qualifications—see the Proclamation of 1799 (Logan's Treaties and Engagements, p. 215). All private property is subject to the right of Government to collect revenue, *Bhaskarappa* v. *The Collector of North Canara* (2). This right of Government is not the creation of legislative enactments, but has merely been regulated by them. The question now raised is as to a supposed restriction on the mode of exercising it. This is really a question of usage rather than of abstract justice, and the right has been exercised as appears from the evidence in the mode now claimed to be lawful in the issue of 16,000 cowles, to the [107] advantage, it should be observed, of the jenmis who have thereby had tenants found for their waste.

The fact that a new man is brought on to the land is a notice of the claim of revenue which cannot be ignored by the jenmi. But there is no authority for the argument that the jenmi is entitled to notice from Government in any other sense. He is sufficiently protected by the law:

(1) 9 M. 175 (180, 186). (2) 3 B. 452 (523).

under the Regulation of 1802 and Act II of 1864, he can insist on being registered as proprietor, and he has the right to eject. See *Tiruchurna Perumal Nadan* v. *Sanguvien*(1).

As to the laches of the plaintiff and the lapse of time, either the possession of defendant No. 2 was without the consent of the jenmi in which case it was adverse to his title, or else it was by his consent and an estoppel arises. See *Zamorin of Calicut* v. *Sitarama*(2).

JUDGMENT.

PARKER, J.—The District Judge has found (1) that the patta was not granted adversely to the plaintiff's title; (2) that the plaintiff has not allowed the second defendant to appear as ostensible owner; and (3) that the Collector had no legal power to grant the plaintiff's lands for cultivation without previous notice to him, and that in the absence of such notice no public revenue on account of which the plaintiff's title can be brought to sale under Act II of 1864 can be held to be due upon the land. To these findings the first defendant has put in a memorandum of objections.

There can be no doubt that the patta was granted on the same terms as the cowle, *i.e.*, without prejudice to the jenmi's right. The further plea was put forward that second defendant had acquired an adverse title as against plaintiff, and hence that Government was justified in selling his land for arrears. Defendants Nos. 2 and 3 are however *ex parte* in the suit, and the first defendant never raised this plea in his written statement, nor has any issue been taken upon it. We do not think we ought to allow it to be taken on second appeal, and it would certainly be anomalous that first defendant having let in a cultivator with reservation of the jenmi's rights should afterwards be allowed to plead that that cultivator had through that same act of the first defendant adversely acquired rights against the jenmi, by which **[108]** the jenmi's title had been lost. We must accept the findings therefore on the first and second issues referred.

The third issue raises for decision a question of the utmost importance. It is admitted that the land in Malabar is private property, but it is argued on behalf of Government that co-existent with the proprietorship of the jenmi is the right of Government to allot to any person, not the proprietor of the soil, the right to cultivate any waste land in the jenmi's estate which is capable of cultivation, but which the jenmi has not cultivated. This right, it is asserted, is founded upon the right of the State to derive a revenue from all land cultivated or capable of cultivation, and it is contended that a private proprietor has no right to keep any portion of his estate waste if in the opinion of the officers of Government it should be cultivated so as to yield revenue to the State, and that if he neglects to cultivate such waste the Collector may without reference to him assign such land for cultivation to any other person, subject, however, to the jenmi's right to eject such person and pay the revenue himself.

Such claim is no doubt altogether inconsistent with rights of property as understood by English Law, but it has been held that property in the soil must not be understood to convey the same rights in India as in England. "It may be subject to restrictions and qualifications vary- "ing according to the peculiar laws of each country; and those acts which "under one system would be necessarily regarded as contradictions of any

(1) 3 M. 118. (2) 7 M. 405.

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"ownership over the object on which they were exercised, except that "from which they spring, might under another system be quite compatible "with an ownership subsisting unimpaired side by side with the limited right "to which they would be attributed. The exaction of a share of the crops "is itself an instance of this divided dominion." See *Bhaskarappa* v. *The Collector of North Canara* (1). The right here claimed however is something much larger than a right to a share in the crops. It is not alleged that the right now claimed rests either upon legislative enactment or upon judicial decision, but it is said to be founded upon customary law which has not hitherto received the sanction of judicial recognition. It is necessary therefore that a custom of an anomalous character and apparently so subversive of the ordinary rights [109] of private property should be strictly proved before it can be recognized as having the legal requisites of a valid custom.

The evidence shows that the jenmis or the proprietors of the soil in Malabar have long been in the habit of leasing out the greater portion of their estates to kanomdars who are thus in the immediate occupancy of the greater part of the soil. This was the state of things at the time of Hyder's conquest (Exhibit XIV), and the British Government is stated to have continued the practice of the Mysore Government in settling the assessment with these kanomdars. At the annexation of Malabar in 1799 the Government disclaimed any desire to act as the proprietor of the soil, and directed that rent should be collected from the immediate cultivators, *Trimbak Ranu* v. *Nana Bhavani* (2) and *Secretary of State* v. *Vira Rayan* (3), thus limiting its claim to revenue. Further, in their despatch of 17th December 1813 relating to the settlement of Malabar the Directors observed that in Malabar they had no property in the land to confer, with the exception of some forfeited estates. This may be regarded as an absolute disclaimer by the Government of the day of any proprietary right in the jenmis' estates, and is hardly consistent with the right of letting in a tenant which is certainly an exercise of proprietary right.

The first trace of the assertion of the right now claimed is to be found in 1827 when the then Collector, Mr. Sheffield, made proposals to the Board of Revenue for reclaiming waste lands (Exhibits XV—XVIII), and on 12th February 1827, he was ordered to submit to the Board the precise terms of the cowle, which he proposed to grant. On 20th September 1827, Mr. Sheffield accordingly submitted a specimen cowle (Exhibit XVII) which contained a stipulation that the cowledar should be responsible for the jenmakars' or proprietors' share of the produce of the said land. In acknowledging receipt of this specimen document on May 19th 1828, the Board says Exhibit (XVIII, paragraph 16) "The Board conclude that the "form of cowle which the Principal Collector has forwarded is intended "for *unclaimed lands considered as belonging to the Circar*; and that the "expression 'you will be held accountable for the jenmakars' or proprietors' "share of the produce' is only meant to intimate to the occupant that when "[110] his assessment comes to be fixed he will be regarded as a mere "tenant, *not as proprietor*, and will have to pay the whole of his landlord's "rent to the Circar."

The Board then goes on to ask within what period in Malabar unclaimed lands are considered to have lapsed to the State, and object to the mention of the jenmakars' share when it is uncertain whether or not

(1) 3 B. 452 (715). (2) 12 B.H.C.R. 144. (3) 9 M. 175.

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there be a jenmakar on the ground that the Government ought not to be committed on any doubtful question. The tenor of this document certainly goes to show that in 1828, the Board of Revenue did not consider the Government had power to grant cowles for other than unclaimed lands which were at the disposal of Government, and this is consistent with the despatch of the Marquis Wellesley of 19th July 1804, and that of the Court of Directors of December 1813, and see *Trimbak Ranu* v. *Nana Bhavani* (1).

On April 14th, 1829, the Collector replied to these enquiries (Exhibit XIX) to the effect that according to Malabar custom a jenmakar's right to resume on payment of the value of improvements never became barred by lapse of time. This concludes the correspondence 1827—1829, and there is certainly nothing in it to show that up to 1829, the Government had asserted the right now claimed.

The next document in point of date is a report of the Collector, dated 10th November 1841 (Exhibit XX). In it Mr. Conolly writes on the subject of cowles: "However questionable it may at first sight appear for the "Government to issue cowles for the cultivation of lands which are not "their property, the practice of issuing such documents seems to be attended "with advantage to both Government and proprietor;" and further on, "generally speaking the cultivator at the time of obtaining a cowle from "the Circar makes his own arrangement with the proprietor by "obtaining a verumpattom or kuyikanom lease, which secures both parties "in their respective rights." Here clearly Mr. Conolly justified the practice on the ground of convenience, but not of legal right.

The same officer writing to the Board five years later (Exhibit XXII, January 9th, 1846) for the first time broaches the theory which the Government now puts forward. He then says, "The [111] Government "have nowhere so thoroughly relinquished their claim as sovereign as to "leave it in the power of any proprietor to leave his ground waste to the "detriment of the public interest . . . . If a land-holder will "not cultivate his waste the Government consider themselves at liberty to "get some one who will, reserving always to the said landlord the "share of the produce which his right as proprietor entitles him to "according to the usage of the country." Here we have the first trace of the present claim together with the underlying fallacy that the jenmi's rights are to a share in the produce only and ignoring his right as proprietor to the soil itself.

The Board then appears to have called for a copy of rules issued by the Collector to his subordinates for the reclamation of waste lands, and six months later (10th July 1846, Exhibit XXIII) Mr. Conolly sends them expressing his own anxiety that applications for such cowles should be encouraged, not only because it is always desirable to bring waste lands under cultivation, but also for political reasons, because it was desirable that the restless and vigorous Moplahs of the interior should be encouraged to expend their energy in honest work, failing which they will betake themselves to smuggling and other malpractices.

In the hookumnamah sent for the information of the Board (Exhibit XXIV) the applicants are enjoined to obtain, if possible, the consent of the jenmis, who it is said have the prior right to reclaim for themselves if they wish to do so; but it is stated that if they refuse on insufficient ground, the Government will take the offer of any other party. The

(1) 12 B. H.C.R. 144.

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rights of the jenmi are reserved, but he is relegated to a Civil Court to enforce them.

These extracts make it clear that between 1841 and 1846 Mr. Conolly's views of the relative rights of the Government on the one hand and the jenmi on the other had altered considerably, but four years later—in 1850—we find him making a still further advance in the attitude which he had assumed with reference to the jenmis. He then (Exhibit XXV, August 13th, 1850) instructs the Tahsildars that "Government gains nothing in recording the name of the jenmi" in the cowle and that in future it is not necessary to enter it.

Exhibit XXVI is an extract from the Proceedings of the Sudder Adawlut, dated 13th February 1854, from which it appears that the Government had in 1853 under consideration the question [112] of legislating to limit the rights of jenmis over waste lands, but the only opinion expressed by the Sudder Court (and that not a judicial one) is that it is inexpedient to depart from ancient usages which regulate the relations of landlord and tenant. The *views* of the local officers are referred to without any expression of opinion as to whether they are correct, or the contrary.

It will be observed that Mr. Conolly nowhere gives reasons for the opinion advanced in January 1846 that it is not within the power of a private proprietor to leave his land waste to the detriment of the public revenue, and no documents have been filed to show that either the Board of Revenue or Government formally accepted this view. We were however referred in argument to a proclamation issued on 26th November 1799 to the inhabitants of Koletanaad (North Malabar) contained in Logan's Collection of Treaties and Engagements, page 215, on which the Advocate-General strongly relied, as showing that the present right had been claimed as early as 1799 and before the formal annexation of Malabar. If this were so, the fact would no doubt be strong evidence; but on reading the proclamation carefully it seems to me quite clear that it does not refer to waste lands at all, but to lands which had been assesssed to revenue but the owners of which had disappeared. Malabar was at that time in a transition state under an interim Government, and the British Government which was in possession, but had not formally annexed the country, was anxious to put matters in order, in view to ascertain the revenue really derivable from its new possession. The history of the steps then taken is very fully set forth in the judgment of Westropp, C.J., in *Vyakúnta Bapuji* v. *Government of Bombay* (1), but the fact that this proclamation refers to lands on which revenue (nigudee) had been fixed, is clear from the offer to remit it for one or two years wheresoever there may have been considerable impediments in cultivating the lands, and where such impediments are proved to the satisfaction of Mr. Hodgson. It will not, I think, be denied that the 'Kunnus' of Malabar from which crops of dry drain or rain-fed paddy are taken are assessed to public revenue when cultivated.

The Advocate-General referred in his argument to certain other State papers collected in the same work (Logan's Treaties [113] and Engagements), but they do not appear to me to support his contention, but rather show that the original intention of Government was to hold the jenmis only—not the actual cultivators—liable for the revenue. Thus at page 21, paragraph 5, it appears that in 1792 the Nair jenmis were in

(1) 12 B. H.C.R.. App. 1 (75).

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future to be held liable for the jumma instead of rendering military service as in the days of Tippoo. Paper No. 68 of 28th October 1793 (p. 82) alludes to the flight and return of the jenmis and clearly (paragraphs 4 and 5) indicates an intention of settling with them and not with the kanomkars for the revenue. Document 73 (1794) at page 86 and document 242 at page 240 (1803) point to the same conclusion, and go to show that it was the jenmi whom it was then intended to designate as the proprietor of the land within the meaning of Madras Regulation XXVII of 1802, Section 2. See *Vyakunta Bapuji* v. *Government of Bombay* (1).

The only document to which we have been referred as containing a formal claim with regard to waste lands is paper No. 81 (Logan's Treaties and Engagements, (p. 97) which is an agreement executed by the Achen of Palghat in 1792-93. In it after fixing the revenue payable to the Company's Government it is stated that the " Terse," *i.e.*, waste lands, cannot now be cultivated, but " should it hereafter be found capable of " cultivation, the Company's share of nigudee from the ground in question " shall be allowed and added to the present revenues." This does not amount to more than the assertion of a right to assess the proprietors to revenue for all cultivable land, but it is no assertion of a right to let in and assess any other person than the proprietor.

I have now reviewed all the documentary evidence on the record as to the origin and existence of the alleged custom, and I find nothing whatever to show that the right now contended for has ever been formally claimed in any general notice or proclamation, and the whole evidence tends strongly to show that the claim in its present form was first advanced by Mr Conolly in 1846 and apparently orginated in his zeal for the public revenue and for the reformation of the Moplahs of Malabar.

The evidenee of Mr. Winterbotham, the present Collector of Malabar, shows that the practice originated by Mr Conolly has been continued. That officer has filed a list showing the approxi-[114]mate number of cowles granted in Malabar from *Fasli* 1238 to *Fasli* 1297 (1828-1889). This, it may be assumed, includes cowles granted for the reclamation of Government waste lands as well as for lands belonging to private proprietors. There is no evidence that any cowles were issued for the reclamation of lands of private owners before Mr. Sheffield's tenure of office in 1827 and the instructions of the Board of Revenue in 1828 (Exhibit XVIII) would certainly tend to check the practice. Accordingly we find that the issue dropped from 36 in *Fasli* 1238 and 99 in *Fasli* 1239 to 8 in *Fasli* 1241 and there was no great increase again till Mr. Conolly was Collector when the number rose to 421 in *Fasli* 1256 (1846) which year was synchronous with Mr. Conolly's change of views. After that the number of cowles granted rose annually till it reached its highest point in *Fasli* 1268 when 1524 were issued. Since then the issue has declined and very rapidly from *Fasli* 1278 to *Fasli* 1297 (1868 to 1887). The Malabar Special Commission Report of 1882 (Exhibit XVIII) explains the cause of this to be the insecurity of the cowledar let in by Government and his liability to be ejected by the jenmi.

Mr. Winterbotham is an officer who has considerable experience in Malabar, and he appears to have entirely adopted the later views of Mr. Conolly. He admitted that a considerable number of cowles had been granted on his own recommendation, and stated that since 1850 the Government officials had carefully refrained from making inquiries as to who was

(1) 12 B.H.C.R. App. 1 (75).

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the jenmi before the issue of cowles. He admitted however that, as a general rule, the cowledars had attorned to the jenmi who generally, if kists fell into arrears, paid the revenue himself and thus prevented a sale. In some few cases the issue of the cowle was objected to by the jenmis who involuntarily submitted to be assessed to revenue themselves rather than let in the cowledars. The Collector further stated that sales for arrears of revenue and relinquishment of land were almost unknown in Malabar.

It appears to me that Mr. Winterbotham's evidence proves, not that the right claimed by Government has been acquiesced in, but that jenmis have, as a rule, taken steps to assert and preserve their rights of property when brought into peril by the action of the Collectors.

The Government bases its claim neither upon legislation nor upon judicial decision, but upon customary law. Among the [115] requisites of a valid custom are (1) that it must be ancient; (2) that it must have been continued and acquiesced in; and (3) that it must be reasonable, and it appears to me that none of the conditions have been satisfied. The custom is not ancient, for the evidence shows that it was first put forward by Mr. Conolly in 1846 and has never been formally asserted by the Government; it has not been acquiesced in, for a claim counteracted is not a claim acknowledged; nor do I think it is reasonable, for instead of assessing the *de jure* proprietor to revenue in his own name the Government plants a trespasser upon his land, does not make that trespasser attorn to the owner, but forces the proprietor to take active steps to assert his legal rights if they are not become barred by a hostile possession. And I am confirmed in my opinion that this right does not exist by customary law by the fact that in the only other part of India where it is shown that Government has a right similar to that claimed in Malabar that right does not exist by customary law, but by the sanction of a legislative enactment, (Bengal Regulation VII of 1822.) See *Sakkaji Rau* v. *Latchmana Gaundan* (1).

When examined on interrogatories in May 1886, the Collector, Mr. Winterbotham, rightly stated the law that the landholder contemplated in Section 1 of the Revenue Recovery Act is the person in whose name the land should stand in the revenue register maintained under Madras Regulation XXVI of 1802, but in his later deposition he stated that he considered the term "land-holder" to apply to all the pattadars in Malabar. In this he appears to me to beg the whole question. Regulation XXVI of 1802 provides that Collectors shall keep registers of landed property paying revenue to Government, and shall also enter all transfers of landed property from one proprietor to another. The regulation does not appear to contemplate the contingency of the person paying the revenue not being the proprietor. In other districts the pattadar is, as a rule, the proprietor, and I think I have shown that in Malabar also the original intention was to assess the land to revenue in the name of the jenmi. It is admitted that the jenmi is really proprietor and that he can oust any person holding a patta from Government and retain the land himself—subject only to his liability to pay the revenue. He therefore is and has [116] a legal right to be the landholder within the meaning of Section 1 of the Revenue Recovery Act. It therefore appears to me that where land is private property as in Malabar, the right of Government is limited to that of charging the proprietor with revenue. If the proprietor does not pay the revenue assessed on his land, his proprietary rights can

(1) 2 M. 149.

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be determined under the provisions of Act II of 1864, but the Government is bound to proceed to determine his interest in a manner which the law recognizes *Rajagopala Ayyangar* v. *Collector of Chingleput* (1). The right of Government to grant pattas for unclaimed lands at its own disposal stands entirely on a different footing, and neither the arguments of Mr. Conolly, in 1840, nor those of his successor, 40 years later, really amount to more than a justification of an irregularity on the ground of the great difficulty in Malabar of keeping a register of landed proprietors as required by Regulation XXVI of 1802. It may be that that difficulty requires legislation for its removal, but with the remedy the Courts have nothing to do.

Holding therefore that the plaintiff is the landholder within the meaning of the Revenue Recovery Act, it follows that the sale without notice to him was illegal and will not pass his rights. I would dismiss this second appeal with costs.

SHEPHARD, J.—This is an appeal on behalf of Government against the decree of the District Judge, setting aside a sale of the plaintiff's lands effected by the Collector under the provisions of Act II of 1864. The plaint stated that the land being the jenm of the plaintiff's devasom was granted on cowle to the second defendant by the Collector in fasli 1279 and that it was sold for arrears of revenue on the 18th June 1885 and purchased by the third defendant. The plaint refers to a petition presented by the plaintiff to the Collector subsequently to the attachment, but before the sale took place, praying that the attachment may be set aside "or that it may be ordered that the petitioner is entitled to realize "the jenmibhogam in the lands and the sale held after alteration "in the auction notification." The order on that petition was that the attachment would be set aside on payment of the arrears of revenue. The Collector representing Government, who was the only defendant that appeared, pleaded that the land was properly sold and that the sale was not liable to be set [117] aside. The facts stated in the plaint are admitted. It is found that the second defendant came into possession under a cowle given by the Collector, and that subsequently, in 1872, he had a patta given to him. It is not alleged on behalf of Government that the plaintiff in any way consented to the granting of the cowle or the patta or that he was ever aware of the issue of such documents. On the contrary, the third issue assumes that the Collector did not give any notice to the plaintiff before issuing the patta. The main question argued both in this Court and in the Courts below was whether in the absence of such notice the Collector could, on default being made by the pattadar in payment of revenue, lawfully bring the jenm title to sale. Some argument was addressed to us to the effect that the suit was barred by limitation, inasmuch as the second defendant's possession is shown to have commenced more than twelve years before the suit was brought. As between Government and the plaintiff it seems clear that the action of the Collector was not intended to be hostile to the jenm title. It has been found that the patta was not granted adversely to the plaintiff's title. Whether notwithstanding this the second defendant's possession would have been adverse and the plaintiff therefore deprived of his right by a continuance of that possession for twelve years, is a question which does not arise upon the facts as they are found. The land is found to have been waste at the

(1) 7 M.H.C.R. 98.

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time of the sale and for some time before, and it is not proved that the second defendant's possession lasted for twelve years. Moreover the plea of limitation was not raised in the Courts below.

Another question, which was raised on the original argument of the appeal, is disposed of by the finding on the second of the three issues referred by us. No valid objection can be urged against that finding, and it is clear that the plaintiff in no manner put forward the defendant as the proprietor of the land so as to preclude himself from setting up his own jenm title.

Coming to the main question which is, as far as I can learn, discussed now for the first time in a Court of Justice, we have to consider what authority there is for the proposition asserted on behalf of Government that the jenm title of land can be sold under the Act in satisfaction of arrears of revenue due by a pattadar, who has occupied the land without the jenmi's consent.

There is no doubt that the practice of granting cowles to persons who undertake to cultivate waste lands has largely pre-[118]vailed in Malabar. The practice is consistent with the anomalous system, which has also long prevailed there of settling the revenue with the tenant and not with the jenmi. (See paragraph 196 of the report of the Joint Commission, 1793, and the articles settled with the jenmakars for the year 969, page 81 of Logan's Treaties and Engagements). The grantee of the cowle comes under an engagement with Government to pay revenue on the expiration of a fixed period during which the land is declared free of assessment. The relation in which the cowledar stands to the jenmi is tolerably well ascertained. It is expressly provided in the cowle that the jenmi's rights are unaffected by it, and it appears from the evidence that generally persons taking cowles at the same time make their terms with the jenmi (see Exhibits XIX, XX, extract from jamabandi report of 1841) and in the rules for granting remission on waste lands published in 1846, the advisability of adopting this course is pointed out to applicants for remission (see Exhibit XXIV). Should the cowledar omit to make arrangements with the jenmi, it is quite clear that subject only to his right to compensation for improvements, he may be at once evicted (see Major Walker's report adopted by the Sudder Adawlat in proceedings of 13th February 1854). Should he however be left in possession for more than twelve years without any recognition of the jenmi's right, he would like any other trespasser acquire a valid title by limitation. By the mere fact of a cowle being given and taken, no benefit accrues to the grantee in his relations to the jenmi, and conversely the jenmi is in no way prejudiced. The question at issue is in what manner the granting of the cowle affects the relations between the jenmi and the Government.

It is argued that the Government are within their right in planting a cultivator in a jenmi's land without consulting him, and further that they are entitled to treat that cultivator as the landholder, ignoring the person who is admittedly the real owner. It is said that the power is necessarily involved in the right which Government possesses to charge revenue upon all cultivable lands, and it is urged that the jenmi is not injured, because he is at liberty at any time to eject the cultivator and take upon himself the burden of paying the revenue. It appears to me that, in order to disprove the existence and even the utility of the power which is claimed, it is almost sufficient to state the position in [119] which the cultivator is placed with regard to the jenmi who has been ignored. If it is true that the cultivator may be ejected by the jenmi the day after the Collector has let him into

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possession, it is difficult to understand in what sense the Collector had a legal right to admit him upon the land. In so far as the object which the Collector has in view is a fiscal one the obvious way of attaining it is by a direct application to the jenmi and an intimation that he will be charged revenue for his waste land ; in so far as the object is to promote the cultivation of waste lands, that object is not very effectively furthered by a system under which the cultivator is left wholly at the mercy of the jenmi. *A priori* it is most improbable that, in a country where the right of private property in land was highly developed and where it is not even certain that any land revenue was exacted by the ruling authorities before the Mussulman invasion, a power so seriously trenching on proprietary right should have come into existence. Nor am I able to find in the exhibits and other papers to which we have been referred any foundation for the notion that Government has the asserted right. In all the papers from the proclamation of 1799 (Logan, page 215) down to the most recent, it is stated, or at least implied, that the jenmi is to be consulted before a cultivator is put upon his land. In the proclamation the rights of Government are put on the highest ground and a security of tenure is assured to the cultivator which, in fact, he has not obtained. Yet even then the authorities evidently did not intend that the option of cultivating their lands should be taken away from the jenmis altogether. In 1829, the Collector in answer to questions put by the Board of Revenue, citing Major Walker as his authority, asserts to the full extent the right of the jenmi to dispossess a cultivator who has been placed on the land in his absence. The only liability which the latter can incur for such unauthorized cultivation of the land is the liability to pay compensation for improvements (Exhibits XVIII and XIX). The Collector, Mr. Conolly, in 1846 speaking of the right of Government to insist on cultivation of land in the interest of the revenue distinctly saves the rights of the jenmi, saying that if he will not cultivate, Government is at liberty to get some one who will, reserving always to the landlord the share of the produce to which he is entitled (Exhibit XXII), and again in the same year similar language is used by the same Collector—"Proprietors are of course to have the choice of reclaiming such lands them- " [120]selves, but should they refuse to do so on insufficient grounds the " Government will take the offer of any other party who comes forward." (See also Mr. Conolly's letter of 8th October 1853 quoted in Minutes of Consultation of 15th November 1853.) Our attention was specially called to the order of 1850 also proceeding from Mr. Conolly (Exhibit XXV) which the Collector examined as a witness quotes as the authority for prohibiting Revenue Officer from making inquiries as to who is the jenmi when a cowle is to be granted. The Collector appears to have misunderstood the order, for all that it says is that it is unnecessary to record the names of jenmis in the lists of waste lands since the Government gains nothing by such record. Anyhow, this order must not be read by itself, but in connection with the language used by Mr. Conolly on other occasions, and so read it affords no ground for belief that in his opinion the jenmi and his rights might be ignored in the transaction altogether. No doubt he assumed that applicants for cowles would look after their own interests and secure themselves by making a bargain with the jenmi as he had recommended them to do in the hookumnamah published four years before (Exhibit XXIV). Some stress was laid upon the large number of cowles said to have been granted since 1826. In view of the circumstance above referred to that in the majority of cases

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the cowledar at the same time enters into an engagement with the jenmi, the prevalence of the system of granting cowles seems to me of no weight. Assuming that the Government have the right claimed by Mr. Conolly in some of the above-cited papers of introducing a cultivator on to the land of a jenmi who unreasonably refuses to cultivate it, I can find no authority for the further claim which is now made of cultivating lands for a jenmi without giving him the option of doing it himself. This claim appears to me to be an unwarrantable extension of the practice which is itself an anomaly of settling with the tenant and not with the jenmi.

The rights of the jenmi are certainly not less extensive than those of the mirasidar with which they have often been compared (see Mirasi papers, page 434, and appendix 1). Yet the mirasidar is generally entitled to a prior right to undertake the cultivation and consequent assessment, *Fakir Muhammad* v. *Tirumala Chariar* (1) [121] Mirasi papers, page 219, and he does not lose any prescriptive rights he may have by the fact that patta is given to another, *Subbaraya* v. *The Sub-Collector of Chingleput* (2). If we are to adopt the view contended for on behalf of Government the jenmi is placed in a less favourable position, for the cultivation of his waste lands may be taken out of his hands without any choice being allowed to him in the matter, and he may run the risk of having his jenm right sold without any warning or even notice that the land has been assessed.

It was argued that it was the business of landholders to see that their lands were registered in their own names and that they can protect themselves by requiring the Collector so to register them, *Ponnusamy Tevar* v. *Collector of Madura* (3) and that on the other hand it was not the business of the Collector to ascertain who was the real owner and to settle with him. Reference was in this connection made to Section 35 of the Revenue Recovery Act, as showing that the legislature contemplated cases in which other persons than the registered holder might have interest in the land. Notwithstanding the opinion expressed by Turner, C.J., in *Subbaraya* v. *The Sub-Collector of Chingleput* (2), I think it must be allowed that a suit would lie to compel the Collector to settle the assessment with the real owner and not with a third person, *Mahomed Israile* v. *Wise* (4). And in my opinion the possession of such a remedy by the jenmi is only consistent with his contention in this appeal. So far from that circumstance militating against the jenmi's contention, it appears to me that if he had no remedy in the case supposed, there would have been more reason for saying that the Collector in making a settlement might act without regard to claims of legal ownership. The Advocate-General referred to the Madras Regulations XXV and XXVI of 1802 as showing that it is the business of landholders to enter their names in the registry. The provisions for the registration of landholders were enacted for fiscal purposes. The Regulation XXV of 1802 requires that any alienation of part of an entire zamindari shall be registered, or the entire zamindari will still remain answerable for the whole revenue. In other words a zamindar who has come under an engagement to pay a certain revenue on account of a certain estate which stands as security therefor [122] cannot lessen his obligation or diminish the security except with the consent of the Collector. But a provision of this sort is very different from one entailing on the landholder who omits to register the consequence that the Collector may treat another person as the landholder.

(1) 1 M. 205. (2) 6 M. 303. (3) 3 M.H.C.R. 35. (4) 13 B.L.R. 118.

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There is no provision to that effect in the Regulations or in the Act of 1864. In this connection the case of *Bute* v. *Grindall* (1) which is mentioned in a note to *Bhaskarappa* v. *The Collector of North Canara* (2) was cited. That was a case concerning a poor rate, and the question was whether the plaintiff who was the ranger and keeper of a Royal Park was liable to be rated. It was said that it was enough to find that he was occupier, and *quo nomine* occupier whether for gift or wages could make no difference. "It is immaterial" said Buller, J., "what interest the "occupier has in land; whether he holds as tenant-at-will or by any "other tenure, it is not necessary to inquire into the occupier's title." These observations relating to a rate which is not a tax on the land but a personal charge paid by the occupier in respect of it, *Rowls* v. *Gells* (3) have no bearing on the present case in which it is sought to realize by sale of the land arrears of revenue incurred by the occupier.

It was admitted that the right claimed on behalf of Government had not been recognized by the legislature and that no sanction for it was to be found in the Regulations of 1802 or in the Act of 1864. Unless Innes, J., was wrong in his opinion that the Act of 1864 provides a complete scheme for the realization of land revenue, that admission is fatal to the appellant's case; and at any rate, in view of the large measure of attention and discussion which the institutions of Malabar have attracted from 1799 downward, the admission is of great importance. In my judgment the right of Government to deal with a stranger for the purpose of assessing the revenue as if he were the proprietor is not only not recognized by the legislature, but is inconsistent with the provisions enacted by it. In the Act II of 1864 as in the Regulation XXVIII of 1802 it is the landholder against whom measures are to be taken for realization of the revenue. It is the landholder between whom and the Collector the engagement with regard to revenue shall be made. He being the person who may be a defaulter is the person whose property, moveable or immove-[123]able, may be sold under the provisions of Section 6, he is the person to whom notice has to be given under Sections 8 and 25 before the Collector proceeds to sell the property. It is quite true, as was insisted in the argument, that the land is security for the revenue, but a security pre-supposes an obligation, and unless therefore an obligation has been imposed on the landholder, it is difficult to see how his interest in the land can be affected. "The right of the Government is only a right to a "charge on the land and a right to forfeit by due course of law the title "of the person holding the land who does not pay the charge." *Subbaraya* v. *The Sub-Collector of Chingleput* (4). The case for Government requires that the pattadar who, as already observed, is as against the jenmi a mere trespasser, should be identified with the jenmi so that his engagement should be treated as an engagement entered into by the jenmi. It is intelligible that such an identity should be taken to exist in the case where the landholder allows a third person to represent himself as owner of the land (see *Zamorin of Calicut* v. *Sitarama* (5); as to this case compare Minute on Malabar Tenures by Turner, C.J., Chapter V, Section 82). But I fail to see on what principle it can be held that a jenmi on whose land a stranger has intruded behind his back can be taken to have assumed any responsibility for the revenue and therewith to have pledged his land as security for the due payment of it. If the

(1) 1 T.R. 338. (2) 3 B. 452 (580). (3) 2 Cowp. 451.
(4) 6 M. 303 (310). (5) 7 M. 405.

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contention on behalf of the Government is to be accepted and the jenmi is supposed to have assumed any responsibility, it must follow that the Collector is equally at liberty to realize the arrears of revenue by the sale of other immoveable property or moveable property belonging to him. I must not omit to notice the provision of Section 42 of the Act on which some stress was laid, to the effect that land brought to sale for arrears of revenue shall be sold free of all incumbrances. In my judgment it would be a strain on the language of the section to hold that the phrase "incumbrances," which ordinarily denotes a burden imposed on land by the owner, is intended to denote the interest of the owner himself.

I am of opinion that the appellant has failed to show that there was a valid sale of the respondent's property under the provision of the Act and that therefore the appeal must be dismissed with costs.

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13 M. 124.

[124] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

NARASIMMA (*Defendant No.* 1), *Appellant v.* LAKSHMANA (*Plaintiff*), *Respondent.** [13th February and 17th October, 1889.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Section* 12—*Surrender by abandonment.*

In a suit to recover possession of certain land comprised in an unexpired lease granted to the plaintiff by the first defendant it was pleaded that the plaintiff had left the land waste, and had refused to pay rent or give a written relinquishment of the land, and that the first defendant had accordingly let it to the second defendant:

Held that, although the defence did not disclose a surrender by the plaintiff, recorded as prescribed in the Rent Recovery Act, Section 12, the Court should determine the issue whether there had been a surrender by the plaintiff.

SECOND appeal against the decree of Venkatarangayyar, Subordinate Judge of Ellore, in Appeal Suit No. 709 of 1887, confirming the decree of M. B. Sundara Rau, District Munsif of Masulipatam, in Original Suit No. 465 of 1886.

Suit by a tenant, alleging an unexpired lease for five years against his lessor and a subsequent lessee for recovery of possession of the land and for damages. The lessor in his defence pleaded a surrender, which was not in writing.

The District Munsif framed an issue (the second issue) on the question of surrender; but, holding that the surrender set up by the lessor was invalid by reason of the provisions of Rent Recovery Act (Madras), Section 12, he passed a decree for the plaintiff without taking evidence. His decree was affirmed on appeal by the Subordinate Judge.

Rent Recovery Act (Madras), Section 12, provides as follows :—

"The landholders specified in Section 3 are not empowered to eject tenants from their lands except by a decree of a Civil Court or under the provisions of Section 10 or 41 of this Act. Tenants ejected without such due authority may bring a summary suit before the Collector to obtain reinstatement with damages:

[125] Provided always that tenants shall be allowed to relinquish their lands at the end of the revenue year by a writing to be signed by

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* Second Appeal No. 1359 of 1888.

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them in the presence of witnesses, or at any other time if the landholder is willing to accept the relinquishment."

The first defendant preferred this second appeal.

Mr. *DeRozario*, for appellant.

Krishnasami Chetti, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the

JUDGMENTS.

SHEPHARD, J.—The plaintiff sued to recover land of which, as he alleged, he had been in possession up to the end of fasli 1294 as tenant of the first defendant. The defendant in his written statement admitted the plaintiff's possession up to the end of fasli 1291, but averred that as "he "(the plaintiff) neither executed a khat, nor cultivated the lands, nor paid "the rent for that fasli, his (the defendant's) manager ordered the collec-"tion of the rent in the jamabandi and acceptance of relinquishment "from fasli 1292; that when called upon to do so, plaintiff neither paid "the rent nor presented a relinquishment in writing, but said that he "abandoned the lands in the beginning of that very fasli, and that the land "was therefore left waste, and subsequently in fasli 1295 was rented out "to the second defendant."

Upon these averments which formed the subject of the second issue, the District Munsif ruled, as a matter of law, that they afforded no defence and accordingly gave judgment for the plaintiff without taking any evidence. The question argued on appeal, both in the Subordinate Court and in this Court, was whether such surrender, not being in writing, signed and attested in manner provided by Section 12 of the Rent Recovery Act, could be held to be a valid surrender of the land. This question, which is one on which as far as I can see there is no authority, has been answered in the negative, as well by the District Munsif as by the Subordinate Judge. I think that the interpretation which has been put on the proviso of Section 12 is an erroneous one. It is said that the proviso like the substantive part of the section is devised for the protection of the tenant, and that the security of the tenant requires that no surrender, not recorded in writing, should be treated as binding upon him. There is no doubt that the protection of the tenant against hasty eviction is the main object of the section, and the proviso may have been framed with the [126] same view, for the written and attested record of the tenant's relinquishment would afford him protection against subsequent demands for rent. It is plainly to the interest of both parties that a surrender, when made and accepted, should be recorded in some such way as that provided. But, in my opinion, the section does not render wholly void and inoperative a surrender which, although not so recorded, has in fact taken place. If that was the intention it certainly has not been expressed in plain terms. Indeed, the substantive part of the section does not refer to cases in which a surrender has taken place, because a tenant who has surrendered the land cannot be ejected. If it is said that an intention to avoid oral surrenders, though not clearly expressed, must be inferred from the language of the section, it becomes important to consider the inconvenient consequence which would follow from the construction which the Courts below have put on this section. In this particular case, the tenant appears to have been invited to give a written relinquishment of the land but in vain, and about four years afterwards another tenant having meanwhile been placed in possession, he brings this suit. According to the

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construction contended for by the plaintiff, he might have waited even longer before instituting his suit. His surrender being invalid, he might have brought his suit at any time within the period allowed by the law of limitation. Again, if the construction is the correct one, what protection is there for the landlord whose tenant abandons the land with the declared intention of surrendering it, and refuses, as in fact the plaintiff did, to put his declaration in writing?

Having regard to the language of the section and to the above considerations, I am of opinion that a surrender by a tenant is not invalid, because it is not recorded in manner provided in Section 12 of the Rent Act. No evidence having been taken, I think the case must be referred to the Lower Appellate Court for a finding on the second issue, both parties being at liberty to adduce evidence thereon.

MUTTUSAMI AYYAR, J.—I am also of opinion that an oral relinquishment, followed by abandonment of the land for several years, is not inoperative under the proviso of Section 12, Act VIII of 1865. That section first negatives any power in the landholder to eject his tenant except under the provisions of the Act. The power contemplated is obviously not a right arising from [127] a distinct contract between the parties. The proviso further declares a power in the tenant to relinquish the land in writing at the end of the revenue year, or at any other time if the landholder is willing to accept the relinquishment. The apparent intention is to give the tenant a facility which the landlord does not possess in terminating the tenancy of his own will. The words "at any other time if the landlord is willing to accept the relinquishment" are again intended to afford an additional facility subject to the landlord's consent. A writing is prescribed as evidence when the tenant chooses to relinquish the land as a matter of right and thereby to protect himself against continued liability for payment of rent, and the proviso was not intended to apply to cases where the tenancy is determined by mutual contract such as surrender or abandonment for several years under circumstances from which a surrender might reasonably be referred. In the case before us the respondent contended that the tenancy commenced with a lease for five years, commencing with fasli 1286 and ending with fasli 1290, that the tenant neither cultivated the land nor paid rent for 1291, that when questioned about it at the annual settlement, he orally relinquished the land from 1292, that the land lay unoccupied for 1293 and 1294, that the landlord therefore rented it out to the second defendant in 1295, and that he was entitled to do so. If this contention were well-founded, it would amount to a plea of surrender or an abandonment for some years arising from a mutual contract expressed or implied. In such a case a writing does not seem to be necessary and the proviso is not applicable. Though the second issue raised the question of surrender, the Courts below recorded no distinct finding, but rested their decision on the fact that there was no written evidence of relinquishment. The case in *Dinabhandu* v. *Lokanadhasami* (1) only decided that the act of allowing the land to lie waste was not conclusive evidence of an intention to abandon.

I therefore concur in the order proposed by my learned colleague.

[In compliance with the above order, the Subordinate Judge returned a finding, which was in favour of the plaintiff. This finding was accepted by their Lordships on the rehearing of the second appeal which they accordingly dismissed with costs.]

(1) 6 M. 322.

13 M. 128.

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APPELLATE CIVIL.

13 M. 128.

[128] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

PICHUVAYYAN (*Defendant*), *Appellant v.* SUBBAYYAN (*Plaintiff*), *Respondent.** [14th and 24th October, 1889.]

Hindu law—Adoption among Brahmans—Ceremony of adoption after marriage of person to be adopted.

Suit for partition of family property. The plaintiff sued as the adopted son of defendant, who had, after performing the usual ceremony of adoption, long treated him as his adopted son. The defendant denied that the plaintiff was his adopted son on the ground (which was established by the evidence) that the plaintiff was married at the date of the ceremony of adoption. The parties were Brahmans and members of the same gotra by birth :

Held (1) the adoption set up was invalid ;

(2) the defendant was not estopped by his conduct from denying the validity of the adoption.

[F., 35 A. 263 (264)=11 A.L.J. 293=18 Ind. Cas. 960 ; R., 32 A. 247 (248) (P.C.)=7 A. L.J. 349=12 Bom. L.R. 402=11 C.L.J. 454=14 C.W.N. 545=6 Ind. Cas. 272 =20 M.L.J. 439=8 M.L.T. 3 ; 11 C.P.L.R. 56 (61).]

SECOND appeal against the decree of W. M. Thorburn, Acting District Judge of Trichinopoly, in appeal suit No. 240 of 1887, reversing the decree of P. Dorasami Ayyar, Principal District Munsif of Trichinopoly, in original suit No. 11 of 1887.

Suit by the plaintiff as adopted son of defendant for partition of the family property.

The District Munsif dismissed the suit, holding, on the evidence as to the ceremony of adoption, that the adoption set up was not established.

The District Judge found that the ceremony of adoption had been sufficient, regard being had to the fact that the parties were Brahmans, and by birth members of the same gotra ; and ruled on the authority of *Dharmadagu* v. *Ramkrishna Chinnaji* (1), *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (2), and *Lakshmappa* v. *Ramava* (3) that the alleged adoption was not invalid by reason of the previous marriage of the plaintiff. He accordingly passed a decree for the plaintiff.

Both Courts found that the defendant had recognized the plaintiff as his adopted son.

[129] The defendant preferred this appeal.

Sadagopa Chary, for appellant.

Krishnasami Ayyar, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the

JUDGMENT.

The principal qusetion argued in this appeal is whether the plaintiff was validly adopted by his uncle, the defendant. The parties are Brahmans, and, when the adoption took place, the plaintiff was married. The District Judge, on the authority of rulings in the High Court of Bombay, has held that, notwithstanding his marriage, the plaintiff was

* Second Appeal No. 130 of 1889.

(1) 10 B. 80. (2) 11 B.H.C.R. 190. (3) 12 B.H.C.R. 364.

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lawfully adopted by the defendant. We are of opinion that this judgment cannot be supported. Apart from the Bombay cases, which proceed upon texts which have no authority in this Presidency, no text or other authority can be cited to justify an adoption taking place after marriage, notwithstanding that the person taken in adoption may belong to the same *gotra* as the adopter. On the other hand such authority as there is on the subject is against the respondent's contention. In the Dattaka Chandrika, the author, treating of the rites which must be performed in the adopter's family, refers to the rite of marriage as that by which the filial relation can be completed in the case of Sudras. An adoption, therefore, in order to be valid, even among Sudras, must take place before the marriage of the adopted son (Dattaka Chandrika, Section II—§ 29-31, p. 643, Stokes' Hindu Law Books). The same writer fixed Upanayanam as the rite which completes the filial relationship in the case of Brahmans, and though this rule, with regard to Upanayanam has been relaxed in the case of *sagotras*, there is no warrant for the contention that the relaxation should be extended to marriage.

The rule that no one is eligible for adoption after marriage was recognised by the Sadr Adawlut in 1823—*Chettycolum Prusunna Vencatachella Reddyar* v. *Chettycolum Moodoo Vencatachella Reddyar* (1) and *Ranee Sevagamy Nachiar* v. *Mooto Vizia Raghoonadha Satooputty* (2)—and in 1830 Sir T. Strange sums up his view of the law by saying "upon these principles it would seem as if there could be no adoption of one who is married, marriage not being capable, like tonsure and investiture, of **[130]** annulment"—Strange's Hindu Law, Vol. I, p. 79, and see West and Buhler, 1063, &c. In the case of *Vythilinga* v. *Vijayathammal* (3) the parties were Sudras. The Court referred, with approval, to the decision of the Sadr Court in 1823, and held the adoption made at a time when he was a married man and father of three children invalid. The respondent's vakil relied on the Full Bench decision in *Viraragava* v. *Ramalinga* (4), in which it was held that among Brahmans, in Southern India, the adoption after Upanayanam of a boy of the same *gotra* with the adoptive father was permissible. For this exception, from what admitted to be the general rule, in favour of the adoption of a *sagotra*, authority was found as well in the books as in the evidence of usage adduced in the case. There is no colour for the argument that this decision abrogated the rule according to which the previous marriage of the child is an obstacle to his adoption. There is, as we have shown, distinct authority for the rule, and the recognition of it is in no way inconsistent with the decision regarding the ceremony of Upanayanam. It must be borne in mind that a valid adoption presupposes a gift by the father or mother, and they have no power under Hindu Law to give their daughter-in-law or son's wife in adoption. For these reasons we must hold that the adoption of the plaintiff was invalid and of no effect. Failing the validity of the adoption, it was urged on the respondent's behalf that he was nevertheless entitled to a decree, inasmuch as the appellant was estopped from denying the adoption. This point was not raised in the issues settled between the parties, and though it did form one of the grounds of appeal to the District Court, no facts such as are required to support it are found or even alleged. The mere fact that the appellant recognized the respondent as his adopted son is

(1) (1823) M. S. D. 406.
(2) *Ib.*, p. 101.
(3) 6 M. 43.
(4) 9 M. 148.

clearly insufficient to raise a case of estoppel, for such recognition may be, and probably was, due to a mistake on the part of the appellant, a mistake in law, which also was probably shared by the respondent. In order to avail himself of the doctrine of estoppel, the respondent would have had to prove that the appellant by a representation which he knew to be unfounded intentionally misled the respondent into a position prejudicial to the interests which he would otherwise have possessed. There is no trace of any evidence to show that there [131] was any intentional deceit on the appellant's part or that the respondent has by his adoption been deprived of any rights in his natural family—*Vishnu* v. *Krishnan* (1).

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We must reverse the decree of the District Judge and restore that of the District Munsif.

The appellant is entitled to his costs in this and in the Lower Appellate Courts.

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13 M. 131=1 Weir 345.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* RAMASAMI.* [21st August, 1889.]

Penal Code, Section 353—*Public servant—District Municipalities Act (Madras Act IV of* 1884), *Section* 41.

A Municipal Inspector is a public servant within the meaning of Section 41 of the Madras District Municipalities Act.

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by G. W. Fawcett, Acting District Magistrate of Trichinopoly.

Kallaya Pillai, the occupier of a certain house in Trichinopoly, was called on by the Municipal Council to remove an obstruction in the public street. He neglected to do so, and was served with a notice under Section 264 of the District Municipalities Act (Madras Act IV of 1884) to the effect that if he did not remove the obstruction as required, the Municipal Council would have it removed and would recover from him the cost of its removal. The notice having been disregarded, the Council removed the obstruction and demanded the cost (Rs. 7-0-7) from him. This demand also was unheeded, and the Chairman accordingly issued a warrant of distress on him. When the Municipal Inspector came to levy the distress, Ramasami Pillai, the father of Kallaya Pillai, who had [132] meanwhile come to live in the house, assaulted him, pushing him out of the house. Ramasami Pillai was thereupon charged under Section 353 of the Penal Code with the offence of using criminal force to deter a public servant from the discharge of his duty as such. The Town Sub-Magistrate, without taking evidence as to the alleged assault, held that the levy of distress was irregular, in that the warrant should have been issued on the father as owner of the house and not on the son, and that the Inspector was consequently a trespasser and might be lawfully resisted. He accordingly discharged the accused.

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* Criminal Revision Case No. 286 of 1889.

(1) 7 M. 3.

1889 AUG. 21. — APPELLATE CRIMINAL. — 13 M. 131= 1 Weir 345.

The report of the case by the Acting District Magistrate, after stating the above facts, continued as follows:—

"It is not necessary, at present, to discuss the procedure of the Municipal Council previous to the issue of the demand, though I may remark that it was apparently correct. It is sufficient, first, that the distress warrant entrusted to the Inspector for execution was, according to the prosecution evidence, a direction given by a public servant, the Chairman of the Council acting apparently 'in good faith under colour of his office,' and, secondly, that the Inspector was also a public servant apparently 'acting in good faith under colour of his office'—*vide* Indian Penal Code, Section 99, Clauses 1 and 2—and the accused person had no right of private defence against the Inspector's seizure, even if it was not —and even this was not shown—justifiable by law.

"I called on the Sub-Magistrate to explain on this point, and he replies (1) that the Inspector was not a public servant, and (2) that though he was acting under the direction of a public servant, his act, *i.e.*, the distress, was directed against a person other than that named in the public servant's (the Chairman's) direction. This position is untenable, even leaving out of consideration the second part of it, for the Inspector is distinctly a public servant under Section 41 of Act IV of 1884."

The Acting Government Pleader (*Subramanya Ayyar*), for the Crown.

Tyagarajayyar, for the accused.

JUDGMENT.

The Inspector is clearly a public servant within the meaning of Section 41, Madras Act IV of 1884, and if, as stated by the Magistrate, he was assaulted in the execution of a distress upon property in which the father may, perhaps, have a **[133]** joint interest, the offender will be liable to punishment under Section 353 of the Penal Code.

The order of discharge is set aside and the case must be re-tried.

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13 M. 133.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

NARASANNA (*Plaintiff*), *Appellant v.* GANGU AND ANOTHER (*Defendants, Nos.* 1 *and* 6), *Respondents.**
[16th and 20th August, 1889.]

Hindu Law—Deva dasi—Inheritance.

On the death of a prostitute dancing girl her adopted niece, belonging to the same class, succeeds to her property, in whatever way it was acquired, in preference to a brother remaining in caste.

[**F.**, 38 C. 493 (498)=15 C.W.N. 807=9 Ind. Cas. 657; **Appr.**, 21 C. 697 (701); **R.**, 23 M. 171 (177); 26 M. 509 (512); 17 C.L.J. 438=17 C.W.N. 679 (693); 13 C.P.L.R. 81 (84); 24 M.L.J. 223 (227)=13 M.L.T. 83; 4 N.L.R. 37; **D.**, 25 C. 254 (257).]

SECOND appeal, against the decree of L. Moore, Acting District Judge of Cuddapah, in appeal suit No. 73 of 1886, confirming the decree of S. Dorasami Ayyangar, District Munsif of Cuddapah, in original suit No. 484 of 1885.

* Second Appeal No. 652 of 1887.

1889 AUG. 20. — APPELLATE CIVIL. — 13 M. 133.

Suit to recover certain land, alleged by plaintiff to have been the property of his father, which, on his death, passed into the possession of the plaintiff's sisters. Defendant No. 1 was the widow of Konappa, the plaintiff's brother, and defendant No. 6 was her daughter, who claimed title as the adopted daughter and heiress of a dancing girl Pedda Lakshmi, the plaintiff's sister. The plaintiff was divided from the rest of the family and had received, from his father, his share of the family property.

The District Munsif dismissed the suit, and, on appeal, his decree was affirmed by the District Judge.

The plaintiff preferred this appeal.

Rama Rau, for appellant.

Sadagopacharyar, for respondents.

The further facts of the case and arguments adduced on this second appeal appear sufficiently for the purpose of this report from the

JUDGMENT.

The Acting District Judge has found that the sisters, Pedda Narasi and Lakshmi, each took one-fourth share in **[134]** the plaint property, and, on the ground that the sisters' property must revert to the surviving male member of the family, holds that plaintiff is entitled to recover it. The respondents contend that the case is governed by the peculiar law applicable to dancing women and that plaintiff is no heir.

The two sisters were admittedly dancing women, though their brothers, plaintiff and Konappa, remained in caste. At the division the two sisters were given shares. There is now no dispute that defendant No. 1 is entitled to the share of her late husband Konappa, but the question is as to the devolution of the property of the two sisters. Pedda Narasi died first and her degraded sister Lakshmi was, therefore, her heir. The question then is who succeeds to the property left by Lakshmi.

The contention is practically between her brother the plaintiff and defendant No. 6, her niece, who, though not formally adopted by Pedda Narasi, was introduced by her into the temple and has become a *deva dasi*. The decision of this Court in *Sivasangu* v. *Minal* (1) would, no doubt, govern the case were it clear that the property had been acquired by the gain of prostitution, but it is urged that the property was in its origin family property, which should, therefore, revert to the surviving male member of the family.

It is impossible for us to say whether this contention is even well founded on fact. Unless part of the property divided in 1863 had been acquired by the sisters in the exercise of their profession, it is not explained how they came to be allotted a share at all. They were certainly not entitled to it under the ordinary rules of Hindu law. However that may be, it appears to us that it is immaterial how the property was originally acquired. It was at the death of Lakshmi, the property of a dancing girl, and the question is who is the nearest heir to the dancing girl. The general rule is that the legal relation between a prostitute dancing girl and her undegraded relations remaining in caste becomes severed, and in this view the defendant No. 6 is the only legal heir to Lakshmi.

Taking this view, we must hold that the plaintiff's claim fails with regard to the whole property. The second appeal is, therefore, dismissed with costs.

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(1) 12 M. 277.

1889
Oct. 25.

APPEL-
LATE
CIVIL.

13 M. 135.

13 M. 135.

[135] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

VENKATARAMAYYAR (*Plaintiff*), *Appellant v.* KOTHANDARAMAYYAR AND ANOTHER (*Defendants*), *Respondents.**
[17th July and 25th October, 1889.]

Limitation Act—Act XV of 1877, *Sections* 7, 9, 19—*Minority of plaintiff—General Clauses Act—Act I of* 1868, *Section* 3, *Clause* 2.

Suit to recover principal and interest due on a registered bond executed by defendants in favour of the plaintiff's father. The date of the bond was 20th June 1870; the principal sum was payable on 20th June 1872; the plaintiff's father died in 1875; the defendants made acknowledgments of their liability in June 1877; the plaintiff came of age in 1885, and this suit was brought on 11th August 1887:

Held, the suit was not barred by limitation.

[R., 14 Ind. Cas. 694 (698).]

APPEAL against the decree of Shephard, J., sitting on the Original Side of the High Court in civil suit No. 173 of 1887, dismissing the suit.

Suit to recover principal and interest due on a registered bond executed by defendants in favour of the plaintiff's father.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the Appellate Court.

The defendants set up the plea of limitation, and the learned Judge held that it afforded a defence to the suit. He delivered judgment as follows :—

JUDGMENT (ORIGINAL SIDE).

SHEPHARD, J., (after reciting the allegations in the plaint proceeded :—)" On these facts, as stated in the plaint, it was contended on the defendants' behalf that the suit was on the face of it barred by limitation, more than six years having elapsed since the date of the alleged acknowledgments. For the plaintiff it was urged that inasmuch as he was a minor when the acknowledgments were made he was entitled to the benefit of Section 7 of the Limitation Act. The section is so worded as to give colour to this argument; for it provides not, that if a person entitled to sue is a **[136]** minor when his right to sue accrues he shall be allowed a fresh period wherein to sue, but that he shall be allowed such fresh period if he was a minor at the time from which the period of limitation is to be reckoned, and it was argued that the date from which the period had to be reckoned was the date of the acknowledgment. The point thus raised could not have arisen on the Acts of Limitation prior to that of 1877, for the corresponding section of the Acts of 1859 and 1871 are differently worded. No authorities were cited, and as far as I can ascertain there are none exactly in point. But the vakil for the defendants called attention to Section 9 as showing that no allowance was to be made for a disability arising after the accrual of the right of action.

"I am of opinion that the plaintiff is not saved by the provision of Section 7. The plaintiff is suing as representative of his father against whom time was running at the date of his death in 1875. The effect

* Appeal No. 41 of 1888.

of the acknowledgments no doubt was to give the plaintiff a fresh period which apart from any question of disability expired in 1882 or 1883. His contention must be that during that interval and until 1885, when he is said to have come of age, time did not run against him. Time was running against him before the acknowledgments were made, but afterwards ceased to run. This contention, as it appears to me, involves a complete disregard of the provision of Section 9, which says that when once time has begun to run, subsequent disability shall stop it. An acknowledgment does not give a new cause of action, and the fact that it has been made does not make it the less true that time had previously begun to run. Section 9, therefore, becomes applicable, and reading it with Section 7, I must hold that the plaintiff, though he was a minor at the time from which the fresh period should be completed, cannot claim the protection of that section. It may be well to mention with reference to the change of language used in Section 7, that it may be accounted for without supposing that any change of the law was intended. The object, I think, must have been to fix a definite *terminus a quo* and to avoid the difficulties surrounding the question when the cause of action arises, for the date of the accrual of a cause of action does not always give the starting point for the purpose of limitation. However this may be, I do not think it can have been intended to alter the previous rule according to which Section 7 conferring a personal privilege on the minor avails only when the right to sue accrued, and time [137] would otherwise have begun to run, during the minority of the person claiming the privilege. I must dismiss the suit with costs."

1889 OCT. 24.

APPELLATE CIVIL.

13 M. 135.

The plaintiff preferred this appeal.

Rama Rau, for appellant.

Sundaram Sastri and *Seshagiri Ayyar*, for respondents.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the

JUDGMENT (APPEAL SIDE).

The plaintiff sues on a registered bond, repayable within two years, executed to his late father on 20th June 1870. Plaintiff's father died in 1875, leaving plaintiff, a minor. Plaintiff is said to have attained his majority in 1885. It is further alleged that defendants made acknowledgments of their liability in 1876 and 1877, so as to give a new period of limitation under Section 19 of the Limitation Act. Time had begun to run against plaintiff's father and therefore against plaintiff before the dates of these acknowledgments, and the question is whether plaintiff is entitled to the benefit of Section 7, these acknowledgments in his favour having been given and the new period of limitation having arisen during his minority, when time was already running against him.

The learned Judge who tried the suit on the Original Side held that plaintiff was not sued by the provisions of Section 7, notwithstanding the alteration made in that section by the Limitation Act of 1877. He considered that the object of the alteration was only to fix a definite *terminus a quo* since the date of the accrual of a cause of action does not always give the starting point for the purpose of limitation. He held, therefore, that Section 9 was applicable, and that the suit was barred.

If this be so, the only effect of the acknowledgment would be to give to the minor plaintiff, against whom time was already running, an extension of six years (calculated under Article 116 according to the nature of the original liability) within which to bring his suit, such extension being

1889 Oct. 25. — Appellate Civil. — 13 M. 135.

computed from the date of the acknowledgment. In this opinion we are not able to concur. We observe that Section 19 speaks of a new period of limitation, not an extension of the old period.

Under Section 3, Clause 2 of the General Clauses Act, the word "from" is sufficient to exclude the first in a series of days or any other period of time. As, therefore, under Section 19 of the Limitation Act the date of acknowledgment will have to be [138] included in computing the new period of limitation, it is evident that the former period, already running, was not extended, but terminated, and that an entirely new period runs from the date of acknowledgment.

The plaintiff was a minor at the date from which that new period is to be reckoned, and he therefore falls under the strict wording of Section 7. We do not think that Section 9 will take away this privilege since it is not subsequent disability which stops the time already running but the operation of law consequent upon the giving of the acknowledgment.

Taking this view, we must reverse the decree and remand the suit to be heard on the merits. The appellant is entitled to the costs of this appeal, and the costs on the Original Side will abide and follow the result.

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13 M. 138=13 Ind. Jur. 454.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

Brahmappa (*Defendant*), *Appellant v.* Papanna (*Plaintiff*), *Respondent.** [15th March, 8th April and 8th October, 1889.]

Hindu law—Inheritance to stridhanam—Right of stepson to inherit.

A Hindu widow having stridhanam acquired from her husband, died leaving no issue. The defendant who was the son of her elder sister took possession. The stepson of the deceased now sued to recover the stridhanam property. It was found that the marriage of the deceased had been celebrated in the *brahma* form.

Held, that the plaintiff was entitled to succeed.

[R., 1 M.L.J. 592 (593).]

Second appeal against the decree of D. Venkatarangayyar, Subordinate Judge of Tadpatri, in appeal suit No. 83 of 1888, reversing the decree of V. Subramanya Ayyar, District Munsif of Penukonda, in original suit No. 327 of 1887.

Suit for possession of certain jewels, the property of a Hindu widow, being stridhanam acquired by her from her late husband. The plaintiff was the stepson of the deceased: the defendant who was the son of her elder sister, had possession of the jewels, and his [139] defence was that they were only three in number, that the deceased had made a gift of two of them to him in writing, and had given him the third to defray her funeral expenses.

The District Munsif held that the stepson was not entitled to inherit to the deceased and dismissed the suit. The Subordinate Judge on appeal reversed this decree.

The defendant preferred this second appeal.

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* Second Appeal No. 1512 of 1888.

Balaji Rau, for appellant. 1889
Bhashyam Ayyangar, for respondent. Oct. 8.

APPEL-LATE CIVIL.

13 M. 138 = 13 Ind. Jur. 454.

JUDGMENT.

Parker, J.—The plaintiff failed to prove the special arrangement set up that he was to inherit the jewels on the death of his stepmother, and it is found that the property was Sunandamma's *stridhanam*. This inference is drawn from the description of the property in the family list. The only question, therefore, is whether plaintiff, the stepson, is a nearer heir than defendant, who is the son of Sunandamma's elder sister.

According to the Smriti Chandrika, Chap. IX, Section 3, Clause 38, (1) the stepson would be entitled to take where the deceased left no issue, husband, or the like.

According to the Mitakshara, Chap. II, Section XI, Clause 11, (2) the property of a woman dying without issue would go to her husband, and on failure of him to his *sapindas*, if the marriage had been in the form *brahma*, *daiva*, *arsha* or *prajapatya*. If the marriage had been in one of the other forms, *viz.*, *asura*, *gandharva*, *rakshasa*, or *paisacha*, the property would, in default of issue to the woman, go to her parents. Mr. Mayne's observation that stepchildren are not entitled to inherit by Mitakshara law except in a single case is based upon Chapter II, Section XI, Clause 22 of the Mitakshara (3)—but the Calcutta High Court in discussing the Mitakshara law, held that when the marriage has been in any of the four modes first mentioned, the husband's kinsmen had the priority, and held that the husband's brother's son was entitled to preference as against the sister's son *Bachha Jha* v. *Jugmon Jha*(4), *A fortiori* the son of a rival wife is a nearer *sapinda* than a husband's brother's son.

[140] In *Teencowree Chatterjee* v. *Dinonath Banerjee* (5) it was held by the High Court of Bengal in 1865 that a son adopted by one wife might succeed to a co-wife's *stridhanam*, but it is not clear from the report whether the parties were governed by the Mitakshara law.

Although the plaint mentioned property is found to be *stridhanam*, its nature and origin are not ascertained. This may also affect its course of descent. See Mayne's Hindu Law, 4th ed., § 619 *et seq.*

I would ask for a finding upon the issue—"Is plaintiff entitled to succeed to the property of Sunandamma," with reference to these observations and allow further evidence to be taken.

Wilkinson, J.—I concur in the necessity for a finding. The order of succession to the property of a woman, who leaves neither children nor grandchildren appears, according to all the authorities, to vary according to the form in which the deceased female was married. If she have been married in one of the five approved forms, her property goes to her husband and his kinsmen. In other cases, it reverts to her father or other kinsmen from whom she had received it. I think it very doubtful whether stepsons precede sister's sons in any case. Clause 38, Chapter IX, Section 3, of the Smriti Chandrika, which appears to be the only direct authority on the point, is inserted between the exposition of the texts of Brihaspati and Manu, and would appear to form a portion of the exposition of the former. The author of the Daya Vibhaga in his exposition of the text of Brihaspati lays it down that "in case of marriages by the *brahma* and similar rites, in default of the husband, and in the case of marriages in

(1) Krishnasami Ayyar's Translation, p. 147.
(2) Stokes' Hindu Law Books, p. 461.
(3) *Ib.*, p. 463.
(4) 12 C. 348.
(5) 3 W.R. 49.

1889 Oct. 8. — Appellate Civil. — 13 M. 138 = 13 Ind. Jur. 454.

the *asura* and similar forms of marriages in default of the father and mother, and mother's sister's son, &c., take." This is the view followed by Siromani in his Commentary on Hindu Law. He says (p. 392) stepsons succeed sister's son, &c., except in the case of property given by a father to a daughter who is married to a husband of a superior class, &c.

In *Teencowree Chatterjee* v. *Dinonath Banerjee* (1) the question whether the adopted son of a woman can inherit her rival wife's *stridhanam* was only incidentally referred to, and the learned Judges quoted no authority in support of their *dictum*.

[141] If the learned Judges who decided *Bachha Jha* v. *Jugmon Jha* (2) under the Mithila law intended it to be understood that in all cases under the Mitakshara the husband's kinsmen are preferred to the father's kinsmen, I am unable to agree with them.

[In compliance with the above order the Subordinate Judge submitted a finding which was to the effect that "the plaintiff is entitled to succeed to the property of Sunandamma as her marriage was in one of the approved forms, namely, *brahma*, and as the plaint property was given to her by her husband as *stridhanam*." He also found that "they belong to the Vysia sect of the Jains."

The second appeal having come on for re-hearing, their Lordships accepted the finding and dismissed the second appeal with costs.]

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13 M. 141.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

SUBUDHI (*Decree-holder*) v. SINGI (*Judgment-debtor*).*
[6th September, 1889.]

Civil Procedure Code, Section 342—Period of imprisonment of judgment-debtor.

The Court cannot fix any period for the imprisonment of a judgment-debtor under Civil Procedure Code, Section 342.

[F., 5 C.W.N. 145 (146).]

CASE referred for the decision of the High Court under Section 617 of the Code of Civil Procedure, by V. Lakshminarasimham Pantulu, District Munsif of Berhampore, as follows:—

"In the execution of small cause suit No. 808 of 1888 (execution petition No. 1142 of 1888 on the file of my Court), the judgment-debtor, Samapalata Singi, was arrested for decree debt at the instance of the decree-holder Andavarapu Domburu Subudhi and committed to the civil jail to be imprisoned for a period of six weeks, from 27th November 1888, the term having been fixed by the Court at its discretion as in some other cases. But before [142] the expiration of the term, the decree-holder applied to the Court to prolong the period of imprisonment for two months more, stating that the debtor could be imprisoned for a period of six months, as the amount of debt exceeded Rs. 50.

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* Referred Case No. 4 of 1889.

(1) 3 W.R. 49. (2) 12 C. 348.

"Although the matter is a simple one, I am compelled to make the reference as it is a point which I have constantly to deal with and as the question seems to have been never decided before."

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Counsel were not instructed.

JUDGMENT.

The Court has no authority to fix any term of imprisonment. On arrest, the judgment debtor, if he fails to pay the amount decreed and costs, is committed to jail. He can only be released therefrom under the provisions of Section 341. If none of these conditions are fulfilled before the expiry of six months in the one case, or six weeks in the other, the judgment-debtor remains in jail the full time.

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13 M. 142=1 Weir 910=2 Weir 327.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* OOLAGANADAN.*
[12th and 16th September, 1889.]

Criminal Procedure Code, Section 261—*Police Act* (*Aet XXIV of* 1859), *Section* 48—*onservancy clauses* "—*Jurisdiction of a Bench of Magistrates.*

Offences under Police Act, Section 48, are within the cognizance of a Bench of Magistrates.

CASE referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by E. Gibson, District Magistrate of Tanjore.

The Acting Government Pleader (*Subramanya Ayyar*), for the Crown.

The facts of the case and the arguments adduced on it appear sufficiently for the purpose of this report from the

JUDGMENT.

The accused has been convicted by the Bench of **[143]** Magistrates at Negapatam for exposing goods for sale on the road so as to obstruct passengers, and fined two annas. The District Magistrate refers the case on the ground that, according to the construction placed by the High Court in Criminal Revision Cases Nos. 69 of 1886 and 488 to 492 of 1888, upon the phrase "conservancy clauses" in Clause (*b*), Section 261 of the Criminal Procedure Code, an offence punishable under Section 48 of the Police Act XXIV of 1859 is not within the cognizance of a Bench of Magistrates. The decisions referred to were passed by single Judges in the admission Court and not by a Bench.

Under Section 261, Clause (*b*) of the Criminal Procedure Code, Benches of Magistrates are empowered to try certain offences against Municipal Acts and the conservancy clauses of Police Acts. On referring to the General Police Act XXIV of 1859 we observe that Section 48 is the only section which can possibly be referred to, since all other offences punishable under the Act (Sections 18, 20, 44, 45, 46, 47) are offences by or against Police officers in the execution of their duty. The side note to Section 48 describes the subject of the section as "certain duties of Police officers

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* Criminal Revision Case No. 343 of 1889.

1889 SEP. 16 — APPELLATE CRIMINAL. — 13 M. 142 = 1 Weir 910 = 2 Weir 327.

within the limits of towns, obstructions and nuisances in roads;" and as the eight clauses of the section are governed by the preamble, we are of opinion that all the clauses relate to offences which are obstructions and nuisances in roads.

Clause 4, Section 48, is moreover identical with Section 366 of the Madras Municipal Act I of 1884, which falls under Part VI, General Conservancy, and also with Section 203 of the District Municipalities Act, and the Government Pleader has pointed out that other clauses in Section 48 of the Police Act have been reproduced in the conservancy sections of the Acts relating to the Madras and District Municipalities.

Taking this view we are of opinion that Section 48 of the Police Act which relates to obstructions and nuisances in roads (within the limits of towns) is a general conservancy clause, and that offences committed thereunder are within the cognizance of a Bench of Magistrates. The conviction was therefore right.

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13 M. 144.

[144] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* NARAKKA AND OTHERS (*Petitioners*).*
[2nd October, 1889.]

Criminal Procedure Code, Sections 95, 476.

The High Court has no power on appeal to set aside a complaint duly made by a Subordinate Court under Section 476 of the Code of Criminal Procedure.

[R., 21 M. 124 (F.B) = 2 Weir 593; 17 A.W.N. 64; Rat. Un. Cr. Cas. 701 (703); Rat. Un. Cr. Cas. 895 (897); Expl., 16 A. 80.]

PETITION praying the High Court to revoke the order for prosecution of the petitioners passed by the Sessions Court of Kurnool.

The Sessions Judge of Kurnool being of opinion that there was ground for inquiring into the offence of giving false evidence committed before him in Sessions Case No. 18 of 1889 by the present petitioners sent the case under Criminal Procedure Code, Section 476, to the District Magistrate of Kurnool for inquiry.

The present petitioners prayed for the revocation of the above proceedings of the Sessions Judge.

Parthasaradhi Ayyangar, for petitioners.

JUDGMENT.

The Court has no power, on appeal, to set aside a complaint duly made by a Subordinate Court under Section 476, Code of Criminal Procedure, see *Queen-Empress* v. *Rachappa* (1). Without expressing any opinion as to the desirability of the prosecution of the second prosecution witness and of the defence witnesses we can only say that no sufficient grounds have been shown for interfering on revision with the exercise of the Judge's discretion. We think it is to be regretted that the Judge should have ordered the criminal prosecution of a child of such a tender age (8 years) as Lakshmakka, but the Magistrate will no doubt be careful

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* Criminal Miscellaneous Petition No. 86 of 1889.

(1) 13 B. 109.

to consider whether her statements, if false, were also wilfully false, before he commits her for trial, and whether she knew and realized the nature of the evidence she was giving.

1889 OCT. 2. — APPELLATE CRIMINAL. — 13 M. 144.

The petition is dismissed.

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13 M. 145.

[145] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MIRKHAN (*Plaintiff*) *v.* KADARSA (*Defendant*).*
[8th November, 1889.]

Civil Procedure Code, Section 15 Act I of 1889, Section 13 - Jurisdiction of Small Cause Courts to hear suits cognizable by Village Munsif.

The term "Court of lowest grade" in Civil Procedure Code, Section 15, refers only to Courts to which the Civil Procedure Code is applicable, and consequently Small Cause Courts have concurrent jurisdiction with Courts of Village Munsifs to hear suits which are cognizable by the latter.

CASE referred under Section 617 of the Code of Civil Procedure for the decision of the High Court by V. Malhari Rau, District Munsif of Coimbatore, as follows :—

"This is a suit for the recovery of Rs. 18 for arrears of rent from 13th January 1887 to 11th January 1889 under a contract of rent, dated in January 1883, under which defendant promised to pay a monthly rent of As. 12 for a house in his occupation.

"The suit is one which is cognizable by a Village Court under Madras Act I of 1889, Section 13 of which enacts :—'The following are the suits which shall be cognizable by Village Courts, namely, claims for money due on contract, or for personal property, or for the value of such property, when the debt or demand does not exceed in amount or value the sum of Rs. 20, whether on balance of account or otherwise.'

"The expression in the present Act I of 1889, Madras, Section 13, is :—'The following are the suits which shall be cognizable.' This is a change from the old regulation, which simply empowered Village Munsifs to try such suits as might be preferred to them. It is therefore no longer optional with parties who have to institute the suits coming under the description given in that section in the Village Courts and not in a Small Cause Court.

"It may be that Section 15 of the Civil Procedure Code does [146] not apply to a Village Court. But that circumstance does not affect a Court to which the section applies, and which has therefore to be guided by its provisions. And the section does not necessarily become applicable to the Village Courts, because parties have to resort to them.

"The Small Cause Courts Act, IX of 1887, Sections 16 and 32, do not affect the question, as the jurisdiction of Village Munsifs in Madras is expressly saved under Section 3."

Counsel were not instructed.

JUDGMENT.

There is no doubt that the Village Munsif's Court has jurisdiction to hear the suit under Section 13, Madras Act I of 1889, but the question is whether the District Munsif is precluded from hearing it by the provisions of Section 15 of the Civil Procedure Code.

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* Referred Case No. 10 of 1889.

1889 Nov 8. — Appellate Civil. — 13 M. 145.

Under the old law the Small Cause Court had concurrent jurisdiction (*Parasoorama Pillay* v. *Ramasawmy* (1),) and we have to consider whether the new Act has in any way changed this state of affairs.

The Civil Procedure Code has no application to the Courts of Village Munsifs at all, see Section 6, and there is nothing in Madras Act I of 1889 to extend its provisions to Village Munsifs' Courts. Sections 2-4 make it clear that the Courts as now reconstituted are the same Courts that formerly existed under Madras Regulation IV of 1816, and Section 4 makes it clear that no Civil Court should either acquire or lose jurisdiction unless any village or area was withdrawn from the operation of the Act.

We are therefore of opinion that the concurrent jurisdiction remains unchanged, and that the term "Court of the lowest grade" in Section 15, Civil Procedure Code, refers only to Courts to which the Code of Civil Procedure is applicable.

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13 M. 147 (F.B.).

[147] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Parker, Mr. Justice Shephard, and Mr. Justice Handley.

REFERENCE UNDER STAMP ACT, SECTION 49.*
[16th September, 1889.]

Stamp Act, Section 3—Bond.

R. executed a document, by which he promised to pay on demand Rs. 10-12-0 with interest to S.R. The writer of the document and some others signed the document as witnesses:

Held, that the document was a bond and liable to stamp duty as such.

CASE referred to the High Court under Stamp Act, 1879, Section 49, by the District Munsif of Kavali, through C. Ramachandra Ayyar, Acting District Judge of Nellore.

The question referred for determination by the High Court was whether or not the following instrument, which bore a one-anna stamp only, should have been stamped as a bond:—

"Bond executed by Ithadi Ramudu in favour of Swarna Ramanna on the 2nd Sudha, Palguna of the year Parthiva.

"The debt due up to date under the prior bond according to the settlement effected with you this day is Rs. 10-12-0, in words rupees ten and annas twelve. Interest on this is at 12 annas per Rs. 100 per month. I bind myself to pay you the principal and interest at this rate whenever you may make a demand for it. This is the bond passed with my free will and consent in the hand of Nandavanam Venkatasami.

"× Mark of RAMUDU.

"*Witnesses*.

"(Signed) BANDI RAMASAMI.
"(Signed by mark) SWARNA CHINNA VENKATACHALLAM.
"(Signed by mark) SUBHAYA, son of
SWARNA KOTAPPA."

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* Referred Case No. 7 of 1889.

(1) 5 M.H.C.R. 45.

The District Munsif was of opinion that the instrument was a bond, and in his statement of the case he referred to *Reference* [148] *under Stamp Act, Section* 49 (1), *Pattat Ambadi Marar v. Krishnan* (2), Negotiable Instruments Act, Section 46, and Proceedings of the Board of Revenue, No. 1434, dated 24th April 1884.

1889 SEP. 16. — FULL BENCH. — 13 M. 147 (F.B.).

Counsel were not instructed.

JUDGMENT.

We reply to the reference that the document is a bond, see *Reference under Stamp Act, Section* 49 (1), and Section 3 of the Stamp Act.

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13 M. 148=1 Weir 67.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* RAMAYYA AND OTHERS (*Petitioners*).*
[2nd and 5th October, 1889.]

Penal Code, Sections 97, 146—*Self-defence—Rioting—Unlawful distraint.*

A landlord who had not tendered to his tenant such a patta as the latter was bound to accept under the Madras Rent Recovery Act, distrained his cattle for arrears of rent, the assistance of the Police having been procured for the purpose. The tenant, with the assistance of eleven other persons, forcibly obstructed the removal of the cattle which had already been actually seized and driven for some yards. They were charged with the offence of rioting and convicted :

Held, that the conviction was right.

[F., 21 M. 296 (298)=1 Weir 135; R., 21 M. 78 (82)=1 Weir 123; D., 1 Weir 126 (127).]

PETITION under Criminal Procedure Code, Sections 435, 439, praying the High Court to revise the proceedings of the Additional Deputy Magistrate of Kistna in criminal appeal No. 72 of 1888, presented against the convictions of petitioners under Penal Code, Section 146, by the Second-class Magistrate of Bandar town in calendar case No. 579 of 1888.

The accused preferred this revision petition.

Pattabhiramayyar, for petitioners.

The facts of the case appear sufficiently for the purpose of this report from the following

JUDGMENT.

The facts found are that the complainant, the landlord, had distrained the moveable property of first accused (his [149] tenant) under the Rent Recovery Act, for arrears of rent, whereupon the first accused, with the assistance of eleven others, forcibly removed the distrained property. It is also found that the patta tendered by the landlord contained provisions which were illegal and was not such a patta as the first accused would have been bound to accept.

The accused relied upon the Proceedings of the High Court of 19th November 1875 (3) as justifying their action. It was there held that a landholder in distraining moveable property under the Rent Recovery

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* Criminal Revision Case No. 299 of 1889.

(1) 10 M. 158. (2) 11 M. 290. (3) 8 M.H.C.R. App. XI.

1889 Oct. 5. — Appellate Criminal. — 13 M. 148 = 1 Weir 67.

Act acted upon his own responsibility, and if he attempted to seize the goods of his tenant when no rent was in arrear, mere obstruction to the seizure was not an offence. The Magistrate had there treated the case as one of obstruction to legal process.

In this case, however, there is evidence that the cattle had been actually seized, the attachment lists prepared, and the cattle driven some 20 yards before the first accused and his men came up and forcibly obstructed the removal of the cattle off the ground. Moreover the distraint itself was carried out under Section 19 of the Rent Recovery Act, the assistance of the Police having been procured for the purpose.

It appears to us that under such circumstances the use of force to rescue the cattle was clearly unlawful, and that the cattle having been attached there was no right of private defence of property. If the attachment had been made unlawfully, the first accused should have had recourse to the properly constituted authorities.

We must dismiss this petition for revision.

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13 M. 150 (F.B.).

[150] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Parker, Mr. Justice Shephard, and Mr. Justice Handley.

SAMARAPURI (*Insolvent Debtor*), *Appellant v.* PARRY AND COMPANY (*Creditors No.* 1), *Respondents.**
[9th, 12th and 17th September, 1889.]

Insolvent Act—11 & 12, *Vic., Cap.* 21, *Sections* 47, 51—*Civil Procedure Code, Section* 642—*Exemption from arrest on civil process* redeundo.

The Commissioner in Insolvency committed an insolvent to jail by an order under Section 51 of the Insolvent Act :

Held by the Full Bench, that an order made under Section 51 of the Insolvent Act is a final order : and a Commissioner in Insolvency has no power under that section to commit an insolvent to jail, but must leave the excepted judgment-creditors (if any) to their ordinary remedies for the time mentioned in the order. *Nixon* v. *Chartered Mercantile Bank* (I.L.R., 8 Mad., 97) overruled.

The insolvent having been discharged from jail under the rule laid down by the Full Bench as above, was immediately arrested on a warrant obtained by a judgment-creditor :

Held per Shephard, J., that the insolvent was not privileged from arrest as being on his way back from Court.

APPEAL by the insolvent against an order made on 15th July 1889 by Wilkinson, J., sitting as Commissioner of the Insolvent Court, on insolvent petition No. 70 of 1888.

On 11th March 1889 Kernan, J., the then Commissioner, made an order in this insolvency as follows :—

"It is ordered that the further hearing of this matter be adjourned to the fifteenth day of July next, and that the said insolvent, Mundy Samarapoory Chetty, be remanded to custody until the said fifteenth day of July next at the suit of the said creditors, Messrs. Parry and Company, creditors No. 1, and B. C. Narayanappa Chetty, creditor No. 17, and it is further ordered that the said Messrs. Parry and Company and

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* Appeal No. 14 of 1889.

B.C. Narayanappa Chetty do pay batta at the rate of 3 annas a day for the said period to the said insolvent." 1889 SEP. 17.

On the 15th July WILKINSON, J., made the order appealed against, which was as follows :— FULL BENCH.

[151] "It is ordered that under 11 and 12, Vic., Cap. 21, Section 51, the said insolvent, Mundy Samarapoory Chetty, be not entitled to his discharge until he shall have been in custody at the suit of the said Messrs. Parry and Company for a period of one year from the date hereof, and that they, the said Messrs. Parry and Company, do pay batta at the rate of 3 annas per day for the said period of one year, and it is further ordered that the further hearing of this matter be adjourned for one year from the date hereof." 13 M. 150 (F.B.).

The judgment of WILKINSON, J., was as follows :—

"I do not consider that I am precluded by the order of Mr. Justice Kernan, passed on the 11th March last, from passing orders under Section 51 of the Act as to the insolvent's detention in jail. Whether or not Mr. Justice Kernan intended his order to be one passed under Section 51 or not seems doubtful; but, even if it were, I think the terms of Section 51 are wide enough to permit the Court to extend the term of detention, so that on the whole the insolvent be not imprisoned for more than two years. Mr. Justice Kernan was of opinion that the insolvent had carried on trade recklessly. In that opinion I fully concur. The petitioner's present liabilities amount to Rupees 1,28,751. He has represented his assets as Rupees 23,864, but the Official Assignee has only been able to recover Rupees 110, and no explanation has been offered as to the balance which is not forthcoming."

The further facts of this case appear sufficiently for the purpose of this report from the order of reference to the Full Bench.

Sections 47, 51 and 52 of the Insolvent Act are as follows :—

Section 47.—And be it enacted, that upon application to the Court for that purpose it shall be lawful for the Court to declare that the insolvent is entitled to his personal discharge under this Act, and to order the same accordingly, which order of discharge shall have the effect of protecting his person from arrest in respect of all demands inserted in his schedule or established in the same Court; and if such insolvent be in custody, it shall be lawful for the Court to order his immediate discharge from custody accordingly, or to dismiss or give leave to amend the petition aforesaid, or to order the insolvent to amend his schedule, or to adjourn the hearing until a future day, or to make a reference to the examiner or other officer of the said Court to make inquiry into any matter of account, or into the truth of the schedule or schedules, and to report thereon to the Court; and it shall also be lawful for the Court to remand the insolvent to prison, if a prisoner, until a further hearing, or until a further time to be named in such order, or to commit the insolvent to custody for any debt or demand, if he shall not be in custody at the time of the hearing, and to cancel or renew any such order as is hereinbefore mentioned which may have been given for the purpose of affording interim protection to the [152] insolvent from arrest, and to order and direct that the Assignee shall make some reasonable allowance for maintenance of the insolvent until final order, the amount of which shall be fixed by the Court, and shall not exceed 5 Company's rupees per week; and the Court by which any order of discharge shall be made upon any such hearing as is hereinbefore mentioned

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shall by such order direct that the Assignee shall give such notice of such order as to the Court shall seem fit and convenient.

Section 51.—And be it enacted, that in case it shall appear to any such Court that such insolvent shall have contracted any of his debts fraudulently, or by means of breach of trust, or by means of false pretences, or without having any reasonable or probable expectation at the time when contracted of paying the same, or shall have fraudulently or by means of false pretences obtained the forbearance of any of his debts by any of his creditors, or shall have put any of his creditors to any unnecessary expense, by any vexatious or frivolous defence or delay, to any suit for recovering any debt or any sum of money due from such insolvent, or shall be indebted in costs incurred in any action or suit vexatiously brought or defended, or shall be indebted for damages recovered in any action for criminal conversation with the wife, or for seducing the daughter or servant of the plaintiff in such action, or for breach of promise of marriage made to the plaintiff in such action, or for damages recovered in any action for a malicious prosecution, or for a libel or for slander, or assault or battery, or malicious arrest, or in any other action for a malicious injury done to the plaintiff therein, or in any action of tort or trespass to the person or property of the plaintiff therein, wherein it shall appear to the satisfaction of such Court that the injury complained of was malicious, or if it shall appear that the insolvent's whole debts so greatly exceed his means of providing for the payment thereof during the time when the same were in the course of being contracted, reference being had to his actual and expected property, as to show gross misconduct in contracting the same, then and in every such case it shall and may be lawful for such Court to adjudge that such insolvent shall be so discharged and so entitled as aforesaid forthwith, excepting as to any debts, sum or sums of money, or damages to be specially mentioned in the order, and as to such debt or debts, sum or sums of money, or damages, to adjudge that such insolvent shall be so discharged and so entitled as aforesaid as soon as he shall have been in custody at the suit of the person or persons who shall be creditor or creditors for the same respectively, for such period or periods, not exceeding two years on the whole, as such Court shall direct.

Section 52.—And be it enacted, that in all cases where it shall have been ordered that any such insolvent shall be discharged from imprisonment as aforesaid at some future period, such insolvent shall be subject and liable to be detained in prison, and to be arrested and charged in custody, at the suit of any one or more of his creditors with respect to whom it shall have been so ordered, at any time before such period shall have arrived, in the same manner as he would have been subject and liable thereto if this Act had not passed. Provided nevertheless, that when such period shall have arrived, such insolvent shall be entitled to the benefit and protection of this Act, notwithstanding that he may have been out of actual custody during all or any part of the time mentioned in such order, by reason of such insolvent not having been arrested or detained during such time, or any part thereof.

Mr. *Johnstone* and Mr. *Norton*, for appellant.

Mr. *Grant*, for respondent.

[153] The following were among the authorities cited in the argument:—

Nixon v. *Chartered Mercantile Bank* (1), *Bavachi Packi* v. *Pierce Leslie and Company* (2), *Martin* v. *Lawrence* (3), *Cowie*, in re (4), *Ratansi Kalianji*, in re (5), *Mancharji Hirji Readymoney*, in re (6).

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This appeal having come on for hearing before COLLINS, C.J., and PARKER, J., their Lordships made the following

Order of Reference to the Full Bench :—The appellant was a petitioner for relief under the provisions of the Insolvent Debtors' Act, and, on March 11th, 1889, he was remanded to custody until July 15th at the suit of Messrs. Parry and Company and of creditor No. 17, as a Criminal charge was pending against him and the learned Commissioner (Kernan, J.) was of opinion that he had carried on trade recklessly.

On July 15th the insolvent was brought before the present Commissioner (WILKINSON, J.), who, holding that he had been guilty of gross misconduct, directed, under Section 51, that he should not be entitled to his discharge until he should have been in custody at the suit of Messrs. Parry and Company for one year from that date. The order directed that Messrs. Parry and Company should pay batta at 3 annas per diem, but did not contain any direction committing the insolvent to custody. Nor did the order contain any direction that the insolvent should be discharged with respect to the debts in his schedule other than that of Messrs. Parry and Company.

Messrs. Parry and Company were decree-debtors, but on July 15th the warrant which they had taken out against the insolvent had expired and was no longer capable of execution.

The insolvent was, however, sent to jail under the warrant of the Chief Clerk, and we must therefore take it that the absence of a direction for committal is a mere mistake in drawing out the order. The warrant purports to be issued under Section 51.

The question before us is whether the order of the learned Commissioner committing the insolvent to jail under Section 51 is legal, or whether under that section the judgment-debtors (Messrs. Parry and Company) should have been left to their [154] ordinary remedy as decree-holders for the period of one year—after which the insolvent would be entitled to his personal discharge with respect to their claim. In support of the appeal, we are referred to in re *Mancharji Hirji Readymoney* (6).

Against this the decision of Turner, C.J., and Muttusami Ayyar, J., in *Nixon* v. *Chartered Mercantile Bank* (1) is quoted. In that case a precisely similar committal to jail was upheld on the ground that the combined effect of Sections 47 and 51 justified the procedure. On referring to the judgment of the learned Commissioner in that case, we find that he discharged the insolvent under Section 47 with respect to the general creditors, but with regard to the debt due to the bank he directed that he should be discharged when he should have been in custody at the suit of the bank for six months, and the order went on to direct that the insolvent be committed to custody for six months in respect of the debt to the bank, and that the Official Assignee do pay the insolvent while in custody Rupees 5 per week.

The former part of this order would appear to have been passed under Section 51, and the latter under Section 47 and not under Section 52.

(1) 8 M. 97. (2) 2 M. 219. (3) 4 C. 655. (4) 6 C. 70.
(5) 2 B. 148. (6) 5 B.H.C.R. 55.

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In the present case the order drawn out by the Chief Clerk on July 15th concludes with a direction "that the further hearing of this matter be adjourned for one year from the date hereof." This can only have been passed under Section 47, so that if the decision in *Nixon* v. *Chartered Mercantile Bank* (1) is right, the present order can also be justified by a reference of the committal to the Commissioner's powers under Section 47.

The decision of the Bombay High Court in re *Mancharji Hirji Readymoney* (2) appears to us in conflict with the Madras decision, and as we entertain doubts whether the latter is correct, we refer for the decision of a Full Bench the following questions :—

(1) Has a Commissioner in Insolvency power to commit an insolvent to jail under Section 51, or is the effect of that section to leave the judgment-creditors to their ordinary remedies for the term mentioned in the order ?

(2) If not, can any order be passed under Section 51 pending a final order under Section 47 ?

[155] On the above reference, the Full Bench delivered the following

JUDGMENT.*

"Section 47 empowers the Court to give the insolvent his personal discharge, and pending such discharge to adjourn the hearing for further inquiry and to commit the insolvent to custody at the expense of the Official Assignee *until final orders.*

Section 51 empowers the Court in certain cases to grant the insolvent his personal discharge immediately, except as to any debts, sums of money, or damages to be specially mentioned in the order, and as to such debts, &c., as soon as he shall have been in custody at the suit of such creditor or creditors for such period not exceeding two years as the Court shall direct.

Section 52 provides that where such insolvent is ordered to be discharged from imprisonment at a future period, he shall be liable to be arrested and charged in custody at the suit of such creditor abovementioned at any time before such period shall have arrived, in the same manner as he would have been liable if the Act had not been passed, and goes on to provide that if such insolvent be not arrested at the suit of any such creditor within the period mentioned in the order, he shall, at the expiry of such period, be entitled to the benefit and protection of the Act. Section 53 provides that the maintenance is to be at the expense of the creditor.

Section 51 does not empower the Court to commit to custody, and Section 47 only empowers the Court to commit to custody at the expense of the Official Assignee pending a final order. Had the Legislature intended to empower the Court to commit to jail under Section 51, it is reasonable to suppose that it would have given similar powers as in Section 50,—but on the contrary it simply enabled any one or more specified judgment-creditors to enforce their remedies (which may have been previously stayed under Section 49) in the same manner as if the Act had not been passed,—that is to say, that for a specified time the Court refuses to give protection to the insolvent at the suit of any special creditors.

It appears to us that the decision of the Bombay High Court in re *Mancharji Hirji Readymoney* (2) is right; that an order [156] under

* of the Full Bench.

(1) 8 M. 97. (2) 5 B.H.C.R. 55.

Section 51 is a final order, and that a Commissioner has no power to commit an insolvent to jail under that section, but must leave the creditor or creditors mentioned in the order to their ordinary remedies for the term mentioned in the order without protection to the insolvent.

Holding that an order under Section 51 is a final order, we do not consider that the Commissioner in Insolvency is entitled to fall back upon his powers under Section 47 to justify a committal to jail when passing an order under Section 51. The former section appears to us to authorize a committal only pending inquiry and final order in the Insolvent Court. In this respect we differ from the ruling of Turner, C.J., and Muttusami Ayyar, J., reported in *Nixon* v. *Chartered Mercantile Bank* (1).

Our answer to the first question is that a Commissioner in Insolvency has no power under Section 51 to commit an insolvent to jail, but must leave the excepted judgment-creditors to their ordinary remedies for the time mentioned in the order; and to the second question that an order under Section 51 is a final order."

This appeal coming on for final hearing before COLLINS, C.J., and PARKER, J., the Court, in pursuance of the opinion of the Full Bench, delivered the following

JUDGMENT.*

"On the answer of the Full Bench to the questions referred, we must hold that the appellant cannot be detained under Section 51, not having been arrested at the suit of Messrs. Parry and Company, and we must therefore order him to be discharged.

It appears to us that the order of the Chief Clerk has been wrongly drawn. If, as appears probable from the judgment, the learned Commissioner intended to discharge the insolvent with respect to all creditors, except Messrs. Parry and Company, and with respect to his debt to them as soon as he shall have been in custody for the time mentioned in the order, the order should be amended accordingly and we will ask the learned Commissioner to revise it.

The appellant is entitled to his costs in this appeal."

In pursuance of the above order the insolvent was discharged from jail. But as soon as he had left the jail he was arrested on a warrant obtained by Messrs. Parry and Company. This [157] application was then made before Shephard, J., for the discharge of the insolvent on the ground that his arrest was illegal.

Mr. *Johnstone* and Mr. *Norton*, for the insolvent.

The insolvent was entitled to privilege *redeundo* from jail. When he was arrested, as it now appears by the decision of the Full Bench illegally, he was attending the proceedings in the Insolvent Court. But for that illegal arrest he would have returned home, and while returning he would have been exempt from arrest under civil process. See Civil Procedure Code, Section 642; *Chauvin* v. *Alexandre* (2).

(SHEPHARD, J.—Can you say your client was, when he was arrested, returning from a tribunal where a matter to which he was a party was pending?)

The order of the Commissioner in Insolvency must be treated as a nullity and the insolvent must be regarded as having been *redeundo* since the time when he was illegally prevented from returning home in pursuance of that order.

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* [In pursuance of the opinion of the Full Bench ED.]

(1) 8 M. 97. (2) 31 L.J.Q.B.N.S. 79.

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Rex v. *Blake* (1) was the case of one arrested under an illegal or irregular writ. See also in illustration of the privilege of one returning from the Insolvent Court. *List's case* (2), *Ex parte King* (3), Reference was also made to the unreported cases of *Gribble* v. *Arbuthnot* (4), *Oakes* v. *Clegg* (5).

Mr. *W. Grant* for Messrs. Parry & Company.

The insolvent was not within the privilege under either Section 642 or the rules laid down in the English cases.

The privilege is the privilege of the Court (*Magnay* v. *Burt* (6)), and the Court cannot be said to have been touched by his arrest unless an extravagant fiction is invoked:—See *per* Campbell, C.J., in *Hare* v. *Hyde* (7), *Goodwin* v. *Lordon* (8), *Gilpin* v. *Cohen* (9).

Mr. *Norton* in reply.

JUDGMENT.*

SHEPHARD, J.—I have no doubt about this matter. The debtor was sent to jail under an order made by the learned Commissioner in Insolvency on the 15th July. The order purported to be made under Section 51 of the Insolvent Debtors' Act. That order has since been held to be illegal, and the debtor was therefore entitled **[158]** to be released. He was accordingly released from the jail, but, immediately after he was released, was arrested on a warrant obtained by the judgment-creditor. It is argued that that arrest was illegal, because the debtor ought to be treated as if he stood in the position he was in on the 15th July, and was therefore privileged from arrest. The argument amounts to this, that because the imprisonment followed on the order of the 15th July was illegal, therefore the debtor must be treated in the meanwhile as either in attendance upon the Court or returning from it. This involves a fiction of a rather extreme character. No authority is cited for such an extension of the doctrine of privilege, and it appears to me to be inconsistent with the principle on which the doctrine is rested, namely, that it is the privilege of the Court and not of the party (See *Magnay* v. *Burt* (6)). Looking to the language of Section 642 of the Code of Civil Procedure, I can find no sanction for extending it to the present case. No doubt that section covers the case of parties attending the Insolvency Court, but I think it is impossible to hold that a debtor, who is arrested in the circumstances above stated, is either attending or returning from the Insolvency Court.

The motion for release must be dismissed with costs.

Ramanujacharyar, attorney for appellant.

Wilson and King, attorneys for respondent.

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* [on the application for discharge.—ED.]

(1) 4 B. & A. 355. (2) 2 V. & B. 373. (3) 7 Ves. 312.
(4) Civil Suit 30 of 1885. (5) Civil Suit 268 of 1888.
(6) 5 Q.B. 393. (7) 16 Q.B. 394. (8) 1 A. & E. 378.
(9) L.R. 4 Ex. 131.

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APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

GHOUSIAH BEGUM (*Plaintiff*), *Appellant v.* RUSTUMJAH (*Defendant*), *Respondent.** [21st August, 11th September and 15th October, 1889.]

Transfer of Property Act (Act IV of 1882), *Section* 55—*Vendor and purchaser—Implied covenant for title—Acts amounting to waiver of covenant—Possession taken under contract.*

On 16th August 1885 the defendant, having agreed to purchase a house belonging to the plaintiff, executed an agreement, in which it was stated "that that he had this day purchased the house belonging to Ghousiah Begum Sahiba (plaintiff) for Rs. 16,000, that he had paid Rs. 1,000 as an advance and taken possession, that [159] he would pay the balance with interest at the rate of Re. 1 per cent. *per mensem* within fifteen days, and obtain a sale-deed from the said Begum."

The plaintiff at the time of the agreement had not obtained a conveyance of the house to her, and was not able to tender a conveyance to the defendant until January 1887, when she did so. Meanwhile the defendant took possession under the agreement, paying only a portion of the balance of the purchase money; he also executed certain repairs on the house and let it to a tenant and enjoyed the rent. It further appeared that shortly after the above agreement he sought to obtain a sale-deed from the plaintiff and attempted to raise a sum of money on a mortgage of the house. On 22nd December 1885 the defendant wrote to the plaintiff demanding a conveyance and giving notice that if the sale be not completed in the following month, the interest on the balance of the purchase money should cease; but no evidence was given as to any appropriation of the purchase money by the defendant. In 1887 the plaintiff filed the present suit to recover the unpaid purchase money with interest at 12 per cent.:

Held, that the acts of the defendant amounted to a waiver of the implied covenant for title, and that the plaintiff was entitled to recover the unpaid purchase money with interest at the agreed rate up to the date of payment, and that he was further entitled to a lien on the property for that amount.

APPEAL against the decree of Shephard, J., in Civil Suit No. 292 of 1887 on the file of the High Court.

Suit by the vendor to recover with interest at the rate of 12 per cent. per annum the unpaid purchase money of a house, &c., and for a declaration of a lien on the property for that amount.

The facts of the case are stated fully in the judgments of the Court.

SHEPHARD, J., held on the evidence that the implied covenant for title by the vendor had not been expressly excluded; and he ruled that the acts of the defendant did not amount to a waiver of the covenant, but only to a waiver of any objection to the purchase which the defendant might otherwise have had on the ground of the plaintiff's delay in completing, and accordingly held that the plaintiff was entitled to a decree only on her showing that she could give the purchaser a title free from reasonable doubt. (Specific Relief Act, Section 25.) He also ruled that the plaintiff would not in any event be entitled to receive interest on the unpaid purchase money at the contract rate, but only to recover damages which he assessed, citing *Deen Doyal Lall* v. *Het Narain Singh* (1) and *Nanchand Hansraj* v. *Bapusaheb Rustambhai*(2) at 6 per cent. interest on the principal sum.

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* Appeal No. 1 of 1889.

(1) 2 C. 41. (2) 3 B. 131.

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The plaintiff preferred this appeal.

[160] The Advocate-General (Hon. Mr. *Spring Branson*) and Mr. *K. Brown*, for appellant.

Mr. *Wedderburn* and Mr. *R. F. Grant*, for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the following:—

JUDGMENTS.

WILKINSON, J.—This is a suit to recover the balance of purchase money of a house conveyed by plaintiff to defendant on the 16th August 1885. On that day defendant executed the agreement (Exhibit A), in which it was set forth that defendant "has this day purchased the house belonging to Ghousiah Begum Sahiba (plaintiff) for Rs. 16,000, that he had paid Rs. 1,000 as an advance and taken possession, that he will pay the balance with interest at 12 per cent. within fifteen days and obtain a sale from the plaintiff." The defendant did not pay the balance due before the 1st September, but paid Rs. 2,000 on the 4th September and Rs. 1,000 on the 4th November. These facts are not disputed.

The plaintiff asserts that defendant had been informed, and was on the date of his purchase fully aware, that disputes and differences existed between the plaintiff's vendors, which had already delayed and would probably still further delay the execution by them of an assignment in plaintiff's favour.

The defendant on the other hand maintains that he was informed at the time of sale that the plaintiff had a good title and would prove the same and execute a conveyance to defendant before the 1st September and that, learning after the payment in November that plaintiff had not a good title, he on the 22nd December gave notice to plaintiff that he was prepared to pay the balance upon being furnished with a good title, and that if the sale were not completed before the 15th January 1886, he must decline to pay any further interest.

The learned Judge who tried the case found that defendant had not waived his right to demand a good title, and that his right was not prejudiced by his taking possession, and held that plaintiff was only entitled to a decree on her showing that she had a title free from reasonable doubt, and that plaintiff was entitled, provided her title was made out, to damages measured not according to the terms of Exhibit A, but at the usual rate, 6 per cent.

In appeal three points have been argued. First, it is contended that defendant with full knowledge of all the facts con-[161]sented to accept such title as the plaintiff could give him; second, that if there had been an agreement for good title, defendant's possession and dealing with the property amounted to waiver of his right to demand proof of plaintiff's title; and thirdly, that plaintiff was entitled to interest at 12 per cent. on the unpaid balance.

The provisions of the law in this country as to the covenant for title are laid down in Section 55 of the Transfer of Property Act. "In the absence of a contract to the contrary, the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same." The learned counsel for the respondent argues that it is incumbent on the purchaser to make out an express contract entered into between himself and the buyer that the title of the purchaser is accepted, and that as Exhibit A is silent on the question, the plaintiff is under the terms of Section 25

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of the Specific Relief Act not entitled to specific performance. The right to a good title is not a right growing out of the agreement between the parties, but is given by the law. But a vendor may stipulate that the purchaser shall accept the title as it is. Moreover, the purchaser may be precluded from taking objection to the vendor's title by the fact that he had clear notice of the state of the title before he entered into the contract for sale (*Mancharji Pestanji* v. *Narayan Lakshumanji* (1), and this is more especially the case where vendor and vendee deal with each other as in this case without legal advice, and the purchaser relies on the implied covenant for title. (See also Dart's *Vendors and purchasers*, 6th edition, p. 495). The learned Judge remarks that he should have taken this view if the evidence showed that after a full explanation of the facts the defendant had consented to accept such title as the plaintiff could give him. Now, it is the plaintiff's contention that the defendant was put in full possession of all the facts relating to plaintiff's title which has never been in doubt, and that he was satisfied with the title made out. The learned Judge thought it probable that defendant did not trouble himself about the title, but on the ground that that there was no distinct declaration in Exhibit A that defendant accepted plaintiff's title, coupled with his demand in December 1885 for proof **[162]** of title and the omission to reply to that demand, the Judge refused to believe that defendant had expressly waived his right to require a good title.

The contract for sale was negotiated on behalf of plaintiff by Raja Eswara Doss (first witness) and his darogah (second witness). They have gone into the box and given a full and apparently trustworthy account of the negotiations prior to the execution of Exhibit A. The learned Judge thinks it would be rash to accept the evidence of these witnesses as absolutely accurate, but he appears to have overlooked the fact that their evidence is uncontradicted, and that the defendant has not tendered himself for examination. Raja Eswara Doss and his darogah were the persons who on the plaintiff's side were in a position to give evidence as to what had taken place, and the only evidence on the defendant's side is that of a servant of defendant, and it does not negative that of the Raja. Another fact which was overlooked is that certain translations in the vernacular were at the request of the defendant furnished to him, so that the learned Judge's objection that the mere showing to defendant Exhibits B, C, D and K in English, which he remarks defendant did not understand (there is no evidence of this) falls to the ground.

Turning to the evidence—Eswara Doss deposes that he informed defendant why no conveyance had been executed in favor of plaintiff and that he showed him his mortgage (Exhibit D) and informed him that that was the only incumbrance on the property. Defendant's letter of the 22nd December (Exhibit H) confirms this portion of Eswara Doss' evidence, for the said mortgage is therein distinctly referred to. Eswara Doss goes on to say, "defendant asked me for all previous deeds and I told him we had bought at Sheriff's sale (Exhibits B and C) and sold to plaintiff (K). He asked me to draft sale and mortgage deeds and I did so (called for and not produced). Defendant said that the vouchers on which plaintiff had bought (Exhibits B and C) were enough for him and authorized me to advance money for him. I told him the dispute with Vallaba Doss would be settled in a year or two and that it was this dispute which stood in the way of the execution of a conveyance to plaintiff." I can see

(1) 1 B.H.C.R. 77.

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no reason why the evidence of this witness should be distrusted. It has not been contradicted and though in one sense an interested witness in that he had a mortgage on the property to the amount of Rs. 12,000, there is no **[163]** reason to entirely reject his testimony on that account. It certainly shows that the defendant not only, as the learned Judge finds, waived all objection on the score of the plaintiff having no conveyance in her favor, but impliedly, if not expressly, waived his right to question her title. And his subsequent conduct confirms this view, for not only did he enter into possession of the house, but he also made subsequent payments, leased the property to a tenant, and made an attempt to mortgage it. He had at first consented to mortgage it to Eswara Doss, but he never executed the deed which was sent to him and subsequently applied to Agar Chand (his fourth witness) to advance him the Rs. 12,000 to pay plaintiff. When this application was made Agar Chand cannot definitely state but Eswara Doss deposes that it was after *he* took out summons against defendant to compel him to register Exhibit A. That document was registered on the 15th December 1885. If, as Eswara Doss states, defendant fell out with him at that time, the defendant's application to Agar Chand and to Messrs. Champion and Short, who on his behalf sent plaintiff the letter of 22nd December, is accounted for. I am unable to accept Agar Chand's statement that he asked Raja Eswara Doss for the title-deeds of the property and was informed they were in Court. Raja Eswara Doss denies this, and it seems to me improbable that Agar Chand would, after he had been informed by Raja Eswara Doss that defendant intended to mortgage the property to him (Raja Eswara Doss), have insisted on seeing the title-deeds. It is far more likely that he would have accepted the Raja's statement and have taken, as in fact he did take, no further steps about the proposed mortgage. No doubt a person selling property to another without conditions is impliedly bound himself to have, and to give to his purchaser a title free from reasonable doubt. But he may relieve himself of the implied obligation by special contract, and if the purchaser chooses to buy subject to such terms, he will be bound by them. It is the duty of the vendor to inform the buyer of all the facts within his knowledge material to title; and if by reason of misstatement or suppression of facts within his knowledge, which the purchaser is entitled to know and the vendor is bound to communicate, the purchaser is misled, he would not be bound (*Motivahoo* v. *Vinayak Veerchand* (1)). But in the present case **[164]** defendant was placed in possession of all material facts to enable him to decide as to the validity of plaintiff's title and with those facts before him he executed Exhibit A. In *Haydon* v. *Bell* (2) it was held that where possession was taken, part of the purchase money paid and a mortgage of the lessee's interest made, the purchaser was not, after thus dealing with the property, entitled to call for the production of the lessor's title. And in the *Port of London Assurance Company's case* (3), Lord Justice Turner remarked that where a purchaser has taken possession of and enjoyed the subject-matter of a contract, it is the duty of the Court to make every reasonable presumption in favour of the validity of the contract. In the present case, the defendant was informed that the property had been purchased in 1876 in execution of a decree by Raja Eswara Doss and Gunsham Doss, who were partners, that after the death of Gunsham Doss disputes arose between the sons of Gunsham Doss and Raja

(1) 12 B. 1. (2) 1 Beav. 337. (3) 5 Deg. M. & G. 465.

Eswara Doss, that the property was sold by auction, on the motion of Eswara Doss and Vallaba Doss, the only adult son of Gunsham Doss, that the plaintiff had purchased at that auction and been placed in possession, executing a deed of mortgage for a portion of the purchase money in favour of Eswara Doss, and that a conveyance would be executed in her favour as soon as the disputes between her vendors were settled. The defendant thereupon executed Exhibit A, took possession and paid Rs. 1,000. Notwithstanding the non-execution on the 1st September 1885 of the sale-deed by plaintiff which respondent contends was an essential part of the contract, defendant remained in possession, leased the house, executed repairs, paid further portions of the sale amount, and attempted to raise money on it by way of mortgage in order to pay off the whole sum due. There does not appear to have been any cloud upon the plaintiff's title at the time of purchase or subsequently, and I think it must be held that defendant both expressly, before the execution of Exhibit A and impliedly, by his subsequent conduct, waived his right to any further proof of plaintiff's title. In Exhibit H, the only question raised as to plaintiff's title was that defendant had been informed that there were disputes relating to the house between Eswara Doss and Vallaba Doss. Of these disputes which concerned not the house, but the partnership, defendant was fully [165] informed prior to the 16th August and with full notice of them, he took possession and made payments. The learned Judge lays stress on the fact that the claim set up by Exhibit H was not at once repudiated and that no reference was made to this letter in the letter written to defendant by Messrs. Branson and Branson, the plaintiff's solicitors, on 26th January 1887 (Exhibit F). But a conveyance had then been executed in plaintiff's favor by Raja Eswara Doss and the sons of Gunsham Doss (Exhibit E), and the only objection which defendant had raised to the purchase was thereby removed. There was therefore no necessity to refer to Exhibit H.

As to the interest, it was laid down by Sir John Leach in *Esdaile* v. *Stephenson* (1) that where there is an express stipulation as to the payment of interest by the purchaser it applies to every delay however occasioned, unless such delay is owing to the gross misconduct or wilful delay of the vendor. And as remarked by Lord St. Leonards " if the money was not actually and *bona fide* appropriated for the purchase, or the purchaser derived the least advantage from it or in any way made use of it, the Court would compel him to pay interest." (Sugden's *Vendors and Purchasers*, 14th ed., p. 628).

The cases quoted by the learned Judge do not apply as the agreed rate of interest was neither excessive nor extraordinary but reasonable and usual. The purchaser has been in possession of the rents and profits of the property. He has never tendered the balance of the purchase money, nor has he adduced any evidence to show that he had the money by him in readiness for payment. I think he is bound to pay interest at 12 per cent.

For these reasons, I would set aside the decree of the learned Judge and give plaintiff a decree as sued for with costs throughout.

MUTTUSAMI AYYAR, J.—I have had the advantage of reading the judgment of my learned colleague and I concur in the conclusion at which he has arrived. But for a difference of opinion as to one of the grounds of decision and the importance of the case both as regards the amount sued

(1) 1 S. & S. 122.

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for and the questions raised for decision, I should not have written a separate judgment.

The suit brought by the appellant was substantially one for the specific execution of a contract of sale. That contract is evi- [166] denced by document A which bears date the 16th August 1885. Though the suit was instituted only in November 1887, the learned Judge below found and the finding is warranted by evidence in the case that time was not of the essence of the contract, and it is not questioned on appeal by the respondent. The only questions arising for our decision are—first, whether the decree was properly made conditional on the appellant showing a good title, and, secondly, whether the rate of interest awarded to her from the 1st September 1885 is less than what she is entitled to under the circumstances of the case.

As regards the first question, the appellant's contention is that the respondent expressly agreed prior to the date of A, though not in writing, to accept such title as she had and that by his subsequent conduct the respondent waived his right, if any, to call for proof of the appellant's title.

Document A is silent on the subject and under Section 55 of Act IV of 1882, which was in force when it was executed, it must be read, in the absence of a contract to the contrary as if it contained a covenant for title. Though it describes the house bought as "belonging to" the appellant, yet I do not consider that the description can be accepted as equivalent to a statement that the respondent has waived his right to investigate the appellant's title. They are mere words of description and ought not to be so construed, especially as Section 55 requires an express contract to exclude its operation. I take it, therefore, that there was an implied covenant for title.

As to the question whether the respondent had previously agreed to accept the appellant's title, such as it was, the decision must rest on the weight due to the oral evidence in this case. On the one hand Raja Eswara Doss and his darogah say that there was such an agreement, whilst on the other, the respondent's servant contradicts them. Although the evidence for the appellant is apparently somewhat stronger than the evidence for the respondent by reason of the comparative social position of the witnesses, yet the learned Judge below who had them before him considered that it was unsafe to act upon it. It cannot be denied that the Raja has some personal interest in the result of this suit, that he negotiated the sale in question and pays the expenses of this litigation. If there was a conversation regarding title as alleged, and if it was understood by the respondent to form part [167] of his agreement, I do not see my way to account satisfactorily for the omission of Raja Eswara Doss to insert a provision to that effect in document A, having due regard to his shrewdness and intelligence in matters of business and also to the fact that document A was drawn up under his dictation or direction at the instance of the respondent. It seems to me more probable that beyond showing documents B, C, D and K,* the Raja did not press the matter further and make a definite contract as to the title. It must be remembered that an agreement to take such title as the vendor has is in restraint of the purchaser's legal right, and that when it is set up as being antecedent to a written contract in a suit to *enforce* specific performance, it must at all events be established

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* *See* as to these exhibits *ante*, 13 M. 162.

with the greatest clearness and precision. I am not prepared to disturb the finding of the learned Judge below on this point.

But as regards implied waiver by subsequent conduct, I concur in the opinion of my learned colleague. The question of waiver is in the main one of evidence, and in determining it, we have to consider each of the acts of the party concerned in the light thrown by his knowledge at the time of material facts in relation to the title, and then to see whether an intention *not* to rely on the implied covenant as a subsisting covenant can clearly and unequivocally be inferred from them. It is in evidence in this case that Raja Eswara Doss not only showed documents B, C, D and K to the respondent prior to the date of A, but also furnished translations in the vernacular. In coming to a finding on this matter, the learned Judge below overlooked the last-mentioned fact, and I am also of opinion that we must take it upon the evidence that the respondent had the means of knowing, and knew, their contents. On referring then to these documents as evidence of the respondent's knowledge, I find that they only trace the appellant's title up to the Sheriff's sale in 1876 but do not carry it beyond. It is therefore reasonable to presume that it was known to the respondent that no document was shown regarding the state of the title prior to the Sheriff's sale.

It is also admitted that on the date of A, the respondent knew that there was litigation between Raja Eswara Doss and Vallaba Doss, that the appellant herself had no conveyance, and that there might be delay in her executing one in his favor. It is, however, shown that the appellant obtained a conveyance before January [168] 1886, and that when she tendered one to the respondent, the dispute with Vallaba Doss had been compromised and that it had never cast any cloud on the title to the house in dispute. Hence it is the state of title prior to the Sheriff's sale that is of moment in this case, and keeping this fact in view, I pass on to consider the respondent's subsequent acts and to estimate their value as evidence of waiver.

I may first refer to the two part payments made by him, *viz.*, of Rs. 2,000 on the 4th September and of Rs. 1,000 on the 4th November 1885. Exhibit A shows that the balance of purchase money was intended to be paid on or before the 1st September and a conveyance was to be taken. Though the appellant was not in a position to execute a conveyance, yet the respondent proceeded to make the part payments without any inquiry or further proof as to the state of the title prior to the Sheriff's sale in 1876. At law, the purchaser could not have the right to the estate nor the vendor to the money until the conveyance was executed, and according to Exhibit A, both are concurrent acts. The part payments appear to indicate an intention to dispense with the benefit of this provision of law, and of the contract, and even if they stood alone, they would be some evidence to show that he did not attach importance to proof of title prior to 1876.

Another fact which has an important bearing on the question of waiver is the respondent's endeavour about one month after the date of A to obtain at once a sale-deed and to execute a mortgage in favour of Raja Eswara Doss for the unpaid balance of the purchase money. On this point there is the evidence of Raja Eswara Doss that he prepared drafts and sent them to the respondent and that he sent again at his request fresh drafts in the name of his son. There is also the evidence of Gulam Khadir in regard to it. The evidence of Agar Chand shows that the Raja told him that the respondent had agreed to mortgage the house

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to him. It is also in evidence that notice was given to the respondent to produce the drafts but that the respondent did not produce them. I see no sufficient reason to doubt that the respondent agreed to mortgage the house to Eswara Doss and take a sale deed, that drafts were sent to him at his request and that they are withheld lest they may weaken his case. This conduct on his part appears to me to be inconsistent with a belief that the appellant must prove her title or that the dispute with Vallaba Doss had reference to title.

[169] The next fact in evidence is the respondent's endeavour to borrow Rs. 12,000 from Agar Chand in view to pay off the balance of the purchase money. This is spoken to by Agar Chand, who is the respondent's witness. This attempt again indicates that the respondent was endeavouring to deal with the property as his own and to pay off the purchase money though the appellant was not in a position to give him a conveyance. I am unable to reconcile these attempts to exercise acts of ownership with the continuance of an intention to treat the implied covenant as a subsisting covenant.

Though Agar Chand states in his evidence that the Raja told him that the title-deeds of the house were in Court, yet Raja Eswara Doss contradicts him, and there is thus oath against oath. But the evidence also shows that Raja Eswara Doss was unwilling that Agar Chand should take a mortgage and desired that he himself should take the mortgage; and it may well be that if Raja Eswara Doss did really say that the title-deeds were in Court, he did so in order to prevent Agar Chand from advancing money on the house. As already observed, it was in the respondent's knowledge that the Raja had documents B, C, D and K with him, and looking at his subsequent conduct in connection with this fact, the evidence conveys the impression that it was the obstruction caused to Agar Chand advancing the money so as to enable the appellant to complete his contract that really originated the misunderstanding which has finally resulted in this litigation.

The effect of the evidence then is that until the date of the last part payment, the respondent's conduct is inconsistent with a belief on his part that the appellant had first to prove her title before he completed his contract.

It is again in evidence that Raja Eswara Doss bought the house at the auction sale in 1876 without investigating the title of Prince Azimja's daughter, that the appellant accepted the title of the purchasers at the Sheriff's sale, that the dispute of Vallaba Doss raised no doubt as to title and that the daughter of Prince Azimja had been in possession for several years before the Sheriff's sale. It may well be that the respondent thought that it was not necessary for him to ask for more and endeavoured to complete the contract as shown above until December, 1887.

The first document which shows a desire on the respondent's part to ask for proof of title is Exhibit H, dated the 22nd [170] December 1887. Though the first paragraph speaks of an agreement by Raja Eswara Doss to get the appellant to hand over the title-deed, showing a good title in the said Begum (appellant), yet the second paragraph refers to the dispute with Vallaba Doss as the cause of her not being able to give a good title and execute a conveyance. It is remarkable that there was no allusion to the state of the title prior to 1876 whilst there was an allusion to a dispute which as is shown by Exhibit E and the evidence of Vallaba Doss had nothing to do with the title to the house. This indicates that even when the relation between the respondent and Raja Eswara Doss

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was strained, the former continued to treat with the latter irrespective of the State of the appellant's title prior to the Sheriff's sale.

The next occasion to which I have to refer is the tender for the appellant of a conveyance in January 1886 after the dispute with Vallaba Doss was settled and the appellant was thereby enabled to obtain a conveyance. It was not until then that the respondent indicated any intention to insist on proof of title beyond the point to which Exhibits B, C, D and K traced it. It is further in evidence that the respondent has been in possession of the house since August 1885 though the appellant declined to prove title in 1886. It is no doubt true that the respondent entered into possession under the terms of document A and his continuance in possession until the appellant repudiated her obligation to prove title beyond 1876 might in the absence of a waiver be referred to a supposition on his part that the appellant would execute her implied covenant. But the retention of such possession after the appellant repudiated her obligation to show title beyond a certain stage and the appropriation by him of rents to his own use without either rescinding the contract or depositing the remainder of the purchase money or setting it apart with notice of the same to the appellant imply a desire on his part to take undue advantage of his position as the party originally let into possession.

Taking the evidence as a whole, the conclusion to which I am led is that prior to the execution of A, the respondent had knowledge that the title-deeds which the Raja had with him showed title only up to the Sheriff's sale in 1876, that there was no definite agreement as to title when A was executed, that his subsequent conduct until December 1885, was inconsistent with a belief on [171] his part that the appellant had first to prove her title before he completed his part of the contract, that it was the obstruction to his raising money from Agar Chand and Eswara Doss' desire to lend money himself that created a disagreement and induced him to change his front, that the first attempt on his part was to take advantage of the delay in the execution of a coveyance in consequence of the dispute with Vallaba Doss though he knew of it at the date of A, though it tended to cast no doubt on title and though time was not of the essence of the contract, that when this dispute terminated and a conveyance was tendered and not until then, his conduct assumed the phase of insisting on a complete proof of title, and that he has continued to retain possession and receive rents until now without depositing or setting apart the balance of the purchase money.

In this view of the facts, I have no doubt that neither party had Section 55 of Act IV of 1882 before their minds when A was executed, that the respondent had then knowledge of material facts bearing on the title and that he since waived his right to the benefit of the implied covenant by his acts and that his subsequent assertion that he always relied on title being shown further back than the Sheriff's sale in 1876 is an after-thought. Upon facts similar to these it was held that objections to the title were considered waived in *Margravine of Anspach* v. *Noel* (1). As my learned colleague has referred also to other authorities on the question of waiver, I do not desire to repeat them here.

As to the question of interest also I agree with him. As there was a waiver the appellant is *prima facie* entitled to interest at 12 per cent., which is the rate mentioned in A, and there is no evidence to show what

(1) 1 Maddock 310.

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the rent actually received by the respondent was and that the interest claimed is excessive. It is also in evidence that the respondent intended to pay Agar Chand 12 per cent. if he lent him Rs. 12,000.

As regards the contention that there was no contract to pay interest subsequent to the 1st September 1885, the act of taking possession implies an agreement to continue to pay interest until the purchase money is paid. In *Fludyer* v. *Cocker* (1) Sir William Grant remarked with reference to a similar objection that "the act of taking possession is an implied agreement to pay interest, [172] for so absurd an agreement as that the purchaser is to receive the rents and profits to which he has no legal title and the vendor is not to have interest as he has no legal title to the money can never be implied." The purchaser, it was observed in that case, might have said he would have nothing to do with the estate until he got a conveyance. But that was not the course which he took. "He enters into possession, an act that generally amounts to a waiver even of objections to title. He proceeds upon the supposition that the contract will be executed and thereby agree that he will treat it as if it was executed." It is true that this general rule is subject to the exception that when the delay in the completion of the contract is imputable to the vendor and the stipulated interest exceeds the rent, the vendor ought not to be enabled to gain by his own wrong and he can only be entitled to the interim rent. Though in this case the appellant did not tender a conveyance before January 1886 owing to the dispute with Vallaba Doss and the respondent might not until then be liable to pay the vendor more than the rent actually received by him, yet there is no evidence to show that the rate of interest which is the rate current in the market exceeded the rent and was excessive.

For these reasons I concur in the decree proposed by my learned colleague.

Branson & Branson, attorneys for appellant.

Champion & Short, attorneys for respondent.

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Before Mr. Justice Shephard.

RAMAKISTNAYYA *v.* KASSIM.* [29th August, 1889.]

Contract Act, Section 135—*Negotiable Instruments Act—Act* XXVI *of* 1881, *Sections* 37, 39, 66—*Accommodation maker—Discharge of—Presentment of promissory note.*

Suit by the endorsee against the maker of a promissory note, dated 9th August 1886. The plaintiff was aware that the note was made by the defendant for the accommodation of the acceptor, Watson and Co., with whom the plaintiff had large dealings. On the 4th August 1887, Wastson and Co. executed in favour of the [173] plaintiff and another creditor a mortgage of certain property to secure the amount then due by Watson and Co., including the amount due to the plaintiff on the promissory note: the mortgage contained a personal covenant by Watson and Co., to pay the sums due, together with interest, on the 4th August 1888; and the mortgagees practically took over the whole business of the mortgagor and it was intended that they should work it for his benefit up to that date. The promissory note fell due in June 1887, but was not presented to the defendant for payment :

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* Civil Suit No. 231 of 1888,

(1) 12 Ves. 25.

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Held, that plaintiff, by accepting the mortgage, promised to give time to Watson and Co., and thus rendered it impossible for him to sue Watson and Co. had the defendant as surety called on him to do so, and that the defendant was accordingly discharged. *Pogose* v. *Bank of Bengal*, I.L.R., 3 Cal. 174, distinguished.

Semble: The maker of a promissory note is not discharged by the holder's failure to present it at due date.

[F., 21 A. 450 (452); D., 7 Ind. Cas. 727=13 O.C. 206.]

SUIT by the endorsee of a promissory note against the maker. The defendant pleaded that he made the note, as the plaintiff well knew, for the accommodation of Watson and Co., that he was discharged from all liability upon the note by reason of an arrangement entered into between the plaintiff and Watson and Co., and that the note had not been presented to him for payment.

The facts of the case appear, sufficiently for the purpose of this report, from the judgment of the Court.

Mr. *Johnstone*, for the plaintiff.

The issue is on the defendant, who admits the plaint note. He must therefore begin.

Mr. *Norton*, for the defendant.

The plaintiff cannot succeed, though the defendant admits that he was the maker of the note, for the plaintiff knew that it was made for the accommodation of Watson and Co., and became the endorsee from Watson and Co., with notice of this fact. The admitted consideration from the plaintiff to Watson and Co., cannot alter the circumstances. Defendant must be regarded in equity as the drawer, Watson and Co., as the acceptor, and plaintiff as the holder of an accepted bill of exchange. Defendant is, accordingly, in the position of a surety, the principal debtor being Watson and Co. Therefore Sections 39 and 82 (*b*) of the Negotiable Instruments Act apply. For two months after due date the plaintiff obtained from Watson and Co., a mortgage, securing all the debts due by the latter, amongst others the amount of the plaint note. Watson and Co.'s time for repayment was thereby enlarged, and the defendant is therefore discharged under Sections 134 and 135 of the Contract Act. See also Section 139. Watson and Co., became insolvent, and the defendant was deprived of [174] any legal remedy he formerly had against Watson and Co. See Byles on Bills (14th edition), pp. 321, 322; *Seetaram Sahoo* v. *DaCosta* (1); *Smith* v. *Winter* (2); *Cowper* v. *Smith* (3); *Nichols* v. *Norris* (4); *Bailey* v. *Edwards* (5); *Davies* v. *Stainbank* (6); *ex parte Glendinning* (7).

Admittedly there was no presentment of the note in this case. And this is fatal to the plaintiff's case, inasmuch as the plaint note was payable at a specified period after date. Sections 66 and 76 (*c*), Negotiable Instruments Act.

Mr. *Johnstone* in reply cited *Pogose* v. *Bank of Bengal* (8).

cur. ad. vult.

JUDGMENT.

SHEPHARD, J.—The plaintiff sues as the endorsee of a promissory note for Rs. 5,000, made by the defendant on the 9th August 1886 and payable ten months after date. The note was made in favour of Richard Watson

(1) 12 W.R. 294. (2) 4 M. & W. 454. (3) 4 M & W. 519.
(4) 3 B. & Ad. 41. (5) 4 B. & S. 761. (6) 6 DeG. M. & G. 679.
(7) Buck's Ca. in Bankruptcy, 517. (8) 3 C. 174.

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and Co., and was admittedly endorsed to the plaintiff for value. There is no evidence that the note, which fell due in June 1887, was presented to the defendant for payment, and it is contended on defendant's behalf that he is, therefore, discharged from liability, inasmuch as Section 66 of the Negotiable Instruments Act is imperative in requiring presentment. According to English law there is no doubt that presentment for payment is not generally necessary in order to charge the maker of a note (Byles on Bills, 14th edition, p. 290), and this general rule, with specified exceptions, is recognized in the Bills of Exchange Act, 1882, Section 87. It is contended that the Act of 1881, which regulates the law of negotiable instruments in this country, has introduced a new rule with regard to promissory notes payable at a specified period after date, and that on failure to present such a note at maturity the maker is discharged. That Act is in the main at least a reproduction of the English rules on the subject, and apart from Section 66 the provisions with regard to default of presentment appear to be the same as those laid down by the English cases. Comparing the language of Section 66 with that of other Sections in the same chapter, I do not think the defendant's contention can be maintained. Section 61 deals with a bill of exchange payable after sight, and after requiring **[175]** presentment for acceptance, enacts that in default of such presentment no party thereto is liable thereon to the party making such default. Section 62 makes, *mutatis mutandis*, a similar provision for promissory notes payable at a certain period after sight. Sections 68 and 69 make provision for negotiable instruments payable at a certain place, requiring presentment at that place in order to charge any party thereto in the one case and the maker or drawer thereof in the other. Section 64 declares of all negotiable instruments indifferently that they must be presented for payment to the maker, acceptor or drawer thereof by the holder as hereinafter provided, and then enacts that "in default of such presentment, the other parties thereto are not liable thereon to such holder." Seeing that in all these sections the penalty that is to be entailed by default in presentment is expressly declared, I think the inference may be fairly drawn that express language would have been used if the same penalty was intended to ensue on default of the presentment which Section 66 enjoins. In my opinion there was no intention to alter the pre-existing law, and the language of the Act does not justify the contention that the maker of such a note as the present is discharged by the holder's failure to present it at due date.

The defence raised by the written statement was in substance that the defendant to the plaintiff's knowledge received no consideration for the note, and that the plaintiff, after the note fell due, by taking a mortgage from the principal debtor and giving him time, has discharged the defendant. It is for the defendant to show that he is not, as he *prima facie* appears to be, the principal debtor. I think he has sufficiently proved this, and it is also I think clear that the plaintiff knew perfectly well that the defendant gave the note for the accommodation of Watson and Co. Watson and Co., whose real name is Muttusami, and the defendant on the one hand and plaintiff on the other are the witnesses who speak to the circumstances under which the note was made. Both the plaintiff and defendant had in 1876 large dealings with Watson and Co. The plaintiff appears to have been a sort of banker to Watson and Co., while, the defendant carrying on business in Bangalore, had constant supplies of fish and ice from Watson and Co., and they had constant monetary transaction. Both were interested in keeping his business

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afloat. That business was wholly or to a large extent carried on under a [176] contract with the Ice Company and funds were needed for payment of arrears due to the company and for a deposit to be made by Watson and Co., with the company.

The three parties were present when the note was drawn up and then and there endorsed to the plaintiff. The plaintiff knew that Watson and Co., was in want of funds. He knew that the deposit had to be made with the Ice Company and Watson and Co., had even applied to him for money. The defendant and his witness, Muttusami, say that he was fully aware that Watson and Co., was also indebted to the defendant, and knew that the note was not made for the defendant's benefit. I think their evidence must be accepted, and must therefore find that the plaintiff knew the note was an accommodation note. Evidence was gone into by the plaintiff to show that after the note was made the defendant made payments towards it on the footing of one liable as principal debtor, and the plaintiff in his plaint gives credit for Rs. 1,500 said to have been so paid. His case is that there was an agreement between him and defendant that the note should be paid off by monthly instalments of Rs. 500, and that accordingly three instalments were paid in two payments of Rs. 500 and Rs. 1,000 each. There is only the plaintiff to speak to this arrangement; the defendant denies it, and it is not explained why the defendant should have engaged to make payments in anticipation of the time when the note fell due. The defendant's case is that these two sums have nothing to do with the promissory note. (His Lordship, after a discussion of the evidence of this part of the case, proceeded as follows.)

I am unable, for these reasons, to believe the plaintiff's story with regard to the payment of Rs. 500 and Rs. 1,000 for which he gives credit.

In the view I take of the case, it is not necessary to say much about the promise alleged in the first paragraph of the written statement to have been made by the plaintiff about the return of promissory notes. There is evidence of such a promise, and I think it is very probable that the defendant did ask to have his notes back. On the other hand there is the fact that the defendant did not pursue the matter nor obtain from the plaintiff a written undertaking such as Muttusami's brother got. If there was such a promise, there was no consideration for it, and the fact of its being made would only be important to show that plaintiff looked to [177] Watson and Co., as the principal debtor. In the result I find, having regard to the evidence of what took place at the time of the making of the note, that the note was, as the plaintiff knew, made for Watson and Co.'s accommodation; and further looking to the subsequent dealings of the parties, that there is nothing to show that the defendant was treated as principal debtor on the note.

The remaining question is whether there has been a contract between the plaintiff and the principal debtor which should have the effect of discharging the surety under the provisions of Section 135 of the Contract Act. That section has to be read with the provisions of the Negotiable Instruments Act; and as here there was—within the meaning of the Negotiable Instruments Act, Section 37—a "contract to the contrary" making defendant a surety instead of principal debtor, the defendant is entitled to be discharged if he can bring the case within the terms of Section 135 of the Contract Act. (See Negotiable Instruments Act, Section 39.) It is an admitted fact that on the 4th August 1887 a mortgage was executed by Watson and Co., in favour of plaintiff and another creditor, in which mortgage the amount then due on the note

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was included in the sum secured. It is admitted that defendant was no party to the transaction, and was not cognizant of it till after it had taken place. There is no evidence that he assented to the transaction either at the time or subsequently, for I do not believe the plaintiff's evidence as to any statement made by the defendant of his willingness to pay the money if plaintiff did not succeed in realizing it under his mortgage. There is evidence that the defendant was annoyed when he heard of the mortgage, and I think it is not improbable that, as defendant's witnesses say, he asked to have any promissory notes of his in the plaintiff's hands returned to him. The defendant could not help acquiescing in the mortgage, but there is nothing to show that he consented to any arrangement whereby time should be given to Watson and Co. In fact it was not suggested that he did so. Under the mortgage the plaintiff and his co-mortgagee practically took over the whole business of Watson and Co., and it was intended that they should work it for Watson and Co.'s benefit till the 4th August 1888, crediting the balance of profits after payment of various charges first to the interest and then to payment of the principal sum of Rs. 21,035-9-9 expressed to be due to the mort-**[178]** gagees. There was a covenant by the mortgagors to pay that sum with interest at 12 per cent. on the 4th August 1888, and on the other hand a power of sale reserved to the mortgagees on default being made.

The plaintiff and his mortgagee took possession under the mortgage and carried on the business till January 1888 when the Ice Company cancelled the contract with Watson and Co., and Watson and Co. filed a petition in the Insolvency Court. I think there can be no doubt that plaintiff did, by accepting the mortgage, promise to give time to Watson and Co., and thus render it impossible for him to sue Watson and Co., had the defendant as surety called upon him so to do. *Bailey* v. *Edwards* (1).

Mr. *Johnstone* referred to *Pogose* v. *Bank of Bengal* (2), and argued that here also there was nothing to show that the eventual remedy of the surety was prejudiced; but in that case the question turned upon Section 139 of the Contract Act and it did not appear that time had been given in such a way as to make Section 135 applicable.

Upon the question whether the defendant is discharged by the contract between plaintiff and Watson and Co., I must find in the defendant's favour. The result is that I dismiss the suit with costs.

Grant & Laing, attorneys for plaintiff.

Tyagarajayyar, attorney for defendant.

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(1) 4 B. & S. 761.

(2) 3 C. 174.

13 M. 178 (F.B.).

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

RAMASAMI (*Plaintiff*), *Petitioner v.* KURISU (*Defendant*), *Respondent.** [13th August and 20th December, 1889 and 8th January, 1890.]

Civil Procedure Code, Sections 623. 624, 626—*Review—Provincial Small Cause Courts Act—IX of* 1887, *Section* 17—*Deposit of costs.*

On 23rd February 1888 the Subordinate Judge of Tinnevelly dismissed a Small Cause Suit on the ground that the plaintiff had not secured the attendance of his [179] witnesses. On 29th February the plaintiff presented a petition for review on which notice was directed to issue, but he did not deposit in Court the amount of the costs payable under the decree. On 17th April the petition having come on for hearing, the Judge directed that the petitioner should "first" deposit the amount of the defendant's costs under Section 17 of the Provincial Small Cause Courts Act, which was accordingly done on the following day. On 21st April the petition, which proceeded on grounds other than those mentioned in Section 624 of the Code of Civil Procedure, came on for hearing before the Officiating Subordinate Judge, who had assumed charge of the Court between the last-mentioned dates: he entertained the petition, but dismissed it. The plaintiff preferred a revision petition against the order dismissing his petition :

Held by the Full Bench that the Officiating Subordinate Judge had jurisdiction to make the order sought to be revised.

Held by Parker and Wilkinson, JJ., that the provisions of Section 17 of the Provincial Small Cause Courts Act as to the deposit of costs on an application for review are not mandatory, but merely directory.

[**Diss.**, 23 A. 470 (472)=3 A.L.J. 318=A.W.N. (1906) 93 ; 18 C. 83 (85) ; 9 Bom.L.R. 883 (885) ; 2 N.L.R. 23 (24) ; **R.**, 15 C.W.N. 102 (106)=6 Ind. Cas. 154 ; 3 O.C. 296 (298) ; **Expl.**, 34 M. 88 (89)=6 Ind. Cas. 400=7 M.L.T. 308 ; **D.**, 7 P.R. 1894.]

PETITION under Section 25 of the Provincial Small Cause Courts Act praying the High Court to revise the order of S. Subbier, Acting Subordinate Judge of Tinnevelly, dated 21st April 1888, dismissing a petition for review of the judgment of Kanagasabai Mudaliar, Subordinate Judge of Tinnevelly, in Small Cause Suit No. 927 of 1887.

The judgment of which review was sought proceeded on the ground that the plaintiff had omitted to secure the attendance of his witnesses and had not paid batta for summoning them in due time ; and the petition of review set forth reasons why these omissions by the plaintiff should have been excused. The petition was admitted, but when it came on for hearing it appeared that the amount of the costs payable to the defendant under the decree had not been deposited in accordance with the provisions of Provincial Small Cause Courts Act, Section 17, and the hearing was thereupon adjourned for the payment to be made. At the adjourned hearing the Officiating Subordinate Judge, who had in the interval assumed charge of the Court, made the following order:—

"I do dot think that sufficient grounds for a review of judgment have been put forth in this application. The plaintiff was represented by counsel and batta for witnesses was not paid in sufficient time. The allegation that plaintiff's son died does not appear to have been put forward at or before the time of the dismissal of the suit. The defendant appeared and denied the claim and opposes this petition.

* Civil Revision Petition No. 201 of 1888.

1890 JAN. 8. — FULL BENCH. — 13 M. 178 (F.B.).

The permanent Subordinate [180] Judge ordered notice to issue to the opposite party, but from this I have no reason to suppose that he was satisfied with the sufficiency of the grounds put forward. The petitioner, moreover, did not deposit the amount of the decree with this petition as required by Section 17 of the Small Cause Act.

"I accordingly reject this petition with costs."

The plaintiff preferred this petition.

The further facts of this case appear sufficiently for the purposes of this report from the following judgments.

Rama Rau, for petitioner.

Bhashyam Ayyangar, for respondent.

JUDGMENTS.

PARKER J.—This is a petition under Section 25 of the Small Cause Court Act IX of 1887. This suit was dismissed on February 23rd, 1888, by the Subordinate Judge of Tinnevelly on the ground that the plaintiff had not secured the attendance of his witnesses, and had not paid the batta for summoning them in due time. On February 29th a petition for review was presented by the plaintiff under Section 623 of the Civil Procedure Code, on which the Subordinate Judge ordered notice to issue on March 6th, fixing the date of hearing for March 26th. The plaintiff, moreover, failed to deposit the costs payable under the decree as required by Section 17 of the Small Cause Court Act. The case does not appear to have been taken on March 26th; but on April 17th the Subordinate Judge passed an order that the petitioner should "first" deposit the amount of the defendant's costs. This was paid on April 18th, and on April 21st the petition came on for disposal. Between April 17th and April 21st there had been a change of Subordinate Judges, Mr. Kanagasabai Mudaliar having gone on leave and Mr. Subbier having been appointed to act for him. On April 21st the petition for review was dismissed by the latter on the grounds (1) that witness' batta was not paid in sufficient time, (2) that the order for notice was not sufficient ground for holding the permanent Subordinate Judge was satisfied with the excuse, and (3) that the costs had not been deposited with the petition as required by Section 17, Act IX of 1887.

This order we are now asked to revise, and the defendant's pleader raised the preliminary objection that, under Section 624 of the Civil Procedure Code, it was *ultra vires* for the Subordinate Judge, Mr. Subbier to have disposed of the review petition at all [181] *Pancham* v. *Jhinguri* (1). As against this contention, we were referred to the cases of *Karoo Singh* v. *Deo Narain Singh* (2), and *Fazel Biswas* v. *Jamadar Sheik* (3). The decisions of the Allahabad and Calcutta High Courts are directly in conflict.

The question is as to the construction to be put upon the word "made" in Section 624 of the Civil Procedure Code. That section is a new one, but the effect of it is to give legislative sanction to the principles laid down by the Privy Council in *Maharajah Moheshur Singh* v. *The Bengal Government* (4), with reference to granting reviews of judgment. The reason for the rule is obvious; for, if another Judge were to admit a review of the judgment of his predecessor upon any other grounds than that of the discovery of new evidence or to correct a clerical error, he would practically be hearing an appeal from his predecessor's judgment, which is the function of a superior Court.

(1) 4 A. 278. (2) 10 C. 80. (3) 13 C. 231. (4) 7 M.I.A. 283.

In this case I am unable to hold that the application has not been "made" to the Judge who delivered the judgment. The mere filing of the application in Court might be insufficient, but here the Subordinate Judge has exercised his judicial mind upon the application and has seen *prima facie* ground for believing that his judgment required reconsideration. To hold otherwise would lead to this anomaly:—that, after registering the application and before finally disposing of it, the Judge who passed the decree might die or be removed, and the party lose his remedy both by way of review and by appeal (which might be barred). A provision of law should not be construed so as to cause injury to a suitor, nor can it be supposed that the Legislature having given a right to apply for a review when the same Judge is in office, and having allowed the Court to acquire jurisdiction, has left it in certain contingencies without the power to deal with the application or to exercise the jurisdiction acquired. The successor of the Subordinate Judge, to whom the application was made, must therefore exercise the jurisdiction as a case of necessity, since his predecessor can no longer do so. On these grounds, I concur in the view taken by the High Court of Calcutta.

Holding then that the Subordinate Judge (Mr. Subbier) had jurisdiction to make the order, it appears to me that the grounds **[182]** of his order cannot be supported. The witnesses were all resident in Tinnevelly near the Court-house, and some of them, if not all, might have been served between February 17th and February 23rd—at all events the plaintiff was entitled to the issue of summons. The fact of the permanent Subordinate Judge having issued the order was evidence that he considered some *prima facie* ground had been shown. With regard to the third point, *viz.*, the deposit of costs with the application, I am disposed to hold that Section 17 of the Small Cause Court Act is merely directory and not mandatory. The Court did require the costs to be deposited before the review was heard, and this, I think, is the intention of the section.

I would therefore set aside the order and remand the petition for rehearing. The costs to follow the result.

WILKINSON, J.—Small Cause Suit No. 927 of 1887 was dismissed by the Subordinate Judge of Tinnevelly, Mr. Kanagasabai Mudaliar, on 23rd February on the ground that plaintiff had failed to secure the attendance of his witnesses. On the 29th February plaintiff applied for a review. On the 6th March the Subordinate Judge ordered notice to go to the defendant to show cause why the review should not be allowed. On the 17th April he ordered plaintiff to pay into Court the costs decreed. The costs were deposited on the 18th April. Mr. Kanagasabai Mudaliar availed himself of leave on the 19th April, and on the 21st his *locum tenens*, Mr. S. Subbier, rejected the application to review.

We are asked to set aside his order on the ground that it is contrary to law.

The first question we have to decide is whether the Acting Subordinate Judge had power to pass any orders in review. On the one hand, it is contended on the authority of *Pancham* v. *Jhinguri* (1) that the words "shall be made" in Section 624 of the Civil Procedure Code mean "shall be heard and determined," and that as the review was not sought on the ground of (1) new matter, or (2) clerical error, the Acting Subordinate Judge was not entitled to pass any orders in review of his predecessor's

(1) 4 A. 278.

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judgment. On the other side, it is argued on the authority of *Karoo Singh* v. *Deo Narain Singh* (1) followed in *Fazel Biswas* v. *Jamadar Sheik* (2) that the Judge whose judgment it was sought [183] to review having admitted the application, it was competent to his successor to dispose of it, and we are referred to the remarks of the Privy Council in *Maharajah Moheshur Singh* v. *The Bengal Government* (3). There their Lordships say that the primary intention of granting a review was a reconsideration of the same subject by the same Judge. They went on to remark, "we do not say that there might not be cases in which a review might take place before another and a different Judge, because death or some other unavoidable cause might prevent the Judge who made the decision from reviewing it, but we do say that such exceptions are allowable only *ex necessitate*." These remarks were made in 1859 with reference to the law as laid down in the regulations. Having them in view, the Legislature has provided (Section 623 of the Civil Procedure Code) that any person considering himself aggrieved by a decree or order may apply for a review of judgment *to the Court which* passed the decree or made the order, and has prohibited the entertainment of any such application by any Judge other than the Judge who pronounced the judgment, except in two cases, *viz.*, (1) the discovery of new matter, or (2) clerical error. As was held in this Court in *Sarangapani* v. *Narayanasami* (4), where there has been a change of the presiding Judge, no application can be made to the new Judge except on the grounds stated in Section 624. To hold that the issue of notice by the Judge who passed the decree entitles another Judge to pass final orders either granting or rejecting the application for review would render the provisions of Section 624 completely nugatory. As I understand the Code, the only cases in which a Judge other than the Judge who passed the decree can review the judgment of his predecessor are those provided in Section 624, and the Legislature deliberately declined to lay down any other exceptions to the general rule. Where the correctness of the decision either in law or on facts is impeached by the person applying for review, the only Judge who can hear and determine the application is the Judge whose decision is impeached.

Being of opinion that the Acting Subordinate Judge had no jurisdiction to pass the order he did, I would set aside his order.

In consequence of the difference of opinion between their [184] Lordships, the case was referred to a Full Bench, and their Lordships made the following :—

Order of Reference to the Full Bench:—The facts are sufficiently set forth in the foregoing judgments. The plaintiff applied for review of judgment on grounds other than those mentioned in Section 624 of the Civil Procedure Code. The Subordinate Judge who had passed the decree received the petition and ordered notice to be given to the opposite party, but left the Court before passing any final order granting or refusing the review.

The question for the Full Bench is—whether, having regard to the provisions of Section 624 of the Civil Procedure Code, the application may be heard and disposed of by his successor ?

The decisions of the Allahabad and Calcutta High Courts are in conflict—*Pancham* v. *Jhinguri* (5), *Karoo Singh* v. *Deo Narain Singh* (1), and

(1) 10 C. 80. (2) 13 C. 231. (3) 7 M. I. A. 283.
(4) 8 M. 567. (5) 4 A. 278.

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Fazel Biswas v. *Jamadar Sheik*(1). We therefore refer the question to the Full Bench.

Rama Rau for appellant cited *Maharajah Moheshur Singh* v. *The Bengal Government* (2), *Sarangapani* v. *Narayanasami* (3), *Cheru Kurup* v. *Cheru Kanda Kurup* (4), *Fazel Biswas* v. *Jamadar Sheik*(1).

Deseka Chari, for respondent.

All the difficulties which arise here are anticipated and resolved in *Pancham* v. *Jhinguri*(5).

A review of judgment is, except where the application is made under Section 624, a matter of discretion merely. The object of Chapter XLVII of the Civil Procedure Code is to enable the suitor to obtain the result of a maturer consideration by the same mind—see the recent changes in the law, Sections 624, 626. And in this case no hardship would be involved for the plaintiff, for the permanent Subordinate Judge was only absent on leave for two months, and the plaintiff, if he had waited, might have had recourse to the provisions of Section 627.

(WILKINSON, J.—Does that section apply to Small Cause Courts ?)

Its application to such Courts is not excluded in terms, so it would apply the marginal note notwithstanding.

[185] (MUTTUSAMI AYYAR, J.—The first clause appears to presuppose that there are more than one Judge in the Court, and the position of the section in the chapter and the terms of Section 628 point the same way. The Allahabad decision admits the hardship arising under Section 624, but the Judges say they are bound by the Privy Council ruling—) or rather by the words of the section.

(MUTTUSAMI AYYAR, J.—On the words of the section all the High Courts agree in construing "made" as referring not to the actual reception of the application for review, but to the judicial consideration of it.)

The Allahabad Court seems to go further than the Calcutta Court in applying it to the "hearing and determination" of the application. It must be observed that the Legislature in the Amendment Act did not carry out exactly the principle of the Privy Council decision, but made two exceptions only.

Rama Rau in reply.

As to Section 627, it does not apply to Courts of Small Causes—see as to the weight to be attached to the marginal notes, Maxwell on the Interpretation of Statutes, p. 525, and *Venour* v. *Sellon* (6). (He was stopped on that point.)

The Full Bench delivered the following

JUDGMENT.

This is a case referred for the opinion of the Full Bench, and the facts giving rise to the reference are these.

The Subordinate Judge of Tinnevelly dismissed a suit on February 23rd, 1888, on the ground that plaintiff had not secured the attendance of his witnesses, and had not paid the batta for summoning them in due time. On February 29th a petition for review was presented by plaintiff under Section 623 of the Civil Procedure Code, on which the Subordinate Judge ordered notice to issue on March 6th, fixing the date of hearing for March 26th. The plaintiff moreover failed to deposit the costs

(1) 13 C. 231. (2) 7 M. I. A. 283. (3) 8 M. 567.
(4) 12 M. 509. (5) 4 A. 278. (6) L.R. 2 Ch. D. 525.

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payable under the decree, as required by Section 17 of the Small Cause Court Act. The case does not appear to have been taken up on March 26th; but on April 17th the Subordinate Judge passed an order that petitioner should "first" deposit the amount of defendant's costs. This was paid on April 18th, and on April 21st the petition came on for disposal. Between April 17th and April 21st there had [186] been a change of Subordipate Judges, Mr. Kanagasabai Mudaliar having gone on leave and Mr. Subbier having been appointed to act for him. On April 21st the petition for review was dismissed by the latter on the grounds (1) that witness' batta was not paid in sufficient time, (2) that the order of notice was not sufficient ground for holding the permanent Subordinate Judge was satisfied with the excuse, and (3) that the costs had not been deposited with the petition as required by Section 17, Act IX of 1887.

The question for the Full Bench is whether having regard to the provisions of Section 624 of the Civil Procedure Code, the Acting Subordinate Judge was competent to hear and finally determine the application made to his predecessor.

The party aggrieved by a decree is entitled under Section 623 to ask for a review of judgment on all the grounds mentioned therein when the Judge who passed the decree hears and finally determines his application. It is also clear from Section 624 that, when the Judge who delivered the original judgment ceases to be attached to the same Court before the application for review is made, it can only be made on the specific grounds mentioned in that section. There are, however, two intermediate stages at which the Judge who delivered the original judgment may cease to be attached to the same Court, *viz.*, (I) after the application is made and before he orders notice to issue under Section 626, and (II) after he orders notice to issue and before he hears the opposite party in support of the original decree and finally determines the application. As regards the former, there is a consensus of opinion among the High Courts at Madras, Calcutta and Allahabad—that the term "made" in Section 624 must be taken to signify that the application is brought under the judicial cognizance of the Judge who delivered the judgment to be reviewed and is considered, if not finally determined by him under Section 626, see *Cheru Kurup* v. *Cheru Kanda Kurup* (1), *Karoo Singh* v. *Deo Narain Singh* (2), and *Pancham* v. *Jhinguri* (3). As regards the latter, the substantial question is, whether the term "made" signifies a final determination of the application by the same Judge that delivered the judgment of which it is desired to obtain a review.

Section 624 limits the scope of Section 623 and restricts the [187] remedy provided by it, and unless the intention is clear it ought to be construed so as to advance the remedy. In their ordinary sense, the words "no application shall be made" cannot be taken to mean, "no application shall be finally determined." Again in form Section 624 contains a direction to the party seeking to obtain a review of judgment, and in substance it must be taken to limit the power of the Court to entertain and deal with the application only to the extent to which the remedy is taken away from the party concerned. To hold otherwise would lead to this anomaly, *viz.*, that after ordering notice and before finally disposing of the application, the Judge who passed the decree might die or be removed from the Court and the party lose his remedy both by way of review and by appeal (which might become barred). It

(1) 12 M. 509. (2) 10 C. 80. (3) 4 A. 278.

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would also contravene the ordinary rule of construction that a provision of law should be so interpreted, if possible, as to avoid injustice to a suitor or as not to leave a Court that is once seized of jurisdiction to entertain an application without power to determine it. It is no doubt true that Section 624 is intended to give legislative sanction to the principles laid down by the Privy Council in *Maharajah Maheshur Singh* v. *The Bengal Government* (1) in which it was observed that a review was perfectly distinct from an appeal, that the primary intention of granting a review was a reconsideration of the same subject by the same Judge as contradistinguished from an appeal which is a rehearing before another tribunal, and that review should take place before the same Judge that delivered the judgment except in cases of necessity such as the death or removal of the Judge. Whilst taking these observations as a guide to the construction to be put upon Section 624, regard should also be had to the mode in which legal effect was intended to be given to them by that section. According to the prior law as interpreted by the Privy Council, a review might take place in case of necessity before another Judge upon all the grounds mentioned in Section 623 without reference to the question whether the Judge who delivered the original judgment ceased to belong to the Court before or after the application for review had been made. But Section 624 contemplates the state of things when the application for review is made and permits or forbids a review according as the Judge who passed the original decree is [188] or is not then attached to the same Court. Though the intention is clear not to provide even for a case of necessity before the Court acquires jurisdiction to deal with the application, yet it may well be that the exercise of jurisdiction which once vests in a Court, notwithstanding a subsequent change of Judges is regarded as a case of necessity. That this is the correct view is placed beyond doubt by clause (*c*) added to Section 626 by the Amendment Act VII of 1888, Section 59. We concur in the view taken in *Karoo Singh* v. *Deo Narain Singh*(2) and *Fazel Biswas* v. *Jamadar Sheik* (3) and we are not prepared to follow the decision in *Pancham* v. *Jhinguri* (4).

We accordingly answer the question referred to us in the affirmative.

This petition coming on for final hearing before PARKER and WILKINSON, JJ., the Court delivered the following

JUDGMENT.

The Full Bench having held that the Subordinate Judge had jurisdiction to make the order, we are of opinion that the grounds of his order cannot be supported.

The witnesses were all resident in Tinnevelly near the Court-house, and some of them, if not all, might have been served between February 17th and February 23rd—at all events the plaintiff was entitled to the issue of the summons. The fact that the permanent Subordinate Judge had issued the order was evidence that he considered some *prima facie* ground had been shown, and we think that Section 17 of the Small Cause Court Act is merely directory. The costs were deposited before the review was heard.

We therefore set aside the order and remand the petition for rehearing. The costs will follow the result.

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(1) 7 M.I. A. 283. (2) 10 C. 80. (3) 13 C. 231. (4) 4 A. 278.

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APPELLATE CIVIL.

13 M. 189.

13 M. 189.

[189] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

KONDAPPA (*Plaintiff*), *Appellant v.* SUBBA AND ANOTHER (*Defendants*), *Respondents.** [16th October, 1889.]

Hindu law—Revival of a barred debt by the widow of a deceased Hindu.

Although a managing member of a joint Hindu family cannot as such revive a barred debt as against his coparceners, it is competent to the widow of a deceased member of the family, who represents the inheritance for the time being and in whom it is a pious duty to pay her husband's debts, to bind the reversion by a mortgage executed to secure such debts though they were barred at the time of its execution.

When therefore the managing members of an undivided Hindu family, after the death of the widow, sold family property for the purpose of discharging such a mortgage:

Held, that the sale was binding on the co-parcenary.

[R., 5 Ind. Cas. 382 (383)=7 M.L.T. 363.]

SECOND appeal against the decree of R. Sewell, Acting District Judge of Bellary, in Appeal Suit No. 134 of 1888, confirming the decree of V. Subramanyam, District Munsif of Penukonda, in Original Suit No. 403 of 1887.

Suit to establish the plaintiff's right to, and to recover possession of, certain land.

The plaintiff and his undivided brothers (deceased) were members of a joint Hindu family. Their grandfather and one Gurumurthi Bhotlu were undivided brothers. Gurumurthi Bhotlu died leaving only a widow Papamma, and the plaintiffs were the reversionary heirs to his estate. In 1877 Papamma executed an usufructuary mortgage of part of his lands to secure a debt (which was then barred by limitation) incurred by him to the defendants; and in 1880 Papamma having died, and the plaintiff's family having succeeded to the estate of Gurumurthi Bhotlu, the elder brother of the plaintiff executed a sale-deed for the purpose of discharging the mortgage. The plaintiff now charged that the sale-deed was void as against him.

[190] The District Munsif dismissed the suit, and his decree was upheld on appeal by the District Judge.

The plaintiff preferred this appeal.

Rama Rau, for appellant.

Rangacharyar, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.

The Judge is wrong in holding that the manager of a joint Hindu family can *qua* manager revive a barred debt as against his coparceners, and his decision is at variance with the Full Bench ruling in *Chinnaya* v. *Gurunatham* (1). But the decision of the Judge is right, inasmuch as the barred debt was revived, not by the appellant's brother, but by the widow of Gurumurti Bhotlu. That a widow is at liberty to pay her husband's

* Second Appeal No. 229 of 1889.

(1) 5 M. 169.

debts, although barred by limitation, is recognised by the Bombay High Court in a series of cases, *Bhala Nahana* v. *Parbhu Hari* (1), *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole* (2), *Bhau Babaji* v. *Gopala Mahipati* (3). The discharge of her husband's debt, whether barred or not, was clearly a pious duty, and she was also the representative of the inheritance for the time being. A mortgage by her would, therefore, clearly bind the reversion by Hindu law, provided it was executed *bona fide*. In the present case the appellant's brothers *bona fide* sold a portion of the property to discharge such a mortgage and to save the rest of the property from litigation, and we concur in holding that the sale was binding on the appellant.

The appeal is dismissed with costs.

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13 M. 191=1 Weir 834.

[191] APPELLATE CRIMINAL.

Before Sir Arthur, J. H. Collins, Kt., Chief Justice and Mr. Justice Handley.

QUEEN-EMPRESS *v.* RAMANUJAM.* [13th December, 1889.]

Opium Act—Act I of 1878, *Section* 3—*License to possess opium—Transport of opium.*

One having a license for the possession of opium as a medical practitioner, limited to eight pollums of opium, sent his servant to buy from a licensed dealer at Sholavaram and bring to Madras four pollums of opium ; he was convicted of the offence of transporting opium without license :

Held, the conviction was right.

PETITION under Sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the finding and sentence of the Presidency Magistrate, Madras, in Calendar Case No. 17595 of 1889.

Jagarau Pillai and *Nadamuni Chetti*, for the accused.

Mr. *Grant* (the Crown Prosecutor), for the Crown.

The facts of this case appear sufficiently for the purposes of this report from the judgment of the Court.

JUDGMENT.

The facts proved and admitted by the accused are that in June last the accused, who carries on business as a chemist and druggist in Madras under the name of Le Febour and Co., sent his servant, the first prosecution witness, to Sholavaram in the Ponneri Taluk of the Chingleput District, to buy four pollums of opium from one Sathur Khan, a licensed vendor of opium. The first witness accordingly went to Sholavaram, purchased the opium, and brought it to accused at Madras. Accused has a license from the Collector, under Rule VI of the rules framed by the local Government under the Act, for the possession of opium as a medical practitioner. The quantity of opium which he may have in his possession under such a license at one time is limited by Rule VI to one seer, equal to eight pollums. The license is not before us; but, assuming it to be in the form given in the [192] rules, it does not authorize accused to transport opium, unless such authorization can be implied from

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* Criminal Revision Petition No. 270 of 1889.

(1) 2 B. 67. (2) 11 B. 320. (3) 11 B. 325.

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the license to possess. Section 3 of the Opium Act I of 1878 absolutely prohibits the transport of opium, which is defined to mean the moving it from one place to another, except in the manner prescribed by the Act, and the only provisions under the Act allowing transport are contained in Rules VIII to XIII, which only apply to licensed importers, farmers, and licensed vendors, under none of which classes does accused come.

By sending his servant to bring opium from Sholavaram to Madras accused was clearly transporting opium within the meaning of the Act. Except under the provisions of Rules VIII to XIII such transport is illegal, and the license he holds does not authorize it expressly or impliedly.

Whether if accused had carried the opium himself the license to possess the opium would necessarily imply a right to transport it with him and so over-ride the prohibition of transport is a question which does not arise in this case and which we need not therefore determine.

The conviction was right and the petition is dismissed.

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13 M. 192.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SINGJEE (*Plaintiff*), *Appellant v.* TIRUVENGADAM AND ANOTHER (*Defendants*), *Respondents.** [16th August, 1889.]

Transfer of Property Act (Act IV of 1882), *Sections* 65, 68 —*Mortgagor and mortgagee—Construction of mortgage—Sale of premises at suit of a prior mortgagee—Right of a second mortgagee to sue the mortgagor personally.*

The defendants, having already mortgaged certain land to another, executed a hypothecation bond comprising the same land in favour of the plaintiff to secure a debt due by them to the plaintiff and covenanted therein to pay to him daily the proceeds of certain sales of firewood, of which the plaintiff was to credit part towards the secured debt. The defendants having failed to pay the amount due on the first mortgage, the first mortgagee obtained a decree and brought the land to sale. The plaintiff now brought a suit in the Small Cause Court to recover the amount due on footing of his hypothecation bond:

[193] *Held*, that the hypothecation bond contained no personal covenant by the obligors, but that on the construction of Sections 65 and 68 of the Transfer of Property Act the obligors had committed default so as to entitle the obligee to sue them personally under the former section.

[R., 4 C.L.J. 246 (251); 7 Ind. Cas. 251 (252).]

APPEAL under Letters Patent of the High Court, Section 15, against the order of Wilkinson, J., made on Civil Revision Petition No. 227 of 1888, setting aside the decree of the Chief Judge of the Court of Small Causes at Madras in Suit No. 21478 of 1886.

Suit by the obligee of a hypothecation bond, dated 16th March 1883, against the obligors to recover principal and interest of a debt which was secured thereby. The operative part of the hypothecation bond was as follows:—

"The amount in cash that we have this day received on account of our exigency, having hypothecated the properties mentioned below, is Rs. 1,200; in words, Rs. one thousand and two hundred. Since we have received these Rs. 1,200 we will pay away to you from this date the

* Letters Patent Appeal No. 13 of 1888.

1889 AUG. 16. — APPELLATE CIVIL. — 13 M. 192.

rupees arising from sale every day in the firewood depot mentioned below; of this, if any money is required for railway fare expense, &c., and for getting fuel, you should give (us) out of the money that we give each day, and out of the money that we give you arising from the sale each day, you will deduct 2 per cent. for commission and Rs. 100 per mensem towards payment of the principal amount, and pay us the remaining amount. We will settle account in this manner every month. If we do not give the sale-proceeds according to the terms mentioned above, and if we fail to give according to the kist (fixed time), you or those who receive your order should collect, on the properties secured in Madras itself, commission at Rs. 20 per mensem and the balance of total arrears of the principal (money)."

The land comprised in this instrument was subject to a prior instrument of mortgage executed in favour of K. Guruvappa Chetti and dated 8th December 1882: and it appeared that before the present suit it had been sold at the suit of the first mortgagee. The Chief Judge accordingly held under Section 68 of the Transfer of Property Act that the plaintiff was entitled to recover the amount sued for from the defendants personally and passed a decree as prayed.

The defendants presented Civil Revision Petition No. 227 of **[194]** 1888 praying the High Court to revise this decree. This petition came on for hearing before Wilkinson, J., who delivered judgment as follows:—

"It is contended that the Small Cause Court had no jurisdiction, as there was no personal obligation to pay the mortgage amount. The bond sued on certainly gives no personal remedy against the defendants, but provides that in case of default of payment in a certain way, the mortgagee shall collect the money on the properties secured. But the learned Judge of the Small Cause Court held that, under Section 68 of the Transfer of Property Act, plaintiff was entitled to sue, because the property hypothecated had been sold at the suit of the first mortgagee. I do not comprehend how Section 68 applies to the case. The mortgagee has not been deprived of his security by or in consequence of the wrongful act or default of the mortgagor. It is, it is true, argued here that as the mortgagor made default in discharging the first mortgage, Clause (*b*) applies. I do not think the word default is used there in the sense contended for, but looking at Section 65 (*c*), I should hold that a mortgagor made default where he failed to pay public charges accruing due in respect of the property. We do not know what the terms of the first mortgage were, nor whether there was any so-called default on the part of the mortgagor as is alleged. The decree of the Small Cause Court was therefore *ultra vires* and must be set aside with costs."

The plaintiff preferred this appeal against the order of Wilkinson, J.

Mr. *Gantz*, for appellant.

Rama Rau, for respondents.

JUDGMENT.

Two questions are raised in this petition:—first, it is said that there is in the hypothecation bond sued on a covenant to pay, on which the plaintiff is entitled to sue the defendants personally. By the bond it is stipulated that the debtor should pay to the obligee every day the proceeds of sales of firewood and that the latter should retain in his hands, out of the amount so paid, 2 per cent. commission and Rs. 100 towards the debt, repaying the balance to the obligor. In default of such payment there is a stipulation that the obligee may collect the

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money due from the hypothecated property. In our opinion there is clearly no covenant to pay out of the general assets of the obligor, and [195] therefore the plaintiff cannot recover from the defendants on that footing. On this point the learned Judge is right.

Then it is said that there has been default on the mortgagor's part within the meaning of Clause (*b*), Section 68 of the Transfer of Property Act. The alleged default is the non-payment of the amount due on the first mortgage which led to the sale of the mortgaged property. And in this connection our attention is drawn to Clause (*e*), Section 65:—"and "where the mortgage is a second or subsequent incumbrance on the "property, that the mortgagor will pay the interest from time to time "accruing due on each prior incumbrance as and when it becomes due, "and will, at the proper time, discharge the principal money due on such "prior incumbrance." In the absence of an express contract to the contrary, this clause would certainly be an authority for implying a contract on the part of the mortgagor in favour of the second mortgagee to pay the first mortgage debt on its becoming due, and a breach of a covenant, whether express or implied, would equally be a default within the meaning of Clause (*b*) of Section 68. The conclusion arrived at by the Small Cause Court is therefore right. We must set aside the order of the learned Judge and restore the decree of the Small Cause Court.

The revision petition is dismissed with costs including the costs of this appeal.

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13 M. 195.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

KANDASAMI (*Defendant No.* 3), *Appellant v.* AKKAMMAL AND OTHERS (*Defendant No.* 2 *and Plaintiffs Nos.* 1 *and* 2), *Respondents.**
[30th September, 1889.]

Specific Relief Act—Act I of 1877, *Section* 42—*Declaratory decree—Suit by reversioner.*

The intervention of two life estates does not preclude the reversioner from obtaining a declaration of his interest as to land under Specific Relief Act, Section 42.

[R., 32 C. 62 (69) = 9 C.W.N. 25; A.W.N. (1903) 207; 3 C.L.J. 224 (226); 5 O.C. 360 (364); 149 P.R. 1908; D., 24 M. 405 (408).]

SECOND appeal against the decree of G. D. Irvine, Acting District Judge of Coimbatore, in Appeal Suit No. 48 of 1888, confirming [196] the decree of T. Dorasami Pillai, District Munsif of Erode, in Original Suit No. 444 of 1884.

The plaintiffs sued as the brothers of one Gopal Chetty, deceased, (the husband of defendant No. 2, and the father of the deceased husband of defendant No. 1), for a declaration that certain alienations of the property of their late husband, made by defendants Nos. 1 and 2, respectively, in favour of defendant No. 3, were invalid as against the plaintiff's reversionary interest.

Defendants Nos. 1 and 2 were *ex parte* throughout. The District Munsif passed a decree as prayed, which was affirmed on appeal by the District Judge.

* Second Appeal No. 88 of 1889.

Defendant No. 3 preferred this second appeal. 1889

Mr. *Subramanyam* and Mr. *DeRozario*, for appellant. SEP. 30.

Rama Rau, for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court. APPELLATE CIVIL.

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JUDGMENT.

It is urged that the District Judge was in error in holding that the suit was maintainable under Section 42 of the Specific Relief Act. The last male owner was one Sanjivi Chetty, the first defendant is his widow, and the second his mother. As the half-brothers of Sanjivi Chetty's father and the next male reversioners, the plaintiffs brought this suit to set aside a mortgage executed by the first defendant in favor of the third defendant. Under Section 42 of the Specific Relief Act, Illustration (*e*), it is clear that, where there is an alienation by a Hindu widow to the prejudice of the male reversioner, he is entitled to maintain a suit for a declaration that the alienation is not binding upon the reversion. It was also held by the Judicial Committee in *Rani Anand Kunwar* v. *The Court of Wards* (1) that as between the presumptive reversionary heir and a more remote reversioner the latter was not entitled to maintain a suit for a declaratory decree, unless he showed collusion between the former and the widow. The question for decision in this appeal is whether the relation between the second defendant and the plaintiff is that of the nearer and the more remote reversioners within the meaning of the Privy Council decision. The second defendant has only a widow's estate, which under the Mitakshara law is a qualified heritage and **[197]** an estate interposed between the last male owner and the next full owner. We are of opinion that the Judge was right in holding that the intervention of two life estates does not alter the nature of the reversionary interest, which Section 42 was intended to protect. His view is in accordance with the observations made by this Court in *Narayana* v. *Chengalamma* (2) and by the Privy Council in *Anant Bahadur Singh* v. *Thakurain Raghunath Koar* (3). Another objection urged upon us is that the alienation made by the first in favor of the third defendant is binding on the reversion. Both the Courts below find that the appellant, who dealt with a Hindu widow and was therefore bound to show affirmatively the legal necessity which made the alienation by her binding on the reversioners, has failed to establish such necessity. The question whether there was such legal necessity is one of fact, and we are concluded by the concurrent findings of both the Courts below.

This second appeal fails and we dismiss it with costs.

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(1) 6 C. 764. (2) 10 M. 1. (3) 9 I.A. 41 (53).

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

BERESFORD (*Defendant*), *Appellant v.* RAMASUBBA AND ANOTHER (*Plaintiffs*), *Respondents.** [20th August and 8th October, 1889.]

Hindu law—Impartible zamindari—Right of zamindar to alienate—Civil Procedure Code, Sections 437, 464—*Regulation V of* 1804 (*Madras*), *Sections* 2, 8—*Suit by a ward of the Court of Wards—Non-joinder and misjoinder of parties.*

The holder of an impartible zamindari, governed by the law of primogeniture, having a son, executed a mining lease of part of the zamindari for a period of twenty years, by which no benefit was to accrue to the grantor unless mining operations were carried on with success, and the commencement of mining operations was left optional with the lessee. On the death of the grantor, his minor son and successor, by the Collector of the district as his next friend, (authorized in that behalf by the Court of Wards), now sued the assignee of the lessee to have the lease set aside. The second plaintiff was the grantee from the Court of Wards (acting on behalf of the minor zamindar) of certain mining [198] rights on the same land. The defendant had executed a declaration of trust in respect of his interest in favor of certain persons who were not joined: *Held*—

(1) Per *Parker, J.*, that the first plaintiff could sue by the Collector of North Arcot as his next friend, since the Court of Wards had authorized the latter to conduct the suit;

(2) Per *Muttusami Ayyar* and *Wilkinson, JJ.* (*affirming the judgment of Parker, J.*) (1) that the interests of the first and second plaintiffs not being inconsistent with each other, the suit was not bad for misjoinder; (2) that the defendant's interests not having been shown to be hostile to those of the persons entitled under the declaration of trust, the suit was not bad for non-joinder; (3) that the lease was not one which a managing member of an ordinary joint family governed by Mitakshara law could providently enter into;

(3) Per *Muttusami Ayyar* and *Wilkinson, JJ.* (*reversing the judgment of Parker, J.*) that in the absence of evidence of any family custom rendering the zamindari inalienable by the zamindar for the time being for purposes other than those warranted by the Mitakshara law, the lease was not invalid as against the plaintiffs. *Sartaj Kuari* v. *Deoraj Kuari* (I.L.R., 10 All., 272) discussed and followed.

[R., 14 M. 289 (293); 16 M. 11 (16); 20 M. 167 (182); 22 M. 383 (395) (P.C.)=1 Bom.L.R. 277=3 C.W.N. 415=26 I. A. 83=7 Sar. P.C.J. 481; 27 M. 131 (142) (P.C.)=6 Bom.L.R. 7=8 C.W.N. 186=31 I.A. 1=8 Sar. P.C.J. 568; 29 M. 453 (456)=16 M.L.J. 339=1 M.L.T. 272; 23 M.L.J. 658 (663)=12 M.L.T 571 =(1913) M.W.N. 86 (89); D., 38 C. 342 (351)=13 C.L.J. 3=8 Ind. Cas. 837.]

APPEAL against the decree of PARKER, J., (sitting on the Original Side of the High Court) in Civil Suit No. 2 of 1889.

This was a suit by the minor zamindar of Kangundi by his next friend the Collector of North Arcot, appointed as such by the Court of Wards under Madras Regulation V of 1804, to set aside an instrument, dated 18th April 1876, and executed by the late zamindar of Kangundi, the father of the plaintiff, to one Saravana Muttu Pillai, deceased, whereby the exclusive right of mining in part of the zamindari was conveyed to the latter, on the ground that the instrument was not binding on the son and successor of the grantor. The second plaintiff was joined on the ground that the Court of Wards having repudiated on behalf of the first plaintiff, the instrument above referred to had purported to grant to him an exclusive license to search for gold and other metals in the Kangundi zamindari. The defendant was the assignee of the rights of Saravana

* Appeal No. 2 of 1889.

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Muttu Pillai under the instrument of 18th April 1876, of which he (the defendant) had since executed a declaration of trust, Exhibit I, in favor of certain other persons who were not joined as parties to the suit.

It was admitted that the Kangundi zamindari was impartible and was governed by the law of primogeniture. And it appeared that the grantor of the lease sought to be set aside died on 17th February 1883 leaving two sons, of whom the first plaintiff, who was born about 1869, was the eldest. The instrument of the 18th April 1876 was filed as Exhibit A.

[199] Mr. *Shaw* for defendant objected at the hearing that, under the terms of Section 464 of the Code of Civil Procedure, the first plaintiff could not sue by the Collector of North Arcot as his next friend.

With regard to this objection the learned Judge said in delivering judgment :—" I overruled that objection as it appeared to me that the "effect of that section is merely to prevent any person other than some "agent acting under the authority of the Court of Wards from being "admitted as next friend to a minor whose estate has been taken under "the management of the Court. In the plaint as first presented the "manager appointed under Section 8, Regulation V of 1804, was entered "as the next friend of the minor first plaintiff. That manager was subse-"quently dismissed, and the Court authorized the Collector of North "Arcot to conduct the suit. There is nothing in the Regulation to restrict "the duty to the managers appointed under Section 8; the Collector is "*ex-officio* agent of the Court, and the direction would be perfectly legal "under Section 2. The objection is merely formal, and in a similar case "the Privy Council refused to hear such an objection. *Babooo Hurdey* "*Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser* (1)."

The Advocate-General (Hon. Mr. *Spring Branson*) and Mr. *Michell* for the plaintiffs argued that the lease of 18th April 1876 was improvident and was invalid as against the first plaintiff, who was already born at the date of its execution.

Mr. *Shaw* objected further to the frame of the suit on the grounds that the second plaintiff had no right to sue jointly with the first plaintiff, that the beneficiaries under the declaration of trust executed by the defendant should have been joined, and argued that the lease sought to be set aside was not invalid as against the first defendant.

Upon the question of the validity of the lease PARKER, J., delivered judgment as follows :—

" The real question in the suit is whether the lease granted by the late zamindar is binding on the estate in the hands of his successor, and I am of opinion that it is not. Though the estate is an impartible zamindari, there are still rights of survivorship, *Gavuridevamma Garu* v. *Ramandora Garu* (2). and *Naraganti* [200] *Achamma Garu* v. *Venkatachalapati Nayanivaru* (3). The learned Advocate-General does not contend that the lease is invalid merely because it is a long lease running beyond the life-time of the grantor, for the validity of such leases if made for proper purposes beneficial to the family is well recognized. See *Mana Vikiraman* v. *Sundaran Pattar* (4). But he contends that the lease was prejudicial to the interests of the family and altogether beyond the scope of the authority of the zamindar for the time being. Mr. Shaw, on the other hand, contends that the test is not whether the lease has turned out beneficially, but whether, having regard to the circumstances of the

(1) 11 I. A. 26. (2) 6 M.H.C.R. 93. (3) 4 M. 250. (4) 4 M. 148.

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country at the time at which it was granted, it might be viewed as not at that time detrimental.

"It is further urged that the royalties agreed to be paid by Mr. Lonsdale (the second plaintiff) are similar to the terms to which defendant has agreed, and that nothing is to be gained by substituting one lessee for another.

"Not only was Exhibit A granted without consideration for a term of twenty years, but there are no provisions in the document requiring the lessee to work either within a given time or at all, nor are there any provisions for the cancellation of the lease in case the concession is not worked. This is what has actually occurred. It is stated in the plaint, and the allegation is not traversed that nothing whatever has been done by the lessee; nor is he bound to do anything; and the consequence is that the successors of the grantor might be obliged to wait till 1896 before they could derive any profits from gold mining on the estate if from want of capital or want of will, the defendant neglected to utilize his concession. And this without any consideration whatever. A mere one-sided agreement it is impossible to imagine, and even judged by the test proposed by the learned counsel for the defendant the lease could not be upheld.

"There will be a decree for plaintiffs with costs declaring the lease void and for its cancellation."

The defendant preferred this appeal against the decree of Parker, J.

Mr. *K. Brown*, for appellant.

The Advocate-General (Hon. Mr. *Spring Branson*) and Mr. *Kernan* for respondents.

[201] The arguments adduced on this appeal appear sufficiently for the purposes of this report from the following

JUDGMENTS.

Muttusami Ayyar, J.—The first respondent is the minor zamindar of Kangundi in the district of North Arcot and the appellant is the assignee of a mining lease which was granted by the late zamindar on 18th April 1876 to one Saravana Muthu Pillai and by him transferred on 16th October 1876 to Major-General Beresford and Mr. Alexander Mackenzie. Mr. Mackenzie transferred his interest on 21st July 1877 to General Beresford, who, on 8th December 1881, executed a declaration of trust in favor of certain persons in trust for whom he agreed to hold certain shares in the lease. The late zamindar died on 17th February 1883 and the zamindari, which is an impartible estate, devolved by custom on his eldest son, the first respondent, by right of primogeniture. As he was a minor, the Court of Wards took the estate under its management on 11th April 1883; thereupon, the appellant inquired on 7th April 1886 if the Court would renew the lease for a further period of ten or twenty years. The Court of Wards repudiated the lease on 7th May 1886, but offered to consider any proposals which might be made on terms similar to those made in connection with mining leases granted by the Government. No such proposals being made, they granted a lease to the second respondent for two years to search for gold and other metals in a portion of the zamindari on 25th February 1887. The minor zamindar and the lessee of 1887 brought this suit to have it declared that the lease granted in 1876 by the late zamindar was null and void as against them. The plaint stated that the zamindari was the lessor's ancestral property, that he had two undivided sons living at the date of the lease aged seven and five years respectively, and that the

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lease granted by him in 1876 was invalid under the Mitakshara law as against his sons. The learned Judge in the Court below decreed the claim and considered the lease to be improvident and in excess of the late zamindar's authority as the zamindar for the time being of an impartible ancestral estate belonging to a joint Hindu family governed by the Mitakshara law. The first question argued in support of this appeal is whether the parties named in Exhibit I as beneficiaries ought to have been made defendants. The learned Judge below held that there was no privity of contract between them and the minor zamindar, and that they were not necessary [202] parties to the suit. In this conclusion I concur. Exhibit I only declares a trust and constitutes the relation of *cestuique trust* and trustee between the beneficiaries mentioned in it and Major-General Beresford. It is provided by Section 437 of the Code of Civil Procedure that in all suits concerning property vested in a trustee, the trustee shall represent the persons beneficially interested in such property, and it shall not ordinarily be necessary to make such persons parties to the suit. But the Court may, if it think fit, order them or any of them to be made such parties. The last clause is taken from 15 & 16 Vic., cap. 86, Section 42, rule 9, and beneficiaries are made parties in England when the trustee is either wholly uninterested or has an interest adverse to their interest—*Clegg* v. *Rowland* (1), *Payne* v. *Parker* (2). In the case before us, the appellant filed no written statement, nor are we referred to any averment or evidence to the effect that the appellant's interest was hostile to that of the beneficiaries. I do not consider that this contention as to non-joinder can be supported.

The next question is whether the second plaintiff was properly allowed to intervene as a co-plaintiff. It is not denied that he has an interest in the subject-matter of the suit to the extent mentioned by the learned Judge, and such interest could not take effect if the lease sought to be set aside were valid. It is not necessary that the interests of co-plaintiffs should be co-extensive, but it is sufficient if they are not inconsistent with each other. On this point also the decision appealed against is right.

Passing on to the merits, the substantial question for decision is whether the mining lease evidenced by Exhibit A is binding on the minor zamindar. It was executed by his late father and purports to grant mining rights over a portion of the Kangundi zamindari for a period of twenty years. But it is so framed that no benefit could accrue from it to the lessor unless and until the lessee commenced mining operations, and there is no provision whereby the former can insist upon the latter commencing those operations at any time within that period. It was practically left to the arbitrary discretion of the lessee either to commence work or not, and the result is that nothing has been done by the lessee, though the lease was granted in 1876. The learned Judge is, therefore, well founded in holding that the transaction is not [203] one which the manager of a joint Hindu family acting with ordinary care and prudence in the exercise of his qualified power of dealing with family property should conclude.

It is urged for the appellant that there was no improvidence in securing the benefit of English capital and appliances without which no mining operations could ordinarily be carried on in India. But it must be observed that the learned Judge did not take exception to granting a

(1) L.R. 3 Eq. 368. (2) L.R. 1 Ch. App. 327.

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mining lease for that purpose, but objected to the particular transaction evidenced by document A, which was not calculated to secure the benefit suggested for the appellant within a reasonable time and has in the result failed to do so for upwards of ten years. I cannot say that the learned Judge was not warranted in finding that the transaction was not for the benefit of the joint family. His opinion is in accordance with the course of decisions in this Presidency as to the disposing power of the owner for the time being of an impartible estate.

The law hitherto administered in this Presidency was explained by this Court as follows in *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (1):—"Where property is held in co-parcenary by a joint Hindu family, there are ordinarily three rights vested in co-parceners—the right of joint enjoyment, the right to call for partition, and the right of survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment and the right of partition, as the right of an undivided co-parcener, are, from the nature of the property, incapable of existence. But there being nothing in the nature of the property inconsistent with the right of survivorship, it may be presumed that that right remains. The right to call for partition altogether disappears—the right of joint enjoyment is superseded by a right of successive enjoyment. ...... Where from the nature of the property possession is left with one co-parcener, the others are not divested of co-ownership. Their necessary exclusion from possession imposes on the co-owner in possession two obligations to his co-parceners in virtue of their co-ownership—the obligation to provide them with maintenance and the obligation to preserve the *corpus* of the estate." The Court then referred to the decision of the Privy Council in *Katama Natchiar* v. *The Rajah of Shivagunga* (2), where their Lordships declared that, in the absence of **[204]** proof of a special custom of descent, the succession to a zamindari impartible and capable of enjoyment by one member only of the family at a time is governed by "the general Hindu law prevalent in that part of India with such qualifications only as flow from the impartible character of the subject," and observed that the ownership of the co-parcener in possession was not sole was shown by the rule restraining the alienation of the *corpus* by the co-parcener in possession and by the exclusion of the widow from inheritance in the presence of undivided collateral males.

Again, in *Gavuri Devamma Garu* v. *Raman Dora Garu* (3) decided in 1867, this Court observed:—"Such usage (*viz.*, of impartibility) does not interfere with the general rules of succession further than to vest the possession and enjoyment of the *corpus* of the whole of the estate in a single member subject to the legal incidents attached to it as the heritage of an undivided family." It was also considered then that the decision was in accordance with the observations of the Privy Council on the subject. Thus, the principle which has hitherto guided the Courts in this Presidency as supported by the observations of the Judicial Committee has been this—that when an estate is shown to be impartible by custom, the general law is superseded only to the extent of excluding the right of partition and of joint enjoyment, and the Mitakshara law governs the disposing power of the coparcener in sole possession over the *corpus* of the estate. But this view of the law was overruled by the Privy Council in the case of *Sartaj Kuari* v. *Deoraj Kuari* (4). There, the High Court at

(1) 4 M. 250 (266.)
(2) 9 M.I.A 539.
(3) 6 M. H. C. R. 93.
(4) 10 A. 272.

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Allahabad held that unless alienability was shown to be sanctioned by custom, the general Mitakshara law restricted the power of alienation possessed by the co-parcener in sole possession of an impartible raj. Their Lordships of the Privy Council held that the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, that the inalienability of the estate depends upon custom which must be proved or it may be, in some cases, upon the nature of the tenure. The grounds of their decision are (i) that the son's right by birth under the Mitakshara is so connected with the right to demand partition of the estate that it does not exist independently of the latter right; (ii) that when there [205] is no right to demand partition and when the estate descends by custom to the eldest son by primogeniture, as if the property were held in severalty, that mode of succession cannot be reconciled with joint ownership which under the general law is the cause of the restraint on alienation; and (iii) that inalienability is not to be inferred as a matter of law from impartibility, but that it may be specially proved by custom. The Judicial Committee considered also the observations of the same tribunal in the *Shivagunga case* (1) and in the *Naraganti Paleiyam Case* (2) on which the course of decisions in this Presidency was founded, and in other cases, and further adverted to the right of the junior members of the family to be maintained out of the estate and their right of succession. Their Lordships observed that though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it, which under the Mitakshara law is created by birth, does not exist, and that in all the previous cases the question was as to the right of succession to the property on the death of the raja or zamindar, and that it was held that for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family. Referring to the remark of the Judicial Committee in the Shivagunga case. that though the zemindari was impartible, it was part of the common family property, they observed that it must be understood with reference to the question which was then before their Lordships. The decision of the Privy Council in the Allahabad case followed the decision of the same tribunal in *Raja Udaya Aditya Deb* v. *Jadab Lal Aditya Deb* (3) which was decided in 1881. We are concluded by the authority of the Privy Council, and the lease in dispute cannot be set aside on the ground that under the general Mitakshara law it is not binding on the first respondent. The Privy Council decision, however, does not operate to render alienable an impartible estate inalienable by custom or by the nature of its tenure, but it is an authority only to the extent that inalienability is not to be inferred as a matter of general Mitakshara law from impartibility. I am of opinion that before disposing of this appeal we must ask the Court below to try the question :—

Whether by family custom the Kangundi zamindari is inalien-[206] able by the zamindar for the time being for purposes other than those warranted by the Mitakshara law.

Both parties are at liberty to adduce fresh evidence, and the finding will be returned within three months from date of the receipt of this order, and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

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(1) 9 M.I.A. 539. (2) 4 M. 250 (266). (3) 8 C. 199.

1889 Oct. 8. — Appellate Civil. — 13 M. 197.

WILKINSON, J.—The facts of this case are sufficiently set forth in the judgment of the learned Judge. Two objections have been taken to his decision: First, it is argued that all the persons mentioned in the fifth issue should have been made defendants and that the suit is bad for non-joinder of parties; secondly, it is contended that plaintiff not having proved that by law or family custom the late zemindar had not power to alienate, he could not impeach the alienation.

With reference to the first objection, the case is governed by the provisions of Section 437 of the Civil Procedure Code. On the 8th December 1881 the defendant executed a declaration of trust on behalf of certain persons, who were declared to be partners and co-owners with him in the rights. benefits, and privileges of the lease. The deed set forth that the defendants held such lease with all rights, benefits, and privileges granted thereby on behalf of himself and as trustee for the several persons who were partners with him, and he covenanted at any future time at the request and costs of the said persons to convey and assign their respective shares to them. The contention in the present case being between the persons beneficially interested and a third person, the trustee sufficiently represented all the persons interested. It appears from the English cases that all the beneficiaries are necessary parties only where the trustee is wholly uninterested or has an interest adverse to the beneficiaries (*Clegg* v. *Rowland* (1), *Payne* v. *Parker* (2).) It has been held that where a trustee seeks to redeem, or in cases for partition or for sale and partition the trustee sufficiently represents the beneficiaries for the purpose of the suit. In the present case the defendant is net a bare trustee, but a co-owner and partner, and holds the lease as such and as trustee for his partners.

In support of his second contention, the learned counsel for the appellant relies upon two Privy Council cases reported at *Sartaj Kuari* v. *Deoraj Kuari* (3) and *Raja Udaya Aditya Deb* v. [207] *Jadab Lal Aditya Deb* (4). In both these cases the suit was instituted to set aside a permanent alienation made by the holder for the time being of an impartible zamindari and it was held that unless it is shown that there is some custom which would prevent the operation of the general law empowering alienation, proof of custom that the estate descended to the eldest son is not sufficient to invalidate the alienation.

In the Allahabad case the question was as to the validity of the gift of certain villages forming part of the hereditary and impartible estate in favor of a younger wife, and it was disputed by the raja's eldest son. The raja in his defence alleged a right to make any transfer and set up transfers of every description from of old. The High Court decided against the alienation, finding against the fact and custom of alienations set up by defendant. Their Lordships of the Privy Council reversed that decision on the ground that inalienability depends upon custom which must be proved, or it may be in some cases upon the nature of the tenure. They pointed out that if there were no family custom of impartibility, the raja's power over the estate would be governed by the law of the Mitakshara, which renders the father subject to the control of his sons in regard to the immoveable estate, and that the gift would have been void. They wont on to say that the property in the paternal or ancestral estate acquired by birth under the Mitakshara is so connected with the right to partition that it does not exist where there is no right to partition. They

(1) L.R. 3 Eq. 368.
(2) L.R. 1 Ch. App. 327.
(3) 10 A. 272.
(4) 8 C. 199.

quoted with approval two Calcutta cases, *Thakoor Kapilnauth Sahai Deo* v. *The Government* (1) and *Raja Udaya Aditya Deb* v. *Jadab Lal Aditya Deb* (2), in which it was held that it was necessary for the plaintiff, who alleged that the descent of the estate was governed by Mitakshara law, and that by the usage and custom of the family the estate was impartible and descendible according to the law of primogeniture on the male heirs of the original grantee, to show that there was some custom which would prevent the operation of the general law empowering alienation. The decision was given in 1888. The other Privy Council decision was in 1881. It was there held that the owner of an estate which descends as an impartible inheritance is not by reason of its impartibility restricted to making grants or gifts enuring only for his own life, [208] and that the question of inalienability was one depending upon family custom, which would require to be proved.

1889 OCT. 8. — APPELLATE CIVIL. — 13 M. 197.

These decisions are in direct conflict with the principle upon which the whole series of decisions in this presidency as to the right of a zemindar to alienate depends. It has been invariably held that acts and alienations by the holder of an impartible zemindari made to enure beyond his life-time will, if otherwise than *bona fide*, and if prejudicial to the family, be set aside. The grounds on which the decisions have proceeded are that the zemindar, though absolute owner, has only a life interest; that he is the manager of the family for the time being; that his coparceners have rights of survivorship to the possession of the whole estate; and that the law of the Mitakshara by which each son has by birth a property in the ancestral estate, though it cannot apply so as to enable them to insist on partition, at least applies so far as to enable them to claim maintenance. But we are bound by the decisions of the Privy Council, and must hold that the alienation complained of in this suit must be upheld, unless the plaintiff can make out that there exists some family custom in restraint of alienation.

I agree to the issue proposed by my learned colleague.

[Upon the issue remanded for trial, PARKER, J., returned a finding that no family custom to the effect described was proved to exist.

This appeal having thereupon come on for re-hearing their Lordships allowed the appeal and dismissed the suit with costs throughout.]

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13 M. 209.

[209] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

CHANDU AND ANOTHER (*Defendants Nos. 2 and 3*), *Appellants v.* SUBBA AND ANOTHER (*Plaintiff and Defendant No. 1*), *Respondents.** [17th December, 1889.]

Aliyasantana Law—Qualification of ejaman—Leprosy.

The last female member of an Aliyasantana family made an adoption without the consent of her son, who was suffering from ulcerous leprosy, which was not congenital:

Held, the son was entitled to have the adoption set aside.

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* Second Appeal No. 1362 of 1888.

(1) 13 B.L.R. 445. (2) 8 C. 199.

1889 DEC. 17. — APPELLATE CIVIL. — 13 M. 209.

SECOND appeal against the decree of the District Judge of South Canara in appeal suit No. 114 of 1887, affirming the decree of the District Munsif of Karkal in original suit No. 3 of 1886.

The parties to this suit were governed by the Aliyasantana law. Defendant No. 1 was the mother of the plaintiff and had adopted defendant No. 2 and executed a karar in her favour without the consent of the plaintiff, who was a leper. Defendant No. 3 was the natural mother and guardian *ad litem* of defendant No. 2. The plaintiff now sued to set aside the adoption and the karar.

The District Munsif passed a decree in favour of the plaintiff, and his decree was affirmed on appeal by the District Judge.

Defendants Nos. 2 and 3 preferred this second appeal.

This second appeal having come on for hearing before KERNAN and SHEPHARD, JJ., their Lordships made an order directing the trial of (1) an issue as to the truth of a genealogical tree of the family, filed with reference to an allegation in the plaint that there were four male and three female members of the plaintiff's family besides himself and defendant No. 1, and (2) an issue as to the form of leprosy with which the plaintiff was afflicted.

Upon the above issues, the District Judge returned findings as follows :—(1) that the plaintiff had failed to prove the allegation above referred to, and (2) that the leprosy was not congenital, and **[210]** that while the two types of leprosy are often mixed and both result in ulcers, in the present case the ulcerous (non-tubercular) type seemed predominant.

This second appeal then came on for re-hearing before MUTTUSAMI AYYAR and SHEPHARD, JJ.

Narayana Rau, for appellants.

Ramachandra Rau Saheb and *Subba Rau*, for respondents.

JUDGMENT.

The finding on the two issues, remanded for trial which we accept, makes it necessary to decide the question whether the plaintiff's leprosy deprives him of his right to question the adoption made by his mother, the defendant. That the plaintiff as son of the defendant would, but for his disease, have, under the Aliyasantana system, the right claimed by him there can be no doubt. It was held by the late Sudder Court in *Cotay Hegaday* v. *Manjoo Kumpty* (1) that the last female member of an Aliyasantana family having a son cannot, without his consent, make a valid adoption. In the present case it is found as a fact that there is no custom in South Canara excluding lepers either from management or from inheritance. But it is argued that, apart from custom, a leper is disqualified under the Aliyasantana system in the same way as he is under Hindu law. The appellants' vakil, being unable to refer to any distinct authority in support of the position, argues that in the nature of things a leper is not a fit person to act as ejaman, and cites a Malabar case in which a blind man was considered unfit to hold the office of karnavan—*Kanaran* v. *Kunjan* (2). We do not think it was intended to lay down as a matter of general law that blindness is always a disqualification for karnavanship. But apart from that, we are unable to see why a physical infirmity which unfits a man to be karnavan should further deprive him of other rights attached to the status which he enjoys in the family. The question is one of

(1) S.D. (1859) 138. (2) 12 M. 307.

Aliyasantana usage, and in the absence of any authority warranting the adoption by the first defendant during the plaintiff's life time, we are not at liberty to sever from his status one of its legal incidents, viz., the right to bar an adoption by his mother. The Hindu law cannot be extended to the Aliyasantana usage by analogy, especially as it rests on special conventional grounds so far as it relates to disqualified heirs. It must also be observed that [211] the leprosy in the case before us was not congenital, and even if the Hindu law could be extended to the case, it is not applicable on the facts found.

We do not consider that the appeal can be supported, and must, therefore, dismiss it with costs.

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13 M. 211.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

SANKUMANI (*Plaintiff*), *Appellant* v. IKORAN AND OTHERS (*Defendants*), *Respondents.** [24th October, 1889.]

Jurisdiction by consent—Waiver of want of jurisdiction—Civil Procedure Code, Section 25, order made under, without notice to the party not applying.

A suit for land was filed in 1883 in the Subordinate Court of Cochin. In 1884 the Government, by a notification under Act III of 1874, transferred the district where the land was situated from the jurisdiction of that Court to that of the Subordinate Court of Calicut, whereupon the plaintiff applied to the District Court to transfer the case to the file of the first-mentioned Court under Section 25 of the Code of Civil Procedure. The District Judge granted the application without notice to the defendants. The defendants went to trial, and also preferred an appeal against the decree, which was passed in favour of the plaintiff, without objection to the jurisdiction of the Court.

In execution of the above decree, (which was affirmed on appeal) the plaintiff was obstructed. He, therefore, filed the present suit against the obstructors under the provisions of Section 331 of the Code of Civil Procedure, and they pleaded that the decree sought to be executed had been passed without jurisdiction:

Held, (1) that the want of notice to the defendants of the application made under Section 25 of the Code of Civil Procedure was immaterial;

(2) that the defect, if any, of the jurisdiction of the Court passing the decree had been waived by the defendants, and that the present defendants were precluded from availing themselves of it.

[R., 23 M. 314 (316) = 10 M.L.J. 51.]

APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 259 of 1888, reversing the decree of E. K. Krishnan, Subordinate Judge of Calicut, in original suit No. 24 of 1887.

The plaintiff obtained a decree for possession of certain land [212] in original suit No. 25 of 1883 on the file of the Subordinate Court of Cochin. The decree was dated 12th March 1884.

The execution of this decree was resisted as regards part of the land by the present defendants, against whom he accordingly filed this suit under the provisions of Section 331 of the Code of Civil Procedure.

The defendants pleaded, *inter alia*, that the Subordinate Court of Cochin had no jurisdiction to pass the decree sought to be executed by reason of a notification of Government, Judicial Department, No. 40, published in *Fort St. George Gazette* of 2nd February 1884, whereby the

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* Second Appeal No. 468 of 1889.

1889 Oct. 24. — Appellate Civil. — 13 M. 211.

Governor in Council notified under Act III of 1873, Sections 4 and 10, that the Court of the Subordinate Judge at Cochin had, from 11th January 1884, ceased to exercise jurisdiction, and that the Subordinate Judge at Calicut had, from the same date, been invested with jurisdiction over the seven Manaprom amshoms in which the land in question in original suit No. 25 of 1883 and in the present suit was situated.

On the other hand it was argued that Exhibit T, which was an order made by the District Judge of South Malabar on miscellaneous petition No. 93 of 1884, gave jurisdiction to the Subordinate Court at Cochin. That petition was presented by the plaintiff, and prayed that the District Judge should issue an order to the Subordinate Judge at Cochin to hear and determine original suit No. 25 of 1883 himself and not transfer it to the Subordinate Court at Calicut. The order of the District Judge on this petition, which was made without notice to the defendants, was as follows:—"Under Section 25 of the Code of Civil Procedure, original suit No. 25 of 1883 is transferred for disposal to Subordinate Court, Cochin." It appeared that the suit was defended in the Subordinate Court at Cochin and an appeal preferred against the decree of that Court without objection taken as to jurisdiction.

The present suit was dismissed by the District Munsif on the ground that the decree sought to be executed had been passed without jurisdiction, and his decree was affirmed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Sundara Ayyar, for appellant.

Sankaran Nayar, for respondents.

JUDGMENT.

We are unable to concur with the opinion of the Courts below that the decree of the Cochin Subordinate Court in [213] original suit No. 25 of 1883 is bad in law. The notice prescribed by Section 25 of the Civil Procedure Code is intended for the benefit of the party in the suit other than the party applying for transfer, and defendants in the above suit would have been entitled to object to the transfer on the ground that notice had not been given. But admittedly they by their conduct in going to trial submitted to the jurisdiction, and not only suffered the Cochin Court to pass a decree against them, but also appealed from that decree without taking any objection to the jurisdiction of the Court. The only question, therefore, is whether they were at liberty to waive their objection to the validity of the order by which the Cochin Subordinate Court acquired jurisdiction. In *Ledgard* v. *Bull* (1) and *Minakshi* v. *Subramanya* (2), the Privy Council have pointed out that in cases in which a Court has no inherent jurisdiction, waiver will not confer jurisdiction; but in cases in which a Court has jurisdiction, but there has been some irregularity in the initial proceedings upon which it exercised jurisdiction, the defect is one which can be cured by waiver, though it may be made a valid ground of objection to the exercise of jurisdiction. It must not be overlooked that under Section 25 the District Court can of its own motion transfer, and the provision, therefore, as to notice is one in the nature of procedure and practice as observed in *Park Gate Iron Company* v. *Coates* (3) with reference to 13 and 14 Vict., Cap. 61, sect. 14, and in *Graham* v. *Ingleby* (4) with reference to 4 Ann. Cap. 16, sect. 11. It is, therefore, clear that as the objection was not taken by the parties in the suit, but on

(1) 13 I.A. 134. (2) 11 M. 26. (3) L.R. 5 C.P. 634. (4) 1 Ex. 651.

the contrary waived, any defect in the order conferring jurisdiction on the Cochin Court must be held to have been cured. We have also to observe that both the Lower Courts have omitted to consider that the notification of Government transferring jurisdiction over the Manaprom amshoms was dated 2nd February 1884, whereas the suit was filed in 1883. At the time, therefore, of the notification the Cochin Court had jurisdiction to decide original suit No. 25 of 1883, and such jurisdiction was apparently not taken away as regards pending suits by the notification of Government. The order of Government transferring jurisdiction is not before us, and in its absence we do not desire to [214] express any opinion as to whether the jurisdiction in pending suits was validly taken away. Nor do we think that the present defendants, who were no parties to the decree in original suit No. 25 of 1883, and as between whom and the plaintiff the execution creditor in the Cochin Subtlordinate Court, the Calicut Subordinate Court has jurisdiction, are entied to rely on the provisions of Section 25 of which the defendants in original suit No. 25 of 1883 did not avail themselves and thereby call in question the jurisdiction of the Cochin Subordinate Court.

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APPELLATE CIVIL.

13 M. 211.

We set aside the decree of the Lower Appellate Court and remand the appeal to be heard and determined on its merits. Costs to follow result.

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13 M. 214.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RANGANAYAKAMMA AND ANOTHER (*Defendants*), *Appellants v.* ALWAR SETTI (*Plaintiff*), *Respondent.**
[27th November and 12th December, 1889.]

Hindu law—Vaisyas—Requisites of adoption—Adoption during pollution of adoptive parent– Contract Act—Act IX of 1872, *Sections* 15, 16—*Coercion—Undue influence.*

The minor widow of a deceased Hindu of the Komati or Vaisya caste (who had authorized her to adopt a son) corporeally accepted a boy as in adoption from his natural father who (*semble*) belonged to a different gotram from her deceased husband. There were no formal declarations of giving and taking the child, and *datta homam* was not performed. At the time when the child was handed over to the widow her husband's corpse was still in the house, and the relatives of the child and other members of the caste obstructed the removal of the corpse until the child had been accepted as above and the widow had executed a deed of adoption :

Held, that there was no valid adoption by the widow.

Per cur : We cannot say that obstructing the removal of a corpse by the deceased's widow or her guardian, unless she made an adoption and signed a document is not an unlawful act or not an act such as is defined by Section 15 or 16 of the Indian Contract Act.

Dicta in *Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondai rDasi* (1) as to incidents of a formal adoption discussed.

[215] Observations on the necessity of *datta homam* in a ceremonial adoption among members of a twice-born class, and on an adoption taking place during the pollution of the adoptive parent.

[R., 24 B. 218 (223) ; 24 B. 473 (480).]

APPEAL against the decree of L. A. Campbell, District Judge of Nellore, in original suit No. 17 of 1887.

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* Appeal No. 143 of 1888.
(1) 7 I.A. 250.

1889 DEC. 12. — APPELLATE CIVIL. — 13 M. 214.

Suit by the minor plaintiff by his natural father and next friend to establish his adoption by defendant No. 1, the widow of Akula Chenchayya, a Vaisya, and for possession of the moveable and immoveable property of Akula Chenchayya. Defendant No. 1, who was a minor, defended the suit by her guardian *ad litem*, her father, who was also joined as defendant No. 2.

The facts of this case appear sufficiently for the purposes of this report from the judgment of the the High Court. Exhibit A, which is there referred to, was translated as follows:—

"Yesterday at about 8 o'clock in the night my husband Chenchayya Setti died of the disease under which he was labouring.

"Before his death, *i.e.*, about 7 o'clock in the night, my husband directed me to adopt a boy in order to perpetuate his family. This he said in the presence of our priest by name Chakravarthala Govinda Charulu Ayavarlu Garu, Tusali Appala Charlu, Kami Setti China Subbiah, Duggi Setti Bali Setti and others, also in the presence of our relatives and females.

"According to the orders of my husband, I, having this day consented to adopt a boy in the presence of the mediators, who are the attestors, adopted one Alwaru, son of Mogili Garatiah, and settled that the funerals of my husband should be performed in the name of my adopted son.

"If my father, &c., raise any objection as to the said arrangement, these shall not be valid. I caused this to be written by Addanki Subbaramiah of my own free will."

The District Judge, on a question raised as to the ceremonial validity of the adoption, delivered judgment as follows :—

"There were no religious ceremonies. The immediate presence of the corpse forbade them. But there seems to have been a giving and taking, though the defence argue otherwise. Admittedly the father of plaintiff and two sons were fetched to the house, and there is the evidence of several witnesses for plaintiff to the effect that the boy selected, *i.e.*, plaintiff, offered fruits to first defendant. The fifth, sixth, eighth, ninth, and tenth witnesses all say that plaintiff was taken by his father up to first **[216]** defendant, and the first four of these agree in saying that the child was seated on his father's thigh at the time. It is in such little points that the truth becomes apparent, and there can be no doubt but that this action of the father of the boy did occur. If so, it seems to me that there was a giving. An acceptance there certainly was, for not only was the document then signed, but, as already noticed, the boy was admittedly kept on in the house for some days.

"The parties are Komatis and are, therefore, members of the third superior regenerate class, the Vaisyas. It has been ruled by the Madras High Court in *Chandramala* v. *Nuktamala* (1) that a giving and receiving in adoption is sufficient in the case of the next highest class, the Kshatriyas. It follows, therefore, that this is sufficient in the class to which the parties belong. The adoption now in question is, therefore, not invalidated on the absence of religious ceremony. There was some sort of ceremony, for the boy's head was admittedly shaved. If a religious ceremony is not necessary, the fact of the person adopting being under pollution is necessarily not fatal to an adoption. Pollution merely bars the performance of a religious ceremony. This is shown in the case of *Thangathanni* v. *Ramu* (2). The circumstances there were the same as here, and the fact that those

(1) 6 M. 20. (2) 5 M. 358.

parties were Sudras does not affect the principle involved. I take it from that decision that the mere fact of death causes pollution. But the sixth witness for plaintiff, a Brahman, stated that 'pollution begins, it is said, after the dead body is burnt'... ..I hold, therefore, that adoption was made, and that it is valid, unless it can be shown for the defence that undue influence or coercion was used to bring it about."

The District Judge came to the conclusion that no undue influence and coercion had been exercised on defendant No. 1 and passed a decree for the plaintiff.

The defendants preferred this appeal.

Rama Rau, for appellants.

Parthasaradhi Ayyangar, for respondent.

JUDGMENT.

The real parties to this appeal are minors, and the question for decision is whether the first appellant adopted the plaintiff, and whether the adoption, if true, is valid.

The minor appellant's husband was one Chenchayya, a Komati [217] or Vaisya by caste, and on 16th March 1887 he died after a protracted illness extending over several months. He left considerable property, which is estimated in the plaint at Rs. 40,000, and but for the adoption, the first appellant, his childless widow, would be his heir-at-law. The plaintiff's case was that about two hours before his death, Chenchayya learned that he was in a critical condition, that after directing his wife to pay certain legacies, he asked her to adopt some boy and thereby perpetuate his family, and that upon his death and prior to the removal of his corpse for cremation the widow adopted the plaintiff with the consent of her guardian and father, the second appellant, and executed a deed of adoption (Exhibit A) in the name of the plaintiff's natural father. The appellants contended that Chenchayya became uuconscious on the morning of the 16th March and died in the evening; that he was not in a condition either to give legacies or authorize an adoption; that the plaintiff was neither given by his father nor taken by the first appellant in adoption; that no *datta homam* was performed; that the appellant was under pollution when the adoption is said to have been made, and that the plaintiff's brother-in-law with the aid of a police constable and others obstructed the removal of Chenchayya's dead body, and by continuing to do so coerced her to sign Exhibit A when she was in grief and unfit to act with free will and consent. The Judge upheld the adoption and decreed the claim, and to this decision the appellants object and reiterate the objections urged in the written statement.

We agree with the Judge that Chenchayya did authorize his widow to adopt. Five witnesses for the plaintiff deposed to that effect, and they are in no way connected with the plaintiff. The authority to adopt is mentioned in Exhibit A, and it is very likely that a person in Chenchayya's position should have desired to provide against the extinction of his family. Though this evidence is contradicted by some of the appellants' witnesses, and though they state that Chenchayya was unconscious throughout the 16th March, they are all related to the minor appellant with one exception. Again the appellant's pleader lays stress on the absence of an authority in writing, on Chenchayya's omission to adopt whilst alive notwithstanding his protracted illness, on the plaintiff's omission to call Chenchayya's guru or priest, Govindacharlu, who is said by the plaintiff's witnesses to have been [218] consulted about the adoption, and on Chenchayya's conduct in

1889 DEC. 12. — APPELLATE CIVIL. — 13 M. 214.

accepting at once the statement of the plaintiff's sixth witness that he would die soon, without communicating with the physicians who had been treating him. These defects in the evidence in support of the authority to adopt detract doubtless from its weight, but it must also be observed that persons often postpone the making of a will or arranging for an adoption until they are on their death-bed. On the one side there is positive evidence, apparently disinterested and accepted as *bona fide* by the Judge who had the witnesses before him, and not inconsistent with the probabilities of the case; whilst on the other there is only the evidence of relatives, and the observations to which the plaintiff's evidence is open are in themselves not conclusive. We are of opinion that on appeal we must accept the finding that Chenchayya directed his widow to adopt.

We also concur in the opinion of the Judge that before Chenchayya's corpse was removed, the plaintiff was taken to his house and given by the boy's father and taken by the minor appellant in adoption. We shall presently consider how far the latter acted under pressure, and whether the pressure amounts to coercion; but, for the present, we confine ourselves to the consideration of the question whether there was such an overt act as might be accepted in law to amount to a gift and acceptance. The evidence for the plaintiff shows that he was taken to Chenchayya's house, that he was there seated on his father's lap, that a cocoanut and fruits were then placed in his hands, and that he gave them to the minor appellant, his adoptive mother. The plaintiff's third witness, who officiated at Chenchayya's funeral ceremonies, stated that the acceptance of fruits from the boy selected for adoption by the desire of his natural father, and in his presence, was a token of his acceptance in adoption. The appellants' pleader draws our attention to the decision of the Privy Council in *Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondari Dasi* (1) and argues that though the boy might be taken to be corporeally delivered, the act was not accompanied with the declarations, *viz.*, "I give this child as your son, and I take him as my son." We do not apprehend their Lordships of the Privy Council to do more than indicate the ordinary incidents of a formal adoption, and rule that there must be a **[219]** corporeal delivery of the boy by a person competent to give to a person competent to take under circumstances which denote an intention on the part of the one to give and an intention on the part of the other to accept the boy in adoption.

Upon the evidence, the Judge, we consider, properly held that there was a gift and acceptance as described above. Though there is a conflict of testimony on this point also, we are inclined to accept the finding of the Judge. It is clear that the plaintiff was shaved immediately after he had been received in adoption, and according to his third witness, the funeral ceremonies of Chenchayya were performed until the eighth day of his death in the name of the plaintiff. The adoption is further referred to as having taken place in Exhibit A. The substantial questions then for determination in this case are whether the plea of coercion is well founded and whether the adoption is invalid either because no *datta homam* was performed or because it was made whilst the adoptive parent was under pollution. As to the contention in regard to pollution, the Judge is clearly in error in saying that it arises on the cremation of the corpse. Pollution consequent on birth or death arises according to the usage of the caste to which the parties belong at the moment of birth or death. It is, however,

(1) 7 I. A. 250.

unnecessary to dwell further on this point as *datta homam* was admittedly not performed, though Chenchayya was a Vaisya by caste and belonged to the third of the regenerate classes. Though *datta homam* was declared not to be indispensable even among Brahmins in the case of *Singamma* v. *Ramanuja Charlu* (1), yet it was held in *Govindayyar* v. *Dorasami* (2) by the Full Bench that it might be necessary to a ceremonial adoption, that adoption among the three higher classes was ceremonial, and that unless the adoption was from the same *gotram*, an inquiry as to Hindu usage in this Presidency would be material. This view is confirmed by the observations of the Privy Council in *Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondari Dasi* (3). Their Lordships say in that case that "All that has been decided is that amongst Sudras no ceremonies are necessary in addition to the giving and taking of the child in adoption. The mode of giving and taking a child in adoption continues to stand on Hindu law and usage, *and it is perfectly clear* [220] *that amongst the twice-born classes there could be no such adoption by deed, because certain religious ceremonies, the datta homam in particular, are in their case requisite.* The system of adoption seems to have been borrowed by the Sudras from these twice-born classes, whom in practice they imitate as much as they can, adopting those purely ceremonial and religious services which, it is now decided, are not essential for them in addition to the giving and taking in adoption. It would seem, therefore, that according to Hindu usage which the Courts should accept as governing the law, the giving and taking in adoption should take place by the father handing over the child to the adoptive mother and the adoptive mother declaring that she accepts the child in adoption."

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It is then said that these remarks are in the nature of an *obiter dictum*, and that the parties in that case were Sudras. But, even if they were so, they would be entitled to great weight as pointing to a distinction in the law of adoption as administered to the different classes. They are, however, made to indicate the ground of the decision that corporeal delivery of the child is essential even among Sudras, and unless it is shown that the usage in this Presidency is otherwise, they must be accepted as binding upon us.

As regards the plea of coercion, the case for the plaintiff is that the minor appellant insisted upon carrying out the wishes of her husband at once; that her father consented to her doing so; that two boys, the plaintiff and his younger brother, were shown to her; that she selected the plaintiff; that those assembled for the funeral said that there was no objection to the selection, the plaintiff not being the first born, though he was the eldest of the sons alive, and that thereupon he was given and taken in adoption in the mode already described. The appellants' case, on the other hand, is that the removal of the corpse was obstructed; that the appellants were told that the corpse should not be removed until the plaintiff was adopted; that his brother-in-law took an active part in forcing the adoption on the appellants; that at his instance a police constable interfered and insisted on the adoption; that an application made at the neighbouring police station for aid was refused, and that overcome by grief, the minor appellant and her father were coerced into making the adoption, and that Exhibit A was executed by the minor and attested by her father otherwise than with free will and consent. The Judge observes that no [221] actual force or restraint was used; that some caste influence was

(1) 4 M.H.C.R. 165. (2) 11 M. 5. (3) 7 I.A. 250.

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very probably brought to bear on them; that the spiritual needs of the deceased as conceived by his castemen called for their interference, and that his expressed wish for a son almost rendered such interference a duty on their part. No doubt the caste wished the adoption, wished it to take place at once, and if the deceased had authorized it, there was no occasion for the delay. He held that the caste influence was not exerted in an irregular manner, and that the adoption must be upheld. In coming to this finding the Judge has overlooked several facts in evidence which raise a strong presumption in support of the appellants' contention. The first appellant was only about 13 years old when Chenchayya died, and, though under Hindu law a minor might make a valid adoption for the spiritual benefit of her husband, yet there must be cogent evidence to show that she did so under the intelligent and disinterested guidance of her legal guardian seeking *bona fide* to provide for a spiritual necessity with due regard to her interest so far as it is compatible with such necessity. The Judge finds that Chenchayya's castemen exerted a pressure on the widow and her guardian, but he omits to consider that the occasion was one when no such pressure should be and is ordinarily exerted. The adoption was authorized but on the previous evening, and within two hours later, Chenchayya died, and his death, which doomed the minor, according to the usage of her caste, to a lifelong widowhood, must have caused to her and her father intense grief. The occasion was, therefore, one in which no guardian would be in a frame of mind to deliberate and decide whether an adoption should be made, and if so, who ought to be selected for the adoption. Adoption is usually regarded in this country as a solemn and irrevocable act, and it is generally made after protracted discussion and careful consideration among members of the family interested in the infant widow. The procedure which was followed in the case before us is as summary as it is unusual.

If immediate adoption had been deemed necessary by Chenchayya for his spiritual benefit, it was in his power to have made it before he died, or to have named a boy and enjoined his widow to adopt on the expiry of the period of pollution. This he had not done on the plaintiff's own showing. It is then by no means easy to understand why Chenchayya's castemen should care more for his spiritual benefit than himself, unless they feared that the **[222]** widow might, in the exercise of her legal right, either not adopt at all or not adopt the boy they desired to see her adopt if she and her guardian were allowed time for freedom of thought and action.

Again, it is an undisputed fact that the minor appellant was under pollution when the adoption was made. On this point the Judge is clearly in error, for according to the usage of the caste, as is indeed conceded by the respondent's pleader, pollution commences, as already stated, at the moment of death and not after cremation as is remarked by the Judge. The plaintiff's third witness, who officiated at Chenchayya's funeral, deposes that adoption is an auspicious act, that no auspicious or religious ceremony is performed before the expiration of the period of pollution, and that although he is 41 years of age, and although he is a *purohit* by profession, as far as he was aware no adoption ever took place anywhere else whilst the corpse was still lying in the house. Several other witnesses for the plaintiff say that when they have to perform their father's annual obsequies, which, according to custom, must be performed on the lunar day corresponding to the date of death, such ceremonies are postponed, if they are under pollution, until it is over and they become pure again. It

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is also generally believed that religious ceremonies, if performed during the period of pollution, are devoid of merit and lose their efficacy. Hence it is that when an immediate adoption is desired, it is made either immediately prior to death or on the expiration of the period of pollution. Having regard to these incidents of caste custom, we do not see our way to believe that those who insisted on immediate adoption and prior to the removal of the corpse did so *bona fide* to provide for urgent spiritual necessity.

Apparently, several of the plaintiff's witnesses suggest in view of this peculiarity in the case that the minor appellant desired to carry out the wishes of her husband at once and that her father consented to her doing so. The Judge evidently does not credit them, inasmuch as he accepts the evidence for the appellant so far as it shows that pressure was put upon them. In support of this view, there is the evidence of the appellants and their witnesses Nos. 2, 5, 8, 9, and 10. As most of these witnesses are relatives of the minor appellant, the Judge considers perhaps that the pressure was neither irregular nor severe and that it did not go beyond firm persuasion. But we find from the evidence of the [223] Inspector of Police, *viz.*, the fourth witness for the appellants, that the girl's uncle, her second witness, went to the police station-house at Nellore Town whilst Chenchayya's corpse was lying in his house and complained that its removal was being prevented and the adoption of a boy was being fabricated, but that he was told that the matter was not one for police interference. This corroborates the evidence of the minor appellant's father and uncle that the plaintiff's brother-in-law and others urged upon them the plaintiff's adoption; that they refused to adopt and persisted in doing so until 10 o'clock in the morning; that the former refused to allow the corpse to be removed; that these were backed by the head constable of Nabob's Petta; that by the desire of the minor appellant's father, her uncle complained at the police station at Nellore; that the complaint was ineffectual, and that they were overcome by the pressure. Their evidence is corroborated in another important particular. The plaintiff's second witness is the head constable who so interfered. There is strong reason to think that he was there and assisted in bringing about the execution of the document through pressure. Though he states that he went to Chenchayya's house because he wanted to see him on hearing of his death, yet it is to be observed that he must have been then aware that the presence of a Mahomedan like him would be unwelcome on the occasion, that there was no satisfactory reason for his going into the entrance where the corpse lay unless it was to speak to the minor and assist the plaintiff's brother-in-law as suggested by the appellant and several of her witnesses or for his taking part as an attesting witness in the execution of Exhibit A. Seeing that the plaintiff was a pauper, whilst Chenchayya was comparatively well to do in life, and his widow had several relations, the selection of the plaintiff for adoption, whose father only recently settled at Nabob's Petta and was in no way related to Chenchayya's family, was antecedently improbable. The evidence of the appellants' seventh witness, who wrote Exhibit A, shows that it was dictated by the plaintiff's brother-in-law, the police constable, and others, that though he waited there till 10 A.M., the parties did not affix their signatures, and that he then left. He is corroborated by the fact that his attestation does not appear in the document. As to the suggestion that no physical force or restraint was used, we cannot say that obstructing the removal of a corpse by the deceased's widow or

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[224] her guardian unless she made an adoption and signed a document, is not an unlawful act or not an act such as is defined by Section 15 or 16 of the Indian Contract Act.

It is true that one witness for the plaintiff stated in his examination-in-chief that the plaintiff was of the same *gotram* with Chenchayya, but he denied all personal knowledge in cross-examination. The appellants' witnesses Nos. 2 and 8 denied that the plaintiff was of Chenchayya's *gotram*, and the plaintiff's father did not go into the witness box to contradict them. Furthermore, it is an undisputed fact that the plaintiff was expelled from Chenchayya's house within eight days after his death, and before the funeral ceremonies were completed. This revulsion of feeling is also unaccountable on the view suggested for the plaintiff that the adoption was sought for by the minor appellant with the sanction of her father. There appears to have been some misapprehension on the part of the Judge in regard to the right of interference on the part of Chenchayya's castemen. It is usually regarded as indelicate and harsh even to suggest an adoption to an infant widow and her father when the corpse is lying, and when in the midst of their affliction they can think of nothing else than their misfortune, and as altogether inconsistent with what is due from persons calling to condole and express their sympathy. The exerting of any pressure by strangers on such occasion is as unwarranted in law as by the usage of the caste.

We are of opinion upon the whole evidence that but for the obstruction caused to the removal of Chenchayya's corpse by his brother-in-law and others, and for the appellant and her guardian being overawed by a head constable assisting them, and by the police refusing to interfere on their complaint, neither the plaintiff would have been taken in adoption nor Exhibit A executed as evidence of it.

We set aside the decree of the Judge and dismiss the suit with costs throughout.

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[225] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Parker, Mr. Justice Shephard and Mr. Justice Handley.

NILAKANTA (*Plaintiff*), *Appellant* v. KRISHNASAMI AND ANOTHER (*Defendants*), *Respondents*.* [11th January and 25th March, 1889 and 10th January and 24th February, 1890.]

Transfer of Property Act—Act IV of 1882, *Section* 135—*Assignment for value of a debt—Decree to which the assignee is entitled.*

In a suit against a debtor an assignee for value of the debt is precluded by Transfer of Property Act, Section 135, from recovering more than the price paid by him for the assignment with interest thereon and the incidental expenses of the sale. *Jani Begam* v. *Jahangir Khan* (I.L.R., 9 All., 476) approved.

[**Diss.**, 21 C. 568 (575) (F.B) ; **F.**, 20 A. 327 (336) ; 5 C.P.L.R. 13 (14) ; **R.**, 19 B. 290 (292) ; 22 B. 761 (763) ; 23 M. 449 (455) ; 3 O.C. 18 (20); 7 Ind. Cas. 871 (872) = 8 M.L.T. 420 ; **D.**, 16 A. 313 (315).]

SECOND appeal against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in Appeal Suit No. 761 of 1887, affirming the

* Second Appeal No. 805 of 1888.

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decree of T. A. Krishnasami Ayyar, District Munsif of Mannargudi, in Original Suit No. 444 of 1886.

The two defendants and Subbanna and Ramanna were the sons of one Subramanya Ayyar, deceased. One Lakshminarayani Ammal (since deceased) was Subramanya's adoptive mother. During the minority of the defendants, a family arrangement was made by which Lakshminarayani was to receive for her maintenance 100 kalams of paddy and Rs. 150 a year from the four brothers above referred to. The plaintiff stated that the defendants had allowed the sum due by them to Lakshminarayani to fall into arrears for eight years, and that she, in consideration of his having paid her Rs. 800, assigned to him in 1884, her right to receive from defendants Rs. 875 due to her for her maintenance. He brought this suit to recover that amount.

The District Munsif found that the plaintiff had paid to Lakshminarayani Rs. 100 only and he passed a decree in favour of the plaintiff for Rs. 130, being Rs. 100 with interest thereon and the cost of the stamp affixed to the instrument of assignment and the cost of registering it. On appeal, the Subordinate Judge [226] affirmed the decree of the District Munsif, and the plaintiff preferred this second appeal against his decree.

This second appeal having come on for hearing before KERNAN and PARKER, JJ., their Lordships made the following

Order of Reference to Full Bench.—"We think that the question in this case ought to be submitted to a Full Bench.

"The facts material are—

"Lakshminarayani was entitled to recover from the two defendants, her grandsons, and their property for maintenance Rs. 875 from January 1876 to December 1883. She made over her right to recover that sum to the plaintiff, a stranger, not one of the debtors, and not interested in the property on which it may have been charged.

"It has been found that the only consideration paid by the plaintiff for the transfer to him was Rs. 100. The plaintiff alleged that Rs. 700 were due to or advanced by him to Lakshminarayani before the transfer, but this allegation is found to be untrue.

"Decrees have been passed by both the Lower Courts in favour of plaintiff, but limiting the amount to the sum of Rs. 100 and Rs. 22-8-0, interest on it to the date of the plaint and further interest and registration fees. Each party is decreed to bear his own costs.

"It is not alleged by the defendants that any sum was tendered to the plaintiff in discharge of his claim either in Court or out of Court.

"Referring to the Transfer of Property Act, 1882, especially Section 135, the question for the Full Bench is whether the plaintiff is entitled to be paid the full sum of Rs. 875 due, or only the sum decreed, Rs. 130-3-0. In this Court there are two decisions to be considered, *Rathnasami* v. *Subramanya*(1), *Singaracharlu* v. *Sivabai*(2), in the Calcutta Court, the cases of *Grish Chandra* v. *Kashisauri Debi*(3), *Khoshdeb Biswas* v. *Satar Mondol* (4), in the Allahabad Court, the case of *Jáni Begam* v. *Jahangır Khan* (5)."

Rama Rau, for appellant.

Bhashyam Ayyangar, for respondents.

[227] The arguments adduced on this second appeal appear sufficiently for the purposes of this report from the following

(1) 11 M. 56. (2) *Ib.*, p. 498. (3) 13 C. 145.
(4) 15 C. 436. (5) 9 A. 476.

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JUDGMENTS.

COLLINS, C.J.—The point the High Court has to decide in this reference is—

Has an assignee of an actionable claim suing to recover such claim the right to recover the whole amount of such claim, or is he precluded by Section 135 of the Transfer of Property Act from recovering more from the debtor than the amount actually paid by him (the assignee) for it, together with interest and the incidental expenses of the sale?

The words of the section are as follows :—

"Where an actionable claim is sold, he, against whom it is made, is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

"Nothing in the former part of this section applies—

"(*a*) where the sale is made to the co-heir to, or co-proprietor of, the claim sold;

"(*b*) where it is made to a creditor in payment of what is due to him;

"(*c*) where it is made to the possessor of a property subject to the actionable claim;

"(*d*) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment."

The reference was made on account of the High Courts of Allahabad and Calcutta differing in opinion upon the construction of the section.

In *Grish Chandra* v. *Kashisauri Debi* (1), Mitter and Grant, JJ., decided that as Section 135 does not say that a transferee is not entitled to recover from the debtor the full amount of the debt due from the latter, and as it was not alleged that the debtor had paid or tendered the amount mentioned in the section, the transferee was entitled to the whole amount of the claim, and that as the Lower Courts had decreed the plaintiff's claim sub-section (*d*) applied.

[228] In *Khoshdeb Biswas* v. *Satar Mondol* (2), Petheram, C.J., and Tottenham, J., agreed with the decision in *Grish Chandra* v. *Kashisauri Debi* (1), but expressed an opinion that if the defendant paid into Court immediately the suit was commenced the money paid by the plaintiff together with interest and expenses, that would be a payment within the meaning of the Act and would discharge the defendant from further liability. In *Jani Begam* v. *Jahangir Khan* (3), Straight and Tyrrel, JJ., held that the purchaser of an actionable claim was only entitled to recover the actual sum he paid for it together with the interest and incidental expenses. The Transfer of Property Act was evidently the work of more than one hand, and some of the sections in it are very difficult to construe and somewhat obscure to ordinary minds; but it appears to me that if the obvious intention of the legislature is taken into consideration, the meaning of the section appears fairly clear. I take it that the Legislature intended to prevent speculative trafficking in actionable claims, and provided that if an actionable claim was sold the buyer should only get from the debtor the sum he had paid for it. I think, therefore, that a defendant-debtor has a right to put the purchaser of the actionable claim sued on to the proof of his claim, and also to contend that at all events he cannot recover more than the sum he purchased it for, together with

(1) 13 C. 145. (2) 15 C. 436. (3) 9 A. 476.

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interest and expenses. The debtor is to be wholly discharged by paying to the buyer the price given for such claim and incidental expenses of the sale with interest. If the Legislature meant that the debtor should only be wholly discharged if he paid the sum before action brought or paid it into Court immediately the action was brought, I suppose it would have said so. How is the debtor to ascertain what price the purchaser did pay and what are the expenses of such sale until the plaintiff has proved the facts of his case and given the debtor an opportunity of ascertaining what the facts are? Petheram, C.J., in *Khoshdeb Biswas* v. *Satar Mondol* (1) is of opinion that if the debtor immediately on the suit being brought paid the purchaser the amount he paid for it together with expenses and interest, that would be a good payment and the debtor in that case would be wholly discharged. I think this is too limited a view to take of the section. The debtor, in my opinion, is wholly discharged by payment of the sum actually paid [229] together with interest and expenses even if he has contested the claim, and the Court deciding the validity of the claim can give a decree for the amount only which has been actually paid together with interest and expenses, in other words, the debtor's liability is limited to the sum the purchaser gave for the actionable claim together with expenses and interest. If the debtor is wholly discharged in law by payment of a certain sum, it seems to follow that the creditor is only entitled to recover that sum. With regard to clause (*d*) in the section, I am of opinion that it applies only to a state of facts existing at the time of the purchase of the actionable claim.

With very great respect to the learned Judges of the Calcutta High Court, I am constrained to differ from them and to adopt the conclusion arrived at by the Judges of the Allahabad High Court. The plaintiff in this case is, therefore, only entitled to recover the smaller amount.

PARKER, J.—The question referred to the Full Bench is whether the plaintiff, as assignee of an actionable claim, is precluded by Section 135 of the Transfer of Property Act from recovering from the debtor more than the price paid by him with interest thereon.

The object of the section which was enacted in 1882 was apparently to prevent trafficking and speculation in litigation, it having been held that the English laws of champerty and maintenance were not in force in India. See the Privy Council decisions in *Chedambara Chetty* v. *Renja Krishna Muthu Vira Puchanja Naiker* (2) and *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (3). It was held that in India the *bona fide* acquisition of an interest in the subject of litigation was not illegal, but that unfair and extortionate transactions got up for mere purposes of spoil or litigation, or for disturbing the peace of families, should be held invalid. A fair agreement to supply funds to carry on a suit was held not *per se* opposed to public policy.

Section 135 of the Transfer of Property Act appears to have been framed to give effect to these principles. In the first (or principal) clause it is enacted that when an actionable claim is sold the debtor shall be wholly discharged *by paying* to the assignee the price paid by him and incidental expenses of the sale with [230] interest thereon. It is observable, as pointed out by Mitter, J., in *Grish Chandra* v. *Kahisauri Debi* (4) that the legislature did not say the transferee should *not be entitled* to recover the full amount of his debt, but enacted on what terms of payment the

(1) 15 C. 436. (2) 13 B.L.R. 509. (3) 4 I.A. 23. (4) 13 C.145.

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debtor should be wholly discharged. This ruling was followed by the Chief Justice and myself in *Subbammal* v. *Venkatarama* (1); but the conflicting decision of the Allahabad Court in *Jani Begam* v. *Jahangir Khan* (2) was not then before us, having been delivered only a few days previously.

In the view taken by the latter Court it was held that the assignee could in no case recover more than the sale price with interest thereon and incidental expenses of sale except where the original creditor had, before making the transfer, obtained a judgment upon the actionable claim or had prosecuted the claim up to the stage at which the Court was ready to pronounce judgment. In this view it is the state of things existing at the time of transfer and not at the time of payment that is to be regarded. My difficulty in accepting it has been that it seems to me incongruous and inaccurate to speak of a claim already decreed as an actionable claim, and I was, therefore, disposed to think that the legislature intended the debtor to be wholly discharged by payment of the sale price provided that payment was made either before decree or before the claim was ripe for judgment. The difficulties of taking this view are no doubt that in ordinary language a creditor cannot be said to be entitled under any circumstances to recover a larger sum than that which if paid will wholly discharge the debtor, and it is hard to see why a debtor should be worse off because he puts an assignee to the proof of his claim.

Section 135, however, relates to the *sale* of actionable claims and Clauses (*a*), (*b*) and (*c*) relate to the state of things at the date of the transaction. The preceding Section (134) relating to a warranty by the transferor is *expressly* limited to the state of things at the date of the transaction, and this being so the inference is strong that the legislature intended Clause (*d*) of Section 135 to have a similar application. The section is very obscurely worded and appears to have been imported from the Code of Lower Canada :—See Stokes' Anglo-Indian Codes, Volume I, page 814. Upon the whole, therefore, notwithstand-[231]ing the awkwardness of the language in the first sentence in Clause (*d*), I am not prepared to dissent from the opinion of my learned colleagues that the plaintiff is not entitled to recover more than he actually paid, *viz.*, Rs. 100 and interest upon that sum.

SHEPHARD, J.—The question referred to the Full Bench stated in the abstract is this—Is the assignee of a debt suing to recover it precluded by Section 135 of the Transfer of Property Act from recovering from the debtor more than the price paid by him for it with interest thereon and the incidental expenses of the sale? The High Court at Allahabad has answered this question in favour of the debtor, *Jani Begam* v. *Jahangir Khan* (2). The High Court of Bengal has answered it in the assignee's favour, *Grish Chandra* v. *Kashisauri Debi* (3) and *Khoshdeb Biswas* v. *Satar Mondol* (4). Apart from the Act there is no doubt that the debtor is in no way concerned with the price paid by the assignee to the original creditor; his liability is not affected by the transfer of the benefit of the obligation. The Act introduces a rule which, inasmuch as it prejudices the assignee and advantages the debtor, must presumably be founded on the notion that assignments of debts for less than their full nominal value should be

(1) 10 M. 289.
(2) 9 A. 476.
(3) 13 C. 145.
(4) 15 C. 436.

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discouraged, probably with the view of preventing trafficking in litigation. By means of Section 135 there can be no doubt that a debtor can by a payment before suit of the sum paid by the assignee with interest thereon and the expenses of the sale obtain a complete discharge of his liability and thus transfer from the assignee to himself the benefit of the good bargain which the assignee has made. It has to be seen whether the language used in the section is applicable to the case where a suit is brought and the claim is contested. Whether the section should be read in this way or whether it should receive the narrower construction put upon it by the High Court of Bengal, it is equally clear that the language used is somewhat obscure. In the judgment of Mitter, J., in *Grish Chandra* v. *Kashisauri Debi* (1), it is suggested that if the defendant's contention were sound, the section should have declared that a transferee should not be entitled to recover from the debtor the full amount of the debt due from the latter. It may, with equal force, be suggested that if the section was only to operate in case of payment made before the suit or before **[232]** contest, words to that effect would have been introduced. We have to give some reasonable meaning to the section having regard to the language used and the apparent intention of the legislature. And if the language of the section will bear either of two interpretations, that ought to be preferred which appears most reasonable.

When a man is said to be discharged from liability by payment of a certain sum, it is ordinarily meant that the liability is limited to that sum and that no greater sum can be recovered by suit. The sum by payment of which a debtor is discharged is ordinarily the sum for which his creditor can obtain judgment. If similar language is found in a contract between parties, I apprehend there is no doubt that it will be taken to limit the obligation of the debtor, and in consequence the creditor's right of action to the amount stated. In my judgment, therefore, the section is susceptible of the interpretation for which the defendant's vakil contends. According to the construction put upon the section by the High Court of Bengal the amount which, if paid before suit, or if paid into Court immediately after suit brought, would satisfy the plaintiff's claim is not necessarily the amount for which decree must be given. The advantage which the section gives to the debtor and the disadvantage which it brings to the assignee of the debt cease the moment the debtor contests the assignee's claim. With all deference to the learned Chief Justice and the Judges of the High Court of Bengal, I cannot think that this is a reasonable interpretation of the section; for how can it possibly be said that the claim of the assignee is less meritorious because the debtor finds it expedient to satisfy it without dispute? The fact that the debtor admits the claim would rather go to show that the transaction between the assignor and the assignee was not of a speculative character. Moreover, if the section is to be restricted to cases of payment before suit or into Court, there are few cases in which it could operate at all; for the debtor would not ordinarily know what price the assignee had paid or what interest was chargeable or what expenses he had incurred, and he would have no means of ascertaining except those means which would be available to him in the course of a suit. Mitter, J., also refers to clause (*d*) of the section and observes that if the debtor had offered to pay the amount mentioned in the section after the decree of the Lower Court, he would not **[233]** have been discharged.

(1) 13 C. 145.

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This observation, which anyhow would not have been pertinent in the present case where no decree for the full amount claimed has ever been given, assumes that the clause refers to a judgment obtained by the assignee after the assignment. In my opinion the words used in Clause (*d*), as also those used in the preceding clauses indicate a state of things existing at the date of the assignment. If that is the meaning of the clause, the use of the past tense is explained and the whole clause is intelligible. The word "judgment" may be intended to include judgments of foreign Courts, while the word "decree" is avoided, because a debt which has become the subject of a decree is no longer an actionable claim. In either of the two cases supposed, the uncertainty of the claim has been removed to a certain degree, the speculative character of the transaction has disappeared, and therefore there is no reason why the assignee should not realize the whole amount of his claim. It may be said that instances will be rare in which the clause thus construed can become applicable, but that is what might naturally be expected of cases saved by a proviso and excepted from a general rule. On the other hand, if the clause was intended to refer to the suit brought by the assignee himself, the language used is not what might have been expected and the cases covered by the proviso would be those most frequent in occurrence. It would, I apprehend, be a strange and unusual mode of drafting to except from the general rule by one of several provisoes the class of cases in which otherwise the rule could most frequently become applicable. Moreover the operation of the section will become very uncertain. Let me put the case of the heir of an alleged debtor sued by the assignee of the creditor; the defendant being in ignorance as to the circumstances of the claim, puts the plaintiff to proof of the debt and says that if it be proved he is ready to pay into Court the amount claimable under Section 135. On the issue as to the fact of the debt evidence might first be given so as to put it beyond all doubt; and after that witnesses as to the assignment might be called, from whom alone the defendant could learn the particulars needed for fixing the amount to be paid into Court. It would only be at the end of the case and when the claim "had been made clear by evidence and was ready for judgment" that the defendant would have learnt what sum he should pay into Court. And then the former part of the section not applying, a decree must be passed against [234] him for the full amount and costs. Such a case is not an unlikely one, and it shows that an assignee without any unfair astuteness might prevent the defendant from taking advantage of the section. Surely too if the clause was to be read in the way supposed, there would have been some reference to the matter of costs, for if payment is made in the course of the suit, it cannot be intended that the defendant is to be thereby wholly discharged from liability unless he also pays the costs. Having regard as well to the language used as to the consequences which would follow from any other interpretation, I think the clause must be read as referring to a suit brought before the date of the assignment.

In my opinion the section will bear the larger construction put upon it, and that construction is more reasonable and corresponds more fully with the apparent intention of the legislature than the narrower interpretation which has been adopted in Calcutta. I must say, therefore, that the question stated above should be answered in the affirmative, and the plaintiff should have a decree for the lesser sum mentioned in the order of reference.

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HANDLEY, J.—The intention of the legislature in enacting Section 135 of the Transfer of Property Act, *viz.*, to discourage speculative purchases of actionable claims, is sufficiently obvious from the exceptions, which are all cases where that mischief would not exist, and this object is distinctly recognized by the learned Judges who decided the case of *Rathnasami* v. *Subramanya* (1). At page 63 of the judgment in that case occurs this passage :—" The intention indicated by Section 135 is to prevent traffic in actionable claims by making the difference between the amount of the claim and the actual price paid irrecoverable by action, and thereby removing the motive for unconscionable dealing in such cases."

Whether legislation with that object was desirable, or whether if so the provisions of this section are the best that could be devised to carry out that object, may be open to question. It is not easy to see why the debtor should be benefited because his creditor has made a disadvantageous bargain with a third party. But with that the Courts have nothing to do. They have only **[235]** to carry out the intention of the legislature so far as it is sufficiently expressed in the words of the enactment. And though the wording of this section is unusual I confess that but for the decisions in *Grish Chandra* v. *Kashisauri Debi* (2) and *Khoshdeb Biswas* v. *Satar Mondol* (3), I should have entertained no doubt whatever that the words meant that the buyer cannot recover nor can the debtor be compelled to pay more than the price for which the claim was sold with interest and incidental expenses. To say that a person is wholly discharged by doing a certain thing seems to me to be the same thing as to say that that he is under no obligation to do and therefore cannot be compelled to do more than that thing. And the words of the section presuppose a claim made whether by suit or otherwise :—" He against whom it (the claim) is made is wholly discharged." The construction put upon the section by the High Court of Calcutta would render it almost wholly inoperative, for in the majority of cases the debtor cannot know the exact sum which he should pay or tender under the section, and unless he does pay or tender the exact sum according to that construction, the section affords him no protection. And if the words are to be thus strictly construed I cannot see how tender is let in, for the discharge is only to be by payment. And why should payment into Court immediately on the suit being brought be a good payment under the section, as suggested in the judgment in *Khoshdeb Biswas* v. *Satar Mondol* (3) any more than a payment at any other stage of the suit, before (in the words of Clause (*d*) of the section) " the claim has been made clear by evidence and is ready for judgment." As to the construction to be put upon that clause, in my opinion it must refer to the state of things existing at the time of the transfer and not at the time of payment. All the other Clauses (*a*), (*b*) and (*c*) refer to circumstances attending the sale and there are reasons for excepting a transfer made under the circumstances mentioned in Clause (*d*) which accord with the object and intention of the section. When a judgment has been delivered affirming the claim or the claim has been made clear by evidence, there is no longer an element of speculation in the sale of the claim. Seller and buyer alike know what is the value of the thing to be sold and the mischief aimed at by the section is non-existent. On the other hand there seems **[236]** no good reason why the debtor should lose the benefit of the section

(1) 11 M. 56. (2) 13 C. 145. (3) 15 C. 436.

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because he disputes some part of the debt or puts the transferee to proof of the assignment. And the unreasonableness of the other construction of the clause becomes greater in the case of actionable claims, other than money claims, to which the section seems to extend, for in such cases the person against whom the claim is made need have no notice of the transfer, and the suit may be the first intimation he has of it. In my opinion the construction put upon the section by the Allahabad Court in the case of *Jani Begam* v. *Jahangir Khan* (1) is the correct one, though I do not agree with all the reasoning of that judgment. I would answer the question referred that the plaintiff is entitled to be paid only the sum decreed which I understand to be the price actually paid by him with interest and incidental expenses.

[The second appeal having come on for final hearing before a bench of two Judges, the Court delivered judgment as follows:—

JUDGMENT.

On the decision of the Full Bench, the second appeal fails and must be dismissed with costs.]

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SESHAN AND ANOTHER (*Petitioners*), *Appellants in A.A.O. No.* 100 *of* 1886 *v.* RAJAGOPALA (*Counter-petitioner*), *Respondent.** RAJAGOPALA (*Petitioner*), *Appellant in A.A.O. No.* 103 *of* 1886 *v.* RAMANADA AND OTHERS (*Counter-petitioners*), *Respondents.** [9th and 10th April, 1889.]

Civil Procedure Code, Sections 231, 258—*Limitation Act—Act XV of* 1877, *Sections* 7, 8, *Schedule II, Article* 179—*Minority—Execution of decree.*

A member of an undivided Hindu family and his two minor brothers (who sued by him as their next friend) brought a suit for partition of family property against their father, and joined as defendants certain persons who were in possession **[237]** of part of the property under alienations made by the father but alleged in the plaint to be invalid as against the family. In 1875 a decree was passed in favour of the plaintiffs in the above suit No application for the execution of the decree was made by either the first or second plaintiff; but the third plaintiff, having attained his majority in June 1881, applied for execution in April 1884: his application was opposed by two of the defendants. The District Judge made an order granting his application in respect of the one quarter share to which he was declared to be entitled under the decree:

Held, that the order of the District Judge was wrong, as neither Section 7 nor Section 8 of the Limitation Act affected the case, and the application was accordingly barred by limitation.

[**Diss.**, 28 C. 465 (468); 9 O.C. 269 (270); **F.**, 22 A. 199 (203); **Appr.**, 25 M. 26 (36); 25 M. 431 (436) (**F.B.**); **R.**, 20 B. 383 (385); 16 M. 436 (439); 17 M. 189 (192); 18 M. 38 (40); 6 C.W.N. 348 (351); 21 M.L.J. 1041 (1044)=10 M.L.T. 418=(1911) 2 M.W.N. 450; 21 M.L.J 1088 (1092)=10 M.L.T. 370=(1911) 2 M.W.N. 420; 24 M.L.J. 333=13 M.L.T. 268=(1913) M.W.N. 328 (330); 3 O.C. 316 (320); **D.**, 19 M. 243 (247).]

APPEALS against the orders of J. W. Reid, District Judge of Coimbatore, made on execution petition No. 13 of 1884 and civil miscellaneous petition No. 216 of 1885.

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* Appeal against Orders Nos. 100 and 103 of 1886.

(1) 9 A. 476.

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Execution petition No. 13 of 1884, presented in April 1884, was a petition by one of three plaintiffs who had in 1875 obtained a decree for the partition of family property, for the execution of the decree. The applicant was a minor at the date of the decree, but had attained his majority in June 1881. The plea of limitation was raised in civil miscellaneous petition No. 216 of 1885, which was a counter-petition preferred by certain of the judgment-debtors, but the District Judge who referred in his judgment to *Mon Mohun Buksee* v. *Gunga Soondary Dabee*(1), *Jagjivan Amirchand* v. *Hasan Abraham* (2), *Surju Prasad Singh* v. *Khwahish Ali* (3) overruled this plea and granted the application for execution in respect of the applicant's one-quarter share in the property, the subject of the suit.

The persons against whom execution was permitted to issue preferred appeal No. 100; and the decree-holder preferred appeal No. 103.

Bhashyam Ayyangar and *Ramachandra Ayyar*, for appellants in appeal No. 100 of 1886.

Subramanya Ayyar, for respondent.

Subramanya Ayyar and *Sundara Ayyar*, for appellant in appeal No. 103 of 1886.

Balaji Rau, Bhashyam Ayyangar, Anandacharlu, Sankaran Nayar, Mahadeva Ayyar and *Ramachandra Ayyar*, for respondents.

The further facts of this case appear sufficiently for the purposes of this report from the

JUDGMENT.

[238] These are appeals from orders passed in execution of the decree in original suit No. 16 of 1873 on the file of the District Court of Coimbatore. The suit was one brought for partition by the appellants, Rajagopala Misrayer and his two brothers, against their father and 81 others, who were in possession of portions of the family property under alienations made in their favour by the father. Of the three plaintiffs, the first plaintiff alone was of age when the suit was brought, and he instituted it in his own name and as the next friend of his two minor brothers, the second and the third plaintiffs, who were described to be under his protection. The decree which was passed against the 45th and 46th defendants who are the appellants in civil miscellaneous appeal No. 100, had reference to three items of immoveable property Nos. 79, 80 and 81, and it declared that the plaintiffs were entitled to one half of the jenm right in item No. 80 and to redeem the mortgage of items Nos. 79, 80 and 81 on payment to the 45th defendant of Rs. 11,340, the amount for which the plaintiffs and the first defendant, their father, were jointly liable under Exhibit 44, that the plaintiffs' share of the mortgaged property declared to be redeemable by them and of the mortgage-debt was three-fourths. The decree was passed on the 30th August 1875, and no application for its execution was filed either by the first plaintiff or the second plaintiff within the period prescribed by Act XV of 1877.

The third plaintiff, however, who was a minor when the suit was brought, attained his majority on the 4th June 1881 and applied for execution of the decree on the 7th April 1884. The 45th and 46th defendants opposed the application on the grounds, first, that the decree sought to be executed was merely declaratory; secondly, that the third plaintiff was bound to deposit the entire mortgage-debt, amounting to Rs. 17,973-12-9,

(1) 9 C. 181. (2) 7 B. 179. (3) 4 A. 512.

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in Court; and, thirdly, that the application was barred by limitation. The Judge granted the application to the extent of the third plaintiff's quarter share and left the amount payable in redemption of the mortgage to be determined by the District Court in South Malabar, to which the plaintiff prayed that the decree might be transferred for execution. From this order the third plaintiff appeals on the ground that he is entitled to execute the whole decree, and defendants Nos. 45 and 46 appeal for the reason that the execution is wholly barred by limitation. The third plaintiff's appeal [239] No. 103 relates also to portions of the order in which the other respondents are concerned. His pleader, however, does not support the appeal, so far as it relates to those portions, and states that he has had no instructions from his client. We, therefore, dismiss appeal No. 103 so far as it concerns respondents other than respondents Nos. 20 and 21 or defendants Nos. 45 and 46 with costs (separate sets) of such of them as have appeared by pleader in this Court.

As to the contest between the third plaintiff and the 45th and 46th defendants, we attach no weight either to the contention that the decree is, so far as it affects the latter, merely declaratory, or to the fact that the third plaintiff did not offer in his application for execution to pay the mortgage-debt. Reading the decree together with the judgment, we see no reason to doubt that, though the former is not drawn up with precision, it was intended to be mandatory. The prayer in the plaint and the very nature of the suit support the construction suggested by the Judge. Though the application did not in terms offer to deposit the mortgage-debt, yet there is no sufficient warrant for the suggestion that the third plaintiff sought to recover possession before paying the mortgage-debt. The application prayed for transmission of the decree for execution to the District Court in South Malabar, and in his order the Judge left the amount to be paid to be determined by that Court. The substantial question, therefore, for determination is whether the application for execution is barred by limitation. Though the suit in which the decree was made was one for partition, and though in such suit the share of each of the co-parceners might be ascertained and awarded, yet, having regard to the actual direction embodied in the decree, we agree with the pleader for defendants Nos. 45 and 46 that it is not "a decree passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each," and that Article 179 would apply if the appellant's application is not protected by Section 7 of the Limitation Act. It was suggested that Section 8 of the Limitation Act was applicable to the case before us, but we are not prepared to adopt this suggestion. Section 8 does not appear to include execution-creditors, and the classes of persons contemplated by it are joint-creditors or joint-claimants, one of whom is under some disability, whilst there are others who can give a valid discharge [240] in regard to his interest without his concurrence. But the question whether one of several decree-holders can enter satisfaction on behalf of all is one of procedure, and a rule of decision must be looked for in the Code of Civil Procedure. Having regard to Sections 258 and 231, we are of opinion that it is not the act of the joint decree-holder, but the act of the Court executing the decree that is intended to operate as a valid discharge. Though a joint decree-holder may accept payment out of Court and grant a receipt in acknowledgment of such payment, yet in the absence of a certificate of satisfaction, the creditor's acknowledgment does not of itself operate as a discharge. Again, Section 231 suggests that

liability of the adult joint decree-holder to the minor decree-holder in respect of his interests in the decree is not considered to be of itself an adequate protection, but that the duty of protecting the minor's interest is cast upon the Court. We consider that Section 8 applies only to those cases in which the act of the adult joint owner is *per se* a valid discharge.

It is next contended that Section 7 does not apply to the case before us, and we are of opinion that this contention is well founded. It applies to cases in which there is either one decree-holder and he is a minor, or in which all the joint decree-holders are minors or labour under some other disability. It does not seem to be intended to apply to cases in which the minor's interest can be protected by joint decree-holders, who are also interested in the subject-matter of the decree. Section 7 is in these terms :—" If a person entitled to institute a suit or make an application " be, at the time from which the period of limitation is to be reckoned, a " minor, or insane, or an idiot, he may institute the suit or make the " application within the same period after the disability has ceased, as " would otherwise have been allowed from the time prescribed therefor " in the third column of the second schedule hereto annexed." The language of this section is substantially the same as that of the proviso in the statute of James I and of 3 and 4 Will. IV, cap. 42, Section 4. Referring to the former statute Lord Kenyon observed as follows in *Perry* v. *Jackson* (1) :—" the proviso was introduced into the statute in order to " protect the interests of those persons only which there was no one of " competent age, of competent understanding, or competent in point of " residence in [241] this country, to protect . . . Now the words of this " clause, grammatically speaking, do not apply to the present case ; they " only extend to cases where the person individually a single plaintiff, or " persons in the plural, when there are several plaintiffs, are not in a situa- " tion to protect their interests. Neither does this case come within the " policy of the law which provides that, if parties neglect their interests, they " shall lose the benefit of suing to enforce their demands." We are, therefore, of opinion that the construction that ought to be placed on Section 7 is the same as that placed on the corresponding provision of the English statute. It was held under it that the disability of one of two co-heirs cannot operate to save the statute in favour of the other who was capable of instituting a suit. Having regard to the language of Section 231 of the Code of Civil Procedure, we must hold, if any other construction were adopted, that the third plaintiff could not only execute the decree in regard to his own share, but also in regard to the shares of those who are precluded by the Limitation Act from applying for execution. There can be no doubt that the first and second plaintiffs are barred by Article 179 of the Limitation Act, and, if so, what the Act would forbid them from doing directly could not be done for them by the third plaintiff, which would be the case if any other construction were to prevail. The conclusion we come to is that the application of the third plaintiff is barred by limitation as against defendants Nos. 45 and 46.

We set aside the order of the District Judge so far as it relates to them and dismiss the application with costs both in this Court and in the Court below.

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(1) 4 T.R. 519.

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[242] APPELLATE CIVIL.

Before Mr. Justice Shephard.

NARASIMHULU AND OTHERS (*Petitioners*) *v.* ADIAPPA (*Counter-petitioner*).* [20th and 25th February, 1890.]

Civil Procedure Code, Section 272—Post Office Act—Act XIV of 1866, Section 5—Attachment of letters in Post Office.

An attachment was placed under Civil Procedure Code, Section 272, on letters in the post office addressed to certain judgment-debtors The day before the attachment the senders of the letters had applied to have the letters returned to them:

Held, that the postmaster held the letters in trust for, or on behalf of, the judgment-debtors, and they were accordingly liable to attachment on the application of the decree-holder.

CASE referred for the orders of the High Court under Section 617 of the Code of Civil Procedure by E. J. S. White, District Munsif of Kurnool.

The case was stated as follows :—

"Bupalem Subbayya and Kristam Ramayya, tradesmen of Prodatur in the Cuddapah District, came to Kurnool and purchased quantities of indigo, which they forwarded to the petitioners, who are also tradesmen of Prodatur.

"On the 27th March 1889 the petitioners registered and posted two covers at Prodatur. One was addressed to Bupalem Subbayya and contained halves of certain currency notes to the value of Rs. 800. The other cover was addressed to Kristam Ramayya and contained the remaining halves of the same notes. Both were directed to Kurnool. The money was admittedly remitted in payment of the indigo already purchased, or to be thereafter purchased, by Subbayya and Ramayya on account of the petitioners. The covers were received at the Kurnool Post office on the 29th March 1889. Previous to the arrival of the covers at Kurnool, the addressees had left the town, having, it is alleged, absconded without paying for the indigo taken by them. They were arrested on charges of cheating preferred against them, and [243] brought back to Kurnool, on the date the letters were received at the Kurnool Post office, the addressees were in confinement in the Kurnool jail, pending trial.

"On the 5th April 1889 the counter-petitioner filed original suit No. 130 of 1889 against Bupalem Subbayya and original suit No. 131 of 1889 against Kristam Ramayya; and on his application the covers addressed to the defendants, which had in the meantime been received at the Kurnool Post office, were attached before judgment. The attachment was made in the usual manner by notices issued to the Postmaster of Kurnool in the form (No. 142 of the 4th Schedule, Civil Procedure Code) prescribed for orders of attachment under Sections 272 and 486 of the Civil Procedure Code. The order of attachment of this Court was issued in both cases on the 5th April 1889 and received by the Postmaster of Kurnool on the following day. On the 4th April the petitioners presented to the Postmaster of Kurnool an application to the address of the Postmaster-General for return of the covers to them.

* Referred Cases Nos. 20 and 21 of 1889.

"These petitions are now filed for release of the attachment. It is pleaded that the covers, not having been delivered to the addressees, were not liable to be attached; that the petitioners had the right of recalling them; that the post office was merely the agent of the senders for delivery of the letters to the addressees; and that the petitioners having countermanded the request for delivery, before delivery was made, are entitled to have the covers returned to them.

"For the counter-petitioner it is pleaded that the money contained in the covers was remitted to the addressees in payment of indigo supplied by them to the petitioners; that the payment became complete as soon as the covers were posted; that the post office was the agent, not of the senders for delivery, but of the addressees for receipt of the money contained in the covers; and that the petitioners had no right to recall the covers and have not recalled them.

"Decrees have been obtained by the counter-petitioner in both suits against the addressees; and it is now necessary, in execution of those decrees, to decide the question of the legality of the attachment made before judgment.

"The case is one without, as far as I am aware, any exact precedent; and both parties request that it may be submitted for **[244]** the decision of the High Court. The decree-holder specially requests the reference, as the Postmaster-General, it is understood, declines to be bound by the prohibitory order issued; and there is no very obvious method by which the attachment can be enforced against that official.

"In these circumstances, I would beg respectfully to submit, for the decision of the High Court, the question whether the prohibitory orders issued to the postmaster of Kurnool for detention of the covers in question are valid and binding on the petitioners and the Postmaster-General.

"As Section 617 requires that the Court making a reference should state his opinion on the question referred, I would venture to express my opinion that the attachment is valid. The question appears to me to be whether a cover made over to the post office for delivery to the addressee has passed out of the power or possession (which may be constructive) of the sender. This question can, I think, be decided by reference to Section 4 of the Contract Act. We there find in illustration of cases in which an acceptance is 'out of the power' of the acceptor, the case of an acceptance contained in a letter sent by post. The acceptance is out of the power of the acceptor as soon as the letter is posted. The view, then, of the legislature must be that a letter is out of the power of the sender as soon as it is posted. That the legislature considers the title of the sender of a letter to such letter to have ceased as soon as the letter is posted, appears from Section 27 of the Indian Post Office Act XIV of 1866. It is there enacted that 'No person having delivered into any post office any letter or other article shall be entitled to recall the same.' Provision is made for the return of any such letter under the authority of the Governor-General in Council; but this of course is a matter of grace. The sender cannot claim the return of the letter as of right, the title to such letter having ceased to be in the sender, and, as I view it, vested in the addressee. It appears to me that the post office in such a case is the agent, not of the sender, but of the addressee. The addressee can demand as of right the delivery of the cover to him; whereas the sender by express enactment ceases to have such right as soon as he delivers the cover to the post office. The post office receives delivery of the letter for the addressee. The delivery is complete, for the sender

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has also by express enactment ceased to have power over it. Delivery to [245] an agent authorized to receive such delivery is delivery to the principal. The Government is authorized to take delivery of letters—Section 5 of the Post Office Act, 1866. Delivery to a carrier passes the property in the goods delivered—Sections 91 and 92 of the Contract Act. The post office has the exclusive privilege of carrying letters—Section 5 of the Post Office Act. This raises the question of stoppage in transit; but it appears to me that the right to stoppage of letters in transit by the post office is excluded by Section 27 of the Post Office Act already quoted. There is no right, though the stoppage may be permitted at the discretion of the Government. The addressee on the other hand is entitled to delivery—Section 45 of the Post Office Act.

"The Court attaching the letter stands, it seems to me, in the place of the addressee, and, as in the case of any other attachment of property, acquires a superior right to possession of the property attached. The Court clearly can attach a cover, specially a cover known to contain bank notes or promissory notes—Section 266 of the Civil Procedure Code. A cover containing such notes, delivered to the post office, is 'property in the custody of a public officer' within the meaning of Section 272 of the Civil Procedure Code.

"It is not necessary that the property should belong to the judgment-debtor. It is sufficient if he has a disposing power over it—Section 266. It is not denied that the addressee has a disposing power over a letter sent to him through the post office. It cannot be disposed of by the post office except by his authority. He can direct the post office to deliver it to any person mentioned by him, to re-direct it, or keep it till called for. He can sell it and direct delivery to the purchaser. He can refuse to receive it, and direct that it be returned to the sender.

"Property is liable to attachment 'whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf'—Section 266. In the present case the covers containing the notes are expressly held in the name of the judgment-debtor in each case, and it can scarcely be denied that they are held in trust for him on his behalf.

"Admittedly the money contained in the covers was money due to the addressees for the indigo forwarded by them to petitioners. If the petitioners were seeking to recover the money from the addressees, they would, it is clear, have no right to do [246] so. The case does not, it appears to me, differ in any material respect from the ordinary one of money due by A to B and delivered to C for payment. If such money is attached, when C is on the point of paying it to B by D, B's judgment-creditor, can A have any right to object?

"The objection, which the Postmaster-General is understood to take to the attachment, appears to be even less tenable than the objection raised by the petitioners. Let us suppose that the addressees, decrees against whom have been put in execution in this Court, authorized the post office to deliver to the Court, in satisfaction of those decrees, the covers held by the post office containing money due to the said addressees; and that to obviate all objections they authorized the Court, by a power of attorney to receive delivery. The post office would, I presume, in that case have no objection to making the delivery in accordance with the instructions of the addressees. The attachment made by the Court vests for the time being all the rights of the judgment-debtors in the Court, and has all the effect of a direct conveyance. For the post office

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to argue in this case that the Court cannot claim delivery of the covers without an express authority from the addressees is tantamount to an assertion that the Court cannot make an attachment without the judgment-debtors' authority and consent. It is asking the Court to produce its power, of attorney."

Ramasami Mudaliar, for petitioners.

Rama Rau, for counter-petitioner.

JUDGMENT.

The question forming the subject of this reference arises in consequence of a claim to have released from attachment certain letters containing currency notes on the ground that the right and title of the judgment-debtors had ceased before the attachment took place. The letters, which are addressed to the judgment-debtors, were attached in the hands of the postmaster in the manner indicated by Section 272 of the Civil Procedure Code. A day before the attachment took place, the claimants, being the persons who had sent the letters, had applied to the Postmaster-General, through the postmaster, to have the letters returned. The question is whether, in the circumstances stated by the District Munsif, the letters, with their contents, were, on the 6th April, liable to attachment as being the property of the judgment-debtors, and whether they were held by the postmaster in trust for them or on their behalf. I am of opinion that both **[247]** questions must be answered in the affirmative. The notes were sent by the claimants to the judgment-debtors on account of purchases of indigo made, or to be made by the latter on behalf of the former. In the hands of the judgment-debtors the notes would clearly have been part of their general property and subject to attachment by their creditors. The question is whether the ownership in the notes was vested in the judgment-debtors or liable to be divested at the date of the attachment. According to English law, it seems clear that the post office holds every letter that is once posted as agent of the addressee and that therefore where delivery of a thing is requisite to pass the property, it is generally sufficient to deliver it for transmission bv the post office, *Ex parte Cote* (1). I find nothing in the Act XIV of 1866 to indicate a different state of law in this country, and, on the contrary, the illustrations to Sections 4 and 5 of the Contract Act are in accordance with English law. I think that the provision in the Act, reserving to the Postmaster-General the liberty of returning the letter to the sender, which is in effect a proviso to the declaration that the sender shall not be entitled to have his letter returned cannot possibly be construed in the manner suggested by the vakil for the claimants. Construed as giving an absolute right to the sender, the proviso would be inconsistent with the former part of the section. When once the letter has been posted, the property in it becomes vested in the addressee, and the sender has no power of reclaiming it without the addressee's consent. The doctrine of stoppage *in transitu* can have no application, because the parties do not stand in the relation of vendor and purchaser. In my judgment the question referred by the District Munsif must be answered in favour of the judgment-creditors.

(1) L.R. 9 Ch. 27.

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[248] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

PERUMAL AND ANOTHER (*Petitioners*), *Appellants v.* RAJAGOPALA (*Counter-petitioner*), *Respondent.** [1st November, 1889.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Section* 27—*Order under—Civil Procedure Code, Section* 2—*Decree.*

An order made under Rent Recovery Act (Madras), Section 27, is not a decree within the meaning of Civil Procedure Code, Section 2.

APPEAL under Letters Patent against the order of Wilkinson, J., made on civil revision petition No. 228 of 1888, which was presented under Section 622 of the Civil Procedure Code, and prayed the High Court to revise the order of C. Srinivasa Sastri, District Munsif of Trivellore, made on miscellaneous petition No. 13 of 1887.

A landlord having distrained certain crops, &c., as for arrears of rent, the tenants forcibly recovered possession of the property distrained. The landlord accordingly presented miscellaneous petition No. 13 of 1887 in the Court of the District Munsif praying that the distress be restored to him. The District Munsif made an order to the effect sought under Act VIII of 1865, Section 27.

The tenants preferred the above petition.

Sadagopachariar, for petitioners.

Srirangachariar, for respondent.

The petition having come on for hearing before Wilkinson, J., it was objected for the respondent that the petitioners' remedy was by way of appeal to the District Court. His Lordship delivered judgment as follows:—

WILKINSON, J.—" I am of opinion that the preliminary objection must prevail. It is argued that the order of the Munsif being the formal expression of an adjudication upon a right claimed, is a decree, and that from such decree an appeal lies to the District Court. On the other hand it is contended that the only appeals provided for by Section 69 of Act VIII of 1865 are from judgments of a Collector, and that, therefore, no appeal lies from an order passed under Section 27 of that Act. It was unnecessary to **[249]** make any special provision in Act VIII of 1865 for an appeal from an order of a Civil Court, because provision for all such cases is made in the Code of Civil Procedure. The order passed under Section 27 is, in my opinion, a decree capable of execution, and being a decree of a Civil Court, the appeal is regulated by the provisions of the Code.

" This petition must, therefore, be dismissed with costs."

The petitioners preferred this appeal against the above order of Wilkinson, J.

The appeal having come on for hearing before MUTTUSAMI AYYAR and PARKER, JJ., their Lordships, after hearing the pleaders for the parties, delivered judgment as follows:—

JUDGMENT.

We are unable to agree with the learned Judge that an order made under Section 27, Act VIII of 1865, is a decree within the meaning of the Civil Procedure Code.

* Letters Patent Appeal No. 8 of 1889.

Having regard to the language of Section 27, we think it can only be taken to be an order in a summary proceeding, and as such cannot be said to have decided a "suit or appeal" under Section 2 of the Code of Civil Procedure. The decision in *Vadamalai Thiruvana Tevar* v. *Carup-pen Servai* (1) would show that the proceeding contemplated by the section is summary. We must, therefore, allow the appeal with costs, and we shall proceed to hear the civil revision petition under Section 622.

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[Their Lordships, holding that the petitioners had established no grounds on which the Court should interfere in revision, dismissed their petition with costs.]

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Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RANGAYYA APPA RAU (*Plaintiff*), *Appellant v.* KADIYALA RATNAM AND OTHERS (*Defendants*), *Respondents.**
[29th October, 1889.]

Rent Recovery Act, Madras—Act VIII of 1865, *Sections* 9, 10, 11—*Improper stipulations in patta—Claim of tenants to hold over land after expiry of lease.*

In summary suits brought by a landlord to enforce acceptance by his tenants of pattas tendered by him for the current *fasli*, it was pleaded that the pattas were **[250]** improper in that they did not comprise certain land of which the tenants were in possession and in which they claimed permanent occupancy rights, and also in that they contained various terms which the plaintiff was not entitled to impose on the defendants, providing (*inter alia*) (1) that interest should be payable on the several instalments of rent as they became due, (2) that the defendant should not fell certain trees except for agricultural purposes, (3) that the defendants should not reap their crops without previously obtaining the plaintiff's permission, (4) that on a change made without the plaintiff's permission from dry to wet cultivation, the tenancy should be forfeited in case of default made by the defendants in paying the amount of Government assessment, and also an undetermined sum then to become payable by the defendants to the plaintiff in addition to the rent.

The defendants failed to prove the permanent occupancy rights claimed over the land not comprised in the pattas and it appeared that they had held leases from the plaintiff for the land in question for a period of three years and had held over after the expiry of the leases without the permission and contrary to the wishes of the landlord; and it further appeared that the provision as to trees did not extend to shrubs, &c., and had been an accepted term in the pattas issued for ten years. The Revenue Court modified the terms of the pattas and passed decrees that the pattas as modified be accepted, against which some only of the defendants appealed, and the District Judge on appeal introduced further modifications into the pattas:

Held, (1) that the District Judge had no jurisdiction under Civil Procedure Code, Section 544, to introduce further modifications into the pattas in favour of the defendants who had not appealed according to the opinion formed by him in appeals preferred by the defendants in other suits;

(2) that the defendants were not entitled to have the pattas modified by enlarging the extent of the land comprised in them, or by the cancellation of the provisions as to interest and as to felling trees;

(3) that the defendants were entitled to have the pattas modified by the cancellation of the provision as to reaping crops and of the provision for forfeiture.

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* Second Appeals Nos. 1232, &c., of 1888.

(1) 4 M.H.C.R. 401.

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[F., 17 M. 265 (266); R., 17 M. 54 (58); 26 M. 252 (256) =12 M.L.J. 449 (452); 27 M. 143 (145); 29 M. 24 (25)=16 M L.J. 8; 30 M. 155 (157)=17 M.L J. 64=2 M. L.T. 25; 36 M. 4 (5)=10 Ind. Cas. 68=9 M L T. 443=(1911) 1 M.W.N 315; 16 Ind. Cas. 934 (935)=12 M.L.T. 437 (438)=(1912) M.W.N. 960; 2 M.L.J. 292 (294); 24 M.L.J. 342 (344)=(1913) M.W.N. 216; D., 24 B. 47 (54) (F.B.).]

SECOND appeals against the decrees of G. T. Mackenzie, District Judge of Kistna, in appeal suits Nos. 187, 188, 189, &c., of 1887, modifying the decision of P. Ramachandra Rau, Head Assistant Collector of Kistna, in summary suits Nos. 190, 191, 192, &c., of 1886.

Suits by a landlord under Section 9 of the Rent Recovery Act, Madras, to enforce the acceptance of pattas by his tenants. The form of the pattas tendered by the plaintiff, so far as it is material for the purposes of this report, is as follows :—

"You shall pay the kist of every year in that very year, in the order of kistbandi instalments mentioned above, in our taluk of Nuzvid without raising any objections, and obtain receipts.

"On failure to pay according to the kist instalments, you shall pay together with interest at rupee 1 per cent. per mensem from the date of the expiration of the kist instalment.

"You yourself shall bear the profit or loss accruing from excess [251] of rain or want of it; and whether you cultivate or not, you shall pay the kist without relinquishing the lands within the term.

"You shall enjoy (the produce) after obtaining Dumbalas from our Circar for permission for harvesting the produce after the season.

"At the expiration of the term, you shall not cultivate without again obtaining fresh pattas from us.

"If you irrigate the Vetha crops (*i.e.*, crops sown by the hand) by the Krishna water, you shall pay separately the tirva that may be fixed by the Queen's Circar.

"If, without obtaining our permission, you newly raise wet cultivation on dry lands, you shall not only pay the tirva that may be fixed therefor by the Queen's Circar in addition to your paying to our Circar the excess kist that may be determined by us for such wet cultivation, but also you shall thenceforth relinquish the right of cultivating those lands.

"As the fruit trees, the tax on the palmyras, the Tumma trees (Baubul trees), that are on the said lands are not included in the said kist, you shall, when required for cultivation purposes, obtain permission and cut the required Tumma trees only."

The Head Assistant Collector and (on appeals preferred by some of the defendants) the District Judge made certain modifications in the form of the patta.

The plaintiff preferred these second appeals.

Subramanya Ayyar and *Bhashyam Ayyangar*, for appellant.

Mr. *deRozario* and *Ananda Charlu*, for respondents.

The further facts of the case appear sufficiently for the purposes of this report from the following

JUDGMENT

The appellant in these cases is the zamindar of Nuzvid and the respondents are his raiyats in the village of Mastabada. One of the principal questions raised in them was whether the pattas tendered by the former to the latter for fasli 1295 were proper. Both the Head Assistant Collector

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and the Judge considered that they required to be amended, and the zemindar appeals from their decision.

The first objection taken with reference to second appeals Nos. 1292 and 1299 is that the Judge was not entitled to alter the decision of the Court of First Instance to the appellant's prejudice. In those cases the raiyats did not appeal to the District Court, but the Judge modified the decrees of the Head Assistant Collector [252] according to the opinion formed by him in appeals preferred by other raiyats in other suits. It is contended that he was not at liberty to do so, and as Section 544 of the Code of Civil Procedure is not applicable, we are of opinion that the contention must prevail. The decision of the District Court so far as it modifies that of the Head Assistant Collector in the respondent's favour in second appeals Nos. 1292 and 1299 must be set aside.

The second objection which is taken for the appellant is that both the Lower Courts were in error in holding that the relinquished land should be included in the pattas. The zemindar's contention was that the land was granted to the raiyats on a lease for three years ending with 1294, that they cultivated it without his permission in 1295, that he leased it out to others in May, and that he was, therefore, not bound to include it in the pattas tendered to respondents in June 1295. In answer to this contention the raiyats urged that the relinquished land was granted to them in 1292 not on a lease for three years but in perpetuity and on the same tenure on which they hold ordinary jarayati land. The land in dispute is about 2,000 acres in extent, and it was relinquished by the raiyats together with 200 acres more in 1289 when the estate was under the management of the Court of Wards. It was rented out as pasture land in 1289, 1290 and 1291, and at the end of the last-mentioned fasli the zemindari was made over to the appellant. Early in 1292 he granted the relinquished land to the respondents on a joint lease for three years subject to an annual rent of Rs. 24-8-0 per katti, but the respondents since divided it among them and in consequence of this division the joint holding was converted into separate holdings. So far there is no dispute, the contest being as to whether the ordinary raiyatwari tenure was also substituted for the tenancy for three years when separate holdings were substituted for the joint holding. The Head Assistant Collector observed that neither party proved his case, but that as the zemindar did not tender pattas prior to June 1295 and not until long after the raiyats had cultivated the land, it was fair to direct that it should be included in the pattas. The Judge recorded no distinct finding as to whether the lease, as ultimately modified in 1292, was permanent or limited to three years, but upheld the decision of the Head Assistant Collector on the ground that it was equitable. It is argued before us, and rightly we think, that the question which [253] the Judge had to decide was one of legal right. If, as alleged by the zemindar, the land was let but for three years, and the raiyats held it over after the expiration of the lease without his permission and contrary to his wishes such holding over would be wrongful and it would be no valid defence in a suit to eject them. It is not alleged that the zemindar granted permission to raiyats to cultivate the relinquished land in 1295 on the same terms on which they cultivated it during the pervious year. A wrongful holding over could not be treated as a continuation of the prior tenancy unless the zemindar accepted rent or by some overt act condoned the wrong. Again the appellant was entitled under the existing law to tender pattas before the end of the fasli year, and if a tenant who must be taken to know

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the law chose to hold over, the inference is that he is in possession by his own wrong and at his own risk. We must therefore ask the Judge to return a distinct finding as to whether the relinquished land was granted in 1292 ultimately on a lease for three years only or on a permanent tenure.

Adverting to the finding of the Head Assistant Collector that neither party proved his contention as to the tenure on which the relinquished land was let in 1292, it is argued for the appellant that the *onus* of proof being on the respondents, the decision must be in his favour in the event of that finding being adopted. To this suggestion we are unable to accede. The *onus* of establishing a perpetual tenure, if any, is certainly on the respondents, but it is open to them to fall back upon the presumption of tenancy from year to year, which might arise from their occupation from 1292 to 1294, and to claim that the relinquished land should be included in the pattas at least for 1295, if neither a lease for the fixed term of three years nor a perpetual tenure were established. Before we dispose of these second appeals, however, we must request the Judge to return findings on the question mentioned above.

The last objection has reference to two stipulations which the Judge directed to be omitted from the pattas in all the cases on the ground that they were unreasonable. The first stipulation is this :—"In case, without obtaining our permission, you should newly cultivate dry land as wet land, you should not only pay the assessment fixed by the Government of Her Majesty and the extra assessment fixed by us for your having cultivated it as wet [254] land to our Circar, but should also forfeit the right of cultivating the land from that time." This provision, so far as it relates to forfeiture of the right to cultivate, is manifestly penal, and, so far as it relates to extra assessment payable to the zemindar, is arbitrary and likely to prove oppressive. We consider that it was properly disallowed by the Judge. We also concur in his opinion that the second stipulation is unreasonable. It requires the raiyat not to reap his crop without the previous permission of the zemindar. The appellant has a lien on the crop for his rent and is entitled to distrain it for arrears of rent if any. The provision is open to abuse, while it is not necessary for the protection of his interest.

The respondents object that the stipulation for payment of interest from the dates on which the several instalments of rent were payable according to the kistbundi was improperly inserted in the pattas which were tendered at the close of the year. It must here be observed that the pattas, though tendered in June 1295, were tendered as evidence of the contents of a pre-existing obligation consequent on the position of the respondents as occupancy raiyats. The tender is not the *cause* of the obligation, though it is a condition precedent to its enforcement. We see no sufficient ground for upholding this objection.

The respondents also object that the stipulation that raiyats ought not to fell fruit trees and certain other trees except for agricultural purposes is an unwarranted interference with their right to the trees which stand on their land. We observe that there was a similar stipulation in some of the previous pattas. There is, however, no distinct finding as to whether its insertion in the pattas is in accordance with the established usage of the village. On this point also we shall ask the Judge to return a distinct finding.

[The District Judge returned a finding to the effect that the defendants entered upon the relinquished lands in fasli 1292 not as tenants from year to year, but on leases for a term of three years, and that, having held over without the zemindar's consent, they could not claim future pattas at the rent which they had paid in those three years. With regard to the trees, the District Judge found that the stipulation had been comprised in the pattas for ten years, but that this period was not sufficient to constitute a usage.]

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[255] These second appeals having come on for final hearing their Lordships accepted the finding with regard to the relinquished lands, and, with regard to the stipulation not to cut trees delivered judgment as follows:—

We are not able to support the finding of the District Judge, and it appears to us that he has put the burden on the wrong side. *Prima facie* a tenant would not be at liberty to cut down fruit trees on his holding, and by so doing would considerably impair the value of the property. The fact that for ten years this condition in the pattas had been accepted would be evidence of a recognized custom consistent with the usual rights of a landlord and it is shown that the prohibition does not extend to shrubs and small trees which are generally at the disposal of a tenant for the purposes of his holding. With this modification the finding of the Lower Appellate Court is accepted. We direct that each party do bear his own costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RAINIER (*Plaintiff*) *v.* GOULD (*Defendant*).*
[11th and 14th November, 1889.]

Stamp Act—Act I of 1879, *Schedule I, Article* 5(*a*)—*Agreement or memorandum of agreement relating to the sale of shares—Agreement by correspondence.*

Correspondence having passed between the plaintiff and defendant relating to the sale of shares in a certain company by the plaintiff to the defendant, and the sale not having been carried out, the plaintiff in a suit for damages against the defendant sought to prove an agreement for sale from the letters, none of which were stamped:

Held, the letters, though unstamped, were admissible as evidence of an agreement, since they did not constitute an agreement or a memorandum of agreement.

[R., 14 Bur.L.R. 292 (295) = 4 L.B.R. 324; 71 P.R. 1906 = 111 P.L.R. 1907.]

CASE stated under Section 69 of the Presidency Small Cause Court Act by J. W. Handley, Chief Judge of the Madras Court of Small Causes, in suit No. 20399 of 1888.

The case was stated as follows:—

[256] "This was a suit for damages for breach of a contract on the part of defendant to purchase from plaintiff fifty shares in the South Indian Ice Company (Limited). Defendant, amongst other pleas, denied the contract.

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* Referred Case No. 16 of 1889.

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"At the first hearing before the Acting Chief Judge, Mr. Scharlieb, certain letters (Exhibits A to E) were proposed to be put in evidence on behalf of plaintiff in proof of the contract. For defendant these letters were objected to as inadmissible in evidence on the ground that, if they were put forward as constituting a contract for the sale of the shares, they or one of them required a one-anna stamp under Article 5 (*a*), Schedule I of the Stamp Act (I of 1879), which stamp must have been affixed at the time of execution; and that the stamp duty required being one anna, the documents could not be received in evidence on payment of the stamp and penalty under the provisions of Section 34 of the Stamp Act, instruments chargeable with such duty being expressly by the words of the section excluded from the benefit of those provisions.

"One of the letters (Exhibit C), when produced by plaintiff, bore a one-anna adhesive stamp, which, however, it was admitted was affixed to it after it came into plaintiff's hands. It was contended at one time on behalf of plaintiff on the authority of a Bombay case (*Bhauram Madan Gopal* v. *Ramnarayan Gopal* (1) that this was a sufficient stamping to render the document admissible in evidence, but this contention was not much insisted upon, and I do not consider it necessary to refer that point to the High Court.

"Mr. Scharlieb after hearing the evidence of plaintiff held that the letter (Exhibit D) required a one-anna stamp, and, not being so stamped, was inadmissible in evidence, and that the contract could not be proved without that letter, and accordingly he dismissed the suit.

"Upon an application to the Full Court for a new trial, it was held that none of the letters in question required a stamp under Article 5 (*a*) of Schedule I of the Stamp Act, and that they were, therefore, admissible in evidence in proof of the contract, but that even if this opinion were not well founded and one or more of the letters were inadmissible on this ground, plaintiff would still be entitled to prove the contract by the written admissions of the [257] defendant. A new trial was accordingly ordered, leave being given to plaintiff to amend the plaint.

"Upon the new trial before me I found that the contract, as alleged in the amended plaint, was proved by the letters A to E, or, if they were not admissible in evidence by the written admissions of defendant, that plaintiff was ready and willing to complete the contract, and that there was no unreasonable delay on his part in obtaining the share certificates, and that defendant was not justified in rescinding the contract, and that plaintiff had proved his damages as charged in the plaint. I gave judgment, therefore, for plaintiff for the amount claimed and costs, but (at the request of defendant's attorney), contingent upon a case to be stated for the opinion of the High Court upon two questions of law raised in the case, *viz.*,

(1) Do the letters (Exhibits A to E) or any of them require a stamp under Article 5 (*a*), Schedule I of the Stamp Act ?

(2) If all or any of the letters in question are or is inadmissible in evidence on account of not bearing a stamp, is it open to plaintiff to prove the contract by the written admissions of defendant ?

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(1) 12 B.H.C.R. 208.

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"As to (1)—it has been a surprise to me to find that there are no decisions of the Indian Courts upon the effect of the present Stamp Law upon a series of letters put forward in proof of a contract; at least none have been quoted in the argument, and I can find none. The present Stamp Act omits the provision, which found a place in the preceding Act (XVIII of 1869, Schedule II, Art. 2), and in previous Stamp Acts, that, when several letters constitute an agreement, it is sufficient if any one of them is properly stamped. I believe that, notwithstanding this omission, it has still been the practice in the Courts of this Presidency at any rate when a series of letters is tendered in evidence in proof of a contract to require that the stamp duty and penalty be paid on one of them. It seems to me doubtful whether this practice is correct,—whether a series of letters of this kind can be said to be an 'agreement or memorandum of an agreement' within the meaning of the Stamp Act. The question has to be faced and decided in a case, like the present where the stamp (if any) required being a one-anna stamp, the document cannot be admitted on payment of penalty. The difficulty to my mind is that if such a series of letters is an 'agreement or memorandum [258] of an agreement' within the meaning of the Stamp Act, then the requirements of that Act as to the time of stamping instruments cannot be complied with. Section 16 requires that all instruments executed in British India shall be stamped before or at the time of execution. Now take the simple case of two letters—a proposal and an acceptance. At the time of execution by the proposer it is impossible that the instrument should be stamped because there is then no agreement between the parties and consequently there can be no written agreement or memorandum of an agreement to stamp. So in the case of a series of letters introducing variations in the terms of the original offer or acceptance, it is not until the last letter of the series that there is an agreement between the parties, and then it is impossible to stamp the instrument at the time of its execution by one of the parties. In the present case, for instance, Mr. Scharlieb held, and I think quite rightly, that there was no contract till the letter D was written by the plaintiff. How then could this series of letters or any of them have been stamped as an agreement or memorandum of an agreement at the time of its execution by defendant. Another difficulty is that, even in the case of a letter finally accepting an offer, it cannot be said that there is a complete agreement between the parties at the time of its execution, because the previous offer may be retracted at any time before the acceptance is put in course of transmission to the proposer. These and other difficulties and the fact of the omission of the above mentioned provision from the present Stamp Act suggest to me that by an 'agreement or memorandum of an agreement' is meant one document embodying the agreement of the parties, and that it was not the intention of the legislature to require that one or more of a series of letters, which may be evidence of a contract, should be liable to stamp duty.

"As to question (2) the Evidence Act, Sections 22 and 65 (*b*), seems to embody the doctrine of the English cases of *Slatterie* v. *Pooley* (1) and many others that the admissions of a party to the suit are always evidence against him, even though they relate to the contents of a document which is not produced or is not admissible in evidence, with this variation that the admission must be a written one."

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(1) 6 M. & W. 664.

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[259] Exhibits A—E were as follows :—

EXHIBIT A.

18, MOUNT ROAD,
MADRAS, 28*th May*, 1888.

DEAR SIR,

I am informed you wish to part with your shares in the South Indian Ice Company at 20 per cent. discount or more. Please inform me if this is correct, as I should feel inclined to buy.

Yours faithfully,
HORACE J. GOULD.

EXHIBIT B.

29*th May*, 1888.

DEAR SIR,

In reply to your note, I have fifty shares of the Ice Company, which, in spite of the very favourable prospects of that company, I, for other reasons altogether apart, wish to sell, and in order to sell quickly, will sell at a loss.

On the above shares, I have paid Rs. 37-8-0 each, or altogether Rs. 1,875. Rs. 12-8-0 more per share is payable next month.

I am prepared to let you have the above shares at the price you mention, *viz.*, 20 per cent. off what I have paid or for Rs. 1,500 cash. Kindly let me know whether this is settled.

Yours faithfully,
H. RAINIER.

EXHIBIT C.

18, MOUNT ROAD,
MADRAS, 30*th May*, 1888.

DEAR SIR,

In reply to your note, I write to say I am prepared to take your shares at Rs. 2,000, being 20 per cent. off Rs. 2,500, the original price of shares.

Yours faithfully,
HORACE J. GOULD.

EXHIBIT D.

MADRAS CLUB,
31*st May*, 1888.

DEAR SIR,

I accept your offer of Rs. 2,000 for my 50 shares South Indian Ice Company, Limited, fully paid.

I have as previously stated paid only Rs. 37-8-0 per share at present for the above shares, leaving Rs. 12-8-0 per share payable, or altogether Rs. 625; if then you hand me your cheque for Rs. 1,375 in exchange for my transfer deed I presume it will be all right.

Perhaps my bankers had better arrange it with yours.

You are probably aware that scrip of shares is not yet issued pending final call payable next month (June).

[260] Kindly say to whom my bankers (National Bank, India) shall send the bill and transfer for payment.

I am yours truly,
H. RAINIER.

EXHIBIT E.

ANDERSON'S ROAD,
NUNGAMBAKAM, 2*nd June*, 1888.

DEAR SIR,

My Bankers are the Bank of Madras, and I have written them to take over from you the fifty shares in the South Indian Ice Company. I shall be glad if your Bankers will arrange matters with mine.

Yours faithfully,
HORACE J. GOULD.

The Advocate-General (Hon. Mr. *Spring Branson*), for defendant.

Exhibit D, a letter from plaintiff to defendant, dated 1st May 1888, shows that the contract was completed, and also states that the scrip had not been issued. It completes the proposal and acceptance. See Section 7, Contract Act and *Hebb's case* (1). It should accordingly have been stamped under Schedule 1, Clause 5 (*a*). As to the argument of the learned Chief Judge, I say, the admissions referred to really form the contract, and the want of a stamp prevents them from being proved. See *Arunachellum Chetty* v. *Olagappah Chetty* (2), *Arumuga Kolathairian* v. *Kolandai Semandan* (3), and *Sennandan* v. *Kollakiran* (4), where the learned Judges distinguished *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree* (5) (where a decree was passed on the original consideration for which an unstamped promissory note had been given) and followed *Marine Investment Company* v. *Heaviside* (6) which also governs this case, see *per* Lord Cairns at p. 684 of the report, compare also *Muthalagan Ambalam* v. *Ramanadhan Chetti* (7), where as here the terms were reduced to the form of a document, and *Valiappa* v. *Mahommed Khasim* (8), and see *Varada* v. *Krishnasami* (9) (upon the corresponding provisions of the Registration Act, 1864), and *Pothi Reddi* v. *Velayuda Sivan* (10), *Damodar Jagannath* v. *Atmaram Babaji* (11), **[261]** *Jethibai* v. *Ramchandra Narottam* (12), *Benarsi Das* v. *Bhikhari Das* (13).

Evidence Act, Sections 22, 65, must be subject to the rule in the *Marine Investment Company* v. *Heaviside* (*supra*), and if you cannot prove the contract at all directly, you cannot prove it indirectly by proof of admissions.

Mr. *W. Grant*, for plaintiff.

In Act X of 1862, Schedule A, Article 1, there was a note that if two or more letters were offered in evidence, it was sufficient if one be stamped. In subsequent Acts this note has been omitted, probably because it was impossible to say which letter should be stamped or when. A contract evidenced by letters is not "a *written* contract." A contract to be inferred from correspondence is not reduced to a document. Is the person who *makes* the offer to put the stamp to protect himself lest the acceptance should be without one? Letter C should be stamped, if any, but the plaintiff could not stamp it; in fact none of the letters here was written as the contract between the parties, though they evidence it. A man's admissions are evidence against him although contained in a writing not necessarily admissible for all purposes,

(1) L.R. 4 Eq. 9. (2) 4 M.H.C.R. 312. (3) 4 Ind. Jur. 499.
(4) 2 M. 208. (5) 3 C. 314. (6) L.R. 5 P.C. 624.
(7) 4 Ind. Jur. 568. (8) 5 M. 166. (9) 6 M. 117.
(10) 10 M. 94. (11) 12 B. 443. (12) 13 B. 484.
(13) 3 A. 717.

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Iggulden v. *May* (1), *Farr* v. *Price* (2), *Earle* v. *Picken* (3), *The King* v. *The Inhabitants of Wrangle* (4), *Newhall* v. *Holt* (5), *Slatterie* v. *Pooley* (6), and Section 65 (*b*) was never intended to vary the English law that a party's admissions were evidence against him. *Duchess of Kingston's case* (7), *Barker* v. *Birt* (8). See *Teignmouth and General Mutual Shipping Association, in re* (9), for what amounts to sufficient admission of liability in books of policy of insurance.

Moreover an equitable construction should be put on fiscal legislation, see *per* Lord Cairns in *Partington* v. *The Attorney-General* (10), and see *per* Esher, M. R., in *Commissioners of Inland Revenue* v. *Angus and Company* (11). The tax is imposed on the instrument, not on the transaction, therefore if there is a transfer apart from instrument, the section does not apply.

[262] I rely also on *Muttukaruppa Kaundan* v. *Rama Pillai* (12), *Rajah Lakshmi Chelliah Garu* v. *Krishna Bhupati Devu* (13). *Sennandan* v. *Kollakiran* (14) does not apply for I am not proposing to give secondary evidence of any document, but original evidence, admissions—*Valiappa* v. *Mahommed Khasim* (15) only held a plaintiff must succeed if at all on the case he sets up and see *Kopasan* v. *Shamu* (16). *Pothi Reddi* v. *Velayuda Sivan* (17), does not apply as the contract has not been reduced to the form of a document; see illustrations to Section 91, Evidence Act.

How if contract is made by telegrams? What can be stamped? *Arunachellum Chetti* v. *Olagappah Chetti* (18) was also referred to.

Taylor on Evidence, page 361 letters are evidence of agreement, not the agreement itself. Section 22, Evidence Act, only provides for oral admissions, but there are other kinds: Section 17.

The *Advocate-General* in reply referred to *Smith's Case* (19).

JUDGMENT.

This is a case stated for the opinion of the High Court by the Chief Judge of the Madras Court of Small Causes under Section 69 of the Presidency Small Cause Act.

The suit was one for damages for breach of contract on the part of defendant to purchase from plaintiff fifty shares in the South Indian Ice Company (Limited), certain letters (A to E) were proposed to be put in evidence to prove the contract, but objection was raised on the ground that if they were put forward as constituting a contract for the sale of the shares, they or one of them required a one-anna stamp under Article 5 (*a*), Schedule I of the Stamp Act I of 1879.

The questions referred to the High Court by the learned Chief Judge are—

(1) Do the letters (A to E) or either of them require a stamp under Article 5 (*a*), Schedule I of the Stamp Act?

(2) If the letters in question or any of them are or is inadmissible in evidence on account of not bearing a stamp, is it open to plaintiff to prove the contract by the written admissions of the defendant?

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(1) 7 T. R. 241. (2) 1 East 55 (1800). (3) 5 Carrington & Payne 542.
(4) 2 A. & E. 514. (5) 6 M. & W. 662. (6) 6 M. & W. 664.
(7) 2 S.L. Cases 785. (8) 10 M. & W. 61. (9) L.R. 14 Eq. 148.
(10) 4 Eng. & Irish App. Cases 122. (11) 23 Q.B.D. 579.
(12) 3 M.H.C. R. 158. (13) 7 M.H.C.R. 6 (21). (14) 2 M. 208.
(15) 5 M. 166. (16) 7 M. 440. (17) 10 M. 94.
(18) 4 M.H.C. R 312 (19) L.R. 4 Ch. App. 611.

1889 NOV. 14. — APPELLATE CIVIL. — 13 M. 255.

[263] Under Article 5 (*a*) of Schedule I, the "description of instrument" rendered liable to a stamp duty of one anna is an agreement or memorandum of an agreement relating to the sale of shares in any company. From the language of the schedule it might be inferred that what the legislature intended to make liable to duty was some instrument, which should form the record of the agreement, and from which the terms of the agreement could be collected. Where, however, the terms of an agreement have to be collected from a correspondence it is obvious that it would often be difficult if not impossible to select any one letter in the correspondence which could be regarded as containing a memorandum of the entire agreement.

It is clear that this difficulty has not escaped the notice of the legislature. Referring back to Act X of 1862, which was enacted for the purpose of consolidating and amending the law relating to stamp duties, we find a note to Schedule A in which it is enacted that if two or more letters are offered in evidence to prove an agreement between the parties who shall have written such letters, it will be sufficient if any one of such letters be stamped as an agreement. The duty chargeable on an agreement under the Act of 1862 was one rupee.

The General Stamp Act XVIII of 1869 which repealed the Act of 1862, repealed this provision in the form of a proviso to Article 11, Schedule II, at the same time reducing the duty upon a memorandum of an agreement to eight annas. The proviso is, however, entirely omitted in the corresponding Article 5 (*a*), Schedule I of the present Stamp Law, which still further reduces the charge upon an agreement to one anna, and we cannot doubt that the omission of the legislature to re-enact the clause must have been intentional. The point for determination is whether the intention was to exclude such letters from the category of agreements liable to stamp duty or to omit what was regarded as a superfluous provision.

It appears to us that there are several reasons in support of the first-mentioned intention. Not only has the tendency of legislation been to lighten the burden of taxation with reference to agreements, but the Stamp Act being a fiscal enactment, the intention to tax a particular instrument must appear in terms clear and positive, and in case of doubt, the construction must be in favour of the subject.

[264] As the Act stands at present, all the letters would require to be stamped unless the terms of the agreement can be collected from any one of them, which is frequently impossible. It appears to us most improbable that the legislature could have intended to hamper commercial transactions in such a manner and the fact that the terms of an agreement if embodied in a single document was in future intended to be only liable to the reduced duty of one anna certainly favours this view.

When we consider, therefore, the omission of the proviso from the present Stamp Act, together with the recognized principles of construing fiscal enactments, we are led to the conclusion that the legislature intended to make a distinction between a document which is intended by the parties concerned to be a formal expression of the terms of an agreement, and letters offered in evidence from which an agreement and its tenor have to be inferred by a process of construction; and that to provide for the difficulty which might be felt by the parties writing the letters as to which of them should be stamped, the legislature deliberately omitted to render any of such letters merely evidencing an agreement liable to future duty while at the same time imposing a reduced duty upon a formal instrument.

1889 Nov. 14. — APPELLATE CIVIL. — 13 M. 255.

Our answer to the first question is that none of the letters A to E is liable to stamp duty. The contingency on which the second question was referred to us does not, therefore, arise, and it is not necessary for us to answer it. The costs of the reference must follow the event.

Attorneys for plaintiff: *Wilson & King.*

Attorney for defendant: *Grant.*

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13 M. 265.

[265] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

VENKATARAMA (*Petitioner*), *Appellant v.* SENTHIVELU AND ANOTHER (*Counter-petitioners*), *Respondents.**
[6th January, 1890.]

Civil Procedure Code, Section 234—Hindu Law—Execution of a decree against the son of a Hindu judgment-debtor—Determination of questions as to the binding nature of the decree debt.

In execution of a money decree passed against a Hindu, since deceased, ancestral property in the possession of his son was attached. A petition by the son objecting that the property was not liable to be attached in his hands was dismissed:

Held, that the order dismissing the petition was wrong, for when a judgment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu law upon the father's death, he cannot be considered as executing the decree against the property of the deceased judgment-debtor within the meaning of Section 234 of the Code of Civil Procedure.

[**F.**, 6 C.W.N. 223 (225); **Appr.**, 16 A. 449 (463); **R.**, 16 C.P.L.R. 19 (26); 1 N.L.R. 173 (176); 6 O.C. 271 (272); **Expl.**, 5 C.L.J. 80 = 11 C.W.N. 163 (167).]

SECOND appeals against the orders of H. T. Ross, Acting District Judge of Madura, in civil miscellaneous appeals Nos. 17 and 19 of 1888, reversing in part the order of A. Sami Ayyar, District Munsif of Paramagudi, on civil miscellaneous petition No. 935 of 1887.

An application was made for the execution of a money decree passed in original suit No. 332 of 1877 and notice was issued under Civil Procedure Code, Section 248, to the son of the deceased judgment-debtor to show cause against the execution. No cause having been shown, execution was ordered and attachment was placed on certain property in the possession of the son, who thereupon presented the above petition objecting to the execution on the ground that the property proceeded against was not liable to satisfy the decree.

The petitioner was found to have been a minor at the date of the application for execution; and his petition was accordingly heard. The District Munsif held that the petitioner's objection was valid in respect of one moiety of the property which he accord-[266]ingly released from attachment, but he maintained the attachment on the other moiety.

Both parties appealed to the District Court against the above order. The District Judge came to the conclusion that the property in question was ancestral property, and said:—

"If I understand the latest decisions on the question of the son's liability for his father's debts aright, the law, as at present settled, may be taken to be that it makes no difference that the decree against the

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* Appeals against Appellate Orders Nos. 13 and 14 of 1889.

father was a money decree to which the son was not a party, or that the estate which the decree-creditor seeks to make liable is ancestral estate; but that such estate in the son's hands is answerable for the father's decree-debt unless the son can show that the debt was contracted for immoral or illegal purposes not imposing on him the pious duty of discharging it. There is no attempt in the present case to show anything of the kind, and I must hold that the two-thirds of three-eighths of Kilakanjirankulam now in petitioner's hands under Exhibit A and attached by the counter-petitioner is liable for counter-petitioner's decree of 1st December 1877 against petitioner's father."

1890 JAN. 6. — APPELLATE CIVIL. — 13 M. 265.

The District Judge accordingly set aside the orders of the District Munsif so far as it annulled the attachment.

The petitioner preferred these appeals.

Sivasami Ayyar, *Krishnasami Ayyar* and *Sundaram Ayyar*, for appellant.

Ramachandra Ayyar, for respondents.

JUDGMENT.

We do not consider that the Judge was right in upholding the attachment. His opinion is not in accordance with the course of decisions of the High Court (see *Zemindar of Sivagiri* v. *Alwar Ayyangar* (1), *Hanumantha* v. *Hanumayya* (2), *Muttayan* v. *Zemindar of Sivagiri* (3), *Arunachala* v. *Zemindar of Sivagiri* (4), *Muttia* v. *Virammal* (5), *Ariabudra* v. *Dorasami* (6). The principle recognized by them is that the Courts are not at liberty to extend the scope of the decree under Section 234 of the Code of Civil Procedure, though the judgment-creditor may enforce the pious obligation of the son under Hindu law by a regular suit. When, therefore, there is a money decree against the father, and when the judg- [267] ment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu law upon the father's death, he cannot be considered as executing the decree against the property of the deceased judgment-debtor within the meaning of Section 234. How far the son's pious obligation would make him liable for the decree debt is a matter to be investigated in a fresh suit. The respondents' pleader concedes that the course of decisions is against him, but contends that the attachment made by Venkatanarayana Pillai in May 1884 was in force when the attachment now in dispute was made. Having regard to the facts set out by the Judge, we are unable to accept this view. If the former attachment were in force, there was no necessity for the respondents' making the present attachment.

We set aside the orders of the Courts below and the attachment of two-thirds of three-eighths of Kilakanjirankulam. The respondents will pay the appellant's costs throughout.

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(1) 3 M. 42. (2) 5 M. 232. (3) 6 M. 1.
(4) 7 M. 328. (5) 10 M. 283. (6) 11 M. 413.

1889
DEC. 4.

APPELLATE CIVIL.

13 M. 267.

13 M. 267.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

ELAYADATH (*Counter-Petitioner No.* 1), *Appellant v.* KRISHNA (*Petitioner*), *Respondent.** [4th December, 1889.]

Transfer of Property Act—Act IV of 1882, *Sections* 92, 93—*Time fixed for redemption—Application to execute the decree.*

In a suit to redeem a kanom a redemption decree was passed which provided that the kanom amount and the value of improvements be paid in three months. The decree amount was not paid within that period, but the decree-holder applied to execute the decree at a later date :

Held, that the decree-holder was not then entitled to have the decree executed. *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (I.L.R., 16 Cal., 246) dissented from.

[**Diss.**, 25 M. 244 (289) ; **N.F.**, 5 O.C. 82 (84) ; **Appr.**, 19 M. 40 (**F.B.**) ; **R.**, 16 M. 214 (216) ; 25 M. 300 (**F.B.**) ; 27 M. 40 (41) ; 2 N.L.R. 137 (140).]

SECOND appeal against the order of L. Moore, Acting District Judge of South Malabar, in Civil Miscellaneous Appeal No. 317 of 1888 reversing the order of V. Raman Menon, District Munsif of Angadipuram, in Civil Miscellaneous Petition No. 419 of 1887, **[268]** wherein the petitioner prayed for the execution of the decree in Original Suit No. 593 of 1886.

The decree sought to be executed, which was dated 28th June 1887, was a decree for the redemption of a kanom : it provided as follows :—

"The Court doth order and decree that the defendants do surrender to the plaintiff the plaint kutiyirup (dwelling) as per boundaries and measurements noted in the Commissioner's plan and specified in the schedule below on the plaintiffs paying into Court within three months the kanom amount Rs. 2-13-9 and Rs. 107-0-1, the value of kuyikurs and chamayoms, in order that the same may be paid to the first defendant, and that the first defendant do pay to the plaintiff the porapad at 3 annas 6 pies per annum as stipulated in the Kychit A from 1062 till execution of the decree or for three years from this day (whichever event first occurs) and that the first defendant do pay plaintiff's costs."

The decree amount was not paid within three months, but the District Munsif held that "the direction in the decree to deposit kanom and value of improvements within three months does not absolutely debar petitioner of his right to redeem under Transfer of Property Act, Section 92," and he made an order granting the petition.

The Acting District Judge on appeal reversed the above order, observing that the District Munsif was bound to give effect to the directions contained in the decree.

The decree-holder preferred this appeal.

Subba Rau, for appellant.

Sankaran Nayar, for respondent.

JUDGMENT.

We are of opinion that the District Judge is right.

The application by the mortgagor for permission to pay after the expiration of the period fixed in the decree does not fall under the proviso of Section 93 of the Transfer of Property Act. It is conceded

* Appeal against Appellate Order No. 5 of 1889.

that there was no application by the mortgagee for foreclosing the right of redemption. If the appellant's contention were to prevail, the Act of Limitations would be rendered ineffectual in regard to execution of decrees for redemption. Sections 92 and 93 of the Transfer of Property Act ought to be read together, and the proviso of the latter section has no application when the mortgagee does not apply for a foreclosure, or where the [269] original decree does not contain the last clause mentioned in Section 92.

1889 DEC. 4. APPELLATE CIVIL. 13 M. 267.

We are not prepared to follow the decision in *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (1).

The appeal is dismissed with costs.

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13 M. 269.

APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

KRISHNA (*Plaintiff*), *Appellant* v. CHATHAPPAN (*Defendant No.* 2), *Respondent*.* [25th November, 1889.]

Limitation Act—Act XV of 1877, *Sections* 5, 14—"*Sufficient cause*" *to excuse delay—Error in law.*

Land was sold in execution of a decree which wae passed against the defendant for a sum exceeding Rs. 5,000. A suit to set aside the sale was instituted in a Subordinate Court and was dismissed. The plaintiff who desired to appeal against the decree dismissing his suit was advised that the appeal lay to the High Court in which a memorandum of appeal was accordingly filed. On its appearing that the value of the property sold was less than Rs. 5.000. the High Court returned the memorandum of appeal for presentation to the District Court. The District Judge rejected it on the ground that it was barred by limitation, holding that the delay caused by the error which the appellant committed in taking proceedings in the wrong Court could not be excused :

Held, that the District Judge should have decided whether the appellant under the special circumstances of the case in appealing to the High Court acted on an honest belief formed with due care and attention.

Per cur: " We are not prepared to hold that a mistake in law is under no circumstances a sufficient cause within the meaning of Section 5 of the Limitation Act "

[F., 9 Bom.L.R. 893 (894) ; 14 Bur.L.R. 303=U.B.R. 1907, III.Qr. Limitation 1 ; 8 C.P.L.R. 121 (123); **Rel. on**, 12 Ind. Cas. 677 ; **Appr.**, 19 A. 348 (350) (**F.B**) ; 34 C. 216 (219)=5 C.L.J. 380; 25 M. 166 (170)=11 M.L.J. 406 ; 3 O.C. 13 (15) ; 3 O.C. 265 (266) ; 4 O.C. 372 (375); 118 P.R 1908; **R.**, 12 A 461 (482); 23 A.W.N. 32 ; 14 Bur.L.R. 344=4 L B R. 347 ; 2 L.B.R. 283; 19 M.L.J. 209 (217)=5 M.L.T. 28 (31) ; 4 O.C. 303 (308).]

APPEAL against the order of J. H. A. Tremenheere, Acting District Judge of North Malabar, in Miscellaneous Petition No. 666 of 1888.

The order appealed against dismissed a petition which prayed that an appeal against a decree of the Subordinate Judge of North Malabar be ordered to be placed on the file, though presented after the period allowed by the law of limitation.

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* Second Appeal No. 321 of 1889.

(1) 16 C. 246.

1889 Nov. 25. — Appellate Civil. — 13 M. 269.

[270] The further facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Bhashyam Ayyangar and *Sankara Menon*, for appellant.

Sankaran Nayar, for respondent.

JUDGMENT.

In execution of the decree in original suit No. 2 of 1883 on the file of the Subordinate Court of North Malabar certain immoveable properties were sold. The appellant instituted original suit No. 5 of 1886 to set aside the sale and took the amount of the decree in the first-mentioned suit, which exceeded Rs. 5,000, as the value of the second suit.

The Subordinate Court dismissed his suit and he preferred an appeal to the High Court. This Court held that the property sold being less than Rs. 5,000 in value, it was the value of the property in litigation that was the value of the suit, and returned the petition of appeal for presentation to the District Court. The decree was issued on the 16th October 1886, and the affidavit filed by the petitioner states that the memorandum of appeal was returned to the appellant on the 30th October. It was presented to the District Judge on the 8th November, but it was rejected as being out of time. The Judge relied on the decision of *Jag Lal* v. *Har Narain Singh* (1). It is stated in the affidavit that before presenting his appeal to the High Court, the appellant obtained professional advice, and his counsel thought that the appeal lay to the High Court. It is urged before us that there was sufficient cause for the delay under Section 5 of the Limitation Act. We are not prepared to hold that a mistake of law is under no circumstances a sufficient cause within the meaning of that section. In an unreported case to which we have been referred, the appellant valued his partition suit at the amount claimed for his share instead of taking the value of the entire property to be the value of the subject-matter of the suit, and a Divisional Bench of this Court admitted the appeal, though it was out of time. In *Huro Chunder Roy* v. *Surnamoyi* (2) the same view was taken. In that case the plaintiff valued his suit at Rs. 18,000, which was reduced by the Court of First Instance to less than Rs. 5,000. A decree was passed against the defendant, who was under the impression that the appeal would lie to the High Court and placed himself in communication with his Calcutta agent. On his mistake being [271] pointed out, he filed his appeal in the District Court. It was held by a Divisional Bench of the High Court at Calcutta that the Court might admit the appeal in the exercise of its discretion under Section 5. The true rule is whether under the special circumstances of each case the appellant acted under an honest, though mistaken, belief formed with due care and attention. Section 14 of the Limitation Act indicates that the Legislature intended to show indulgence to a party acting *bona fide* under a mistake. We think that Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the appellant.

We do not consider that the Judge is concluded by the decision in *Jag Lall* v. *Har Narain Singh* (1), and we are of opinion that he must exercise his discretion under Section 5 with reference to the special

(1) 10 A. 524. (2) 13 C. 266.

circumstances of each case. We set aside the order of the Judge and direct him to restore the petition of appeal to his file and deal with it in accordance with law.

1889 Nov. 25. — APPELLATE CIVIL. — 13 M. 269.

The costs of the appeal will be provided for by the Judge in his revised order.

13 M. 271.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

APPA RAU (*Defendant No.* 1), *Appellant v.* VIRANNA (*Plaintiff*), *Respondent.** [28th August, 1889.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Sections* 4, 11—*Acceptance of patta not in accordance with the Act.*

A tenant having accepted a patta (which did not give the particulars described in Section 4 of the Rent Recovery Act) and having executed to the landlord a muchalka which was registered, is not entitled to obtain in a summary suit an order setting aside a distraint by the landlord for arrears of rent.

[272] SECOND appeal against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in Appeal Suit No. 582 of 1887, reversing the decree of L. M. Wynch, Acting Head Assistant Collector of Kistna, in Summary Suit No. 156 of 1887.

Suit to set aside a distraint by the first defendant for rent due to him by the plaintiff. The Head Assistant Collector dismissed the suit. His decree was reversed on appeal by the District Judge against whose decree the first defendant preferred this appeal.

The further facts of the case appear sufficiently for the purposes of this report from the judgment of the High Court.

Mr. *Subramanyam* and *Subramanya Ayyar*, for appellant.

Rama Rau, for respondent.

JUDGMENT.

The District Judge has lost sight of the fact that in this case the patta has been accepted and a registered muchalka given in exchange. The case is, therefore, distinguishable from *Ramanjulu* v. *Ramachandra*(1), in which the landlord relied upon his having tendered a proper patta to justify his distraint. Had the defendant in this case merely tendered the patta and received no muchalka, it may be admitted that the Court would not hold the patta a proper one, inasmuch as the rates of rent are not given as required by Section 4 of the Rent Recovery Act.

An express contract having been made between the parties, it should be enforced (Section 11).

Had the patta not been accepted, this stipulation would have made the patta void for uncertainty, *Ramasami* v. *Rajagopala* (2), but in that case no muchalka had been given. The rate charged by the landlord was the highest wet rate in the village, which was not in itself an illegal or unreasonable charge. Under the circumstances we must reverse the decree of the Lower Appellate Court and restore that of the Head Assistant Collector. The appellant is entitled to his costs in this and in the Lower Appellate Court.

* Second Appeal No. 1623 of 1888.

(1) 7 M. 150. (2) 11 M. 200.

1889
DEC. 20.
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APPELLATE
CIVIL.
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13 M. 273.

13 M. 273.

[273] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

VELAYUDAM (*Defendant No.* 25), *Appellant v.* ARUNACHALA (*Plaintiff*), *Respondent.** [20th December, 1889.]

Jurisdiction—Objection as to, first taken in second appeal—Waiver of objection to jurisdiction—When objection cannot be waived.

A suit of which the subject-matter was less than Rs. 2,500 was instituted in a Subordinate Court. The Subordinate Judge tried the suit and passed a decree, and an appeal against this decree was entertained and determined by the District Judge without objection taken that the Subordinate Court had no jurisdiction to hear and determine the suit. On second appeal objection was taken as above:

Held, that the objection must prevail and the plaint be returned for presentation in the proper Court.

[R., 23 B. 22 (26); 2 L.B.R. 117 (119); 2 L.B.R. 192 (194); 5 P.R. (Rev.) 1903=144 P.L.R. 1903; **Doubted**, 23 M. 367 (370)=9 M.L.J. 263.]

SECOND appeal against the decree of H. T. Ross, Acting District Judge of Madura, in Appeal Suit No. 515 of 1887, affirming the decree of S. Gopalachariar, Subordinate Judge of Madura (East), in Original Suit No. 10 of 1887.

Suit to recover possession of land with mesne profits. To the plaint was affixed the following note:—

"The value of the property for purpose of jurisdiction is given at Rs. 4,500, and the value of plaintiff's claim inclusive of mesne profits at Rs. 2,160. The suit has been instituted in this Court in pursuance to the ruling of the High Court in *Vydinatha* v. *Subramanya* (1)."

The plaintiff obtained a decree, which was affirmed on appeal. Defendant No. 25 preferred this second appeal.

Mr. *Parthasaradhi Ayyangar*, for appellant.

Mr. *Johnstone*, for respondent.

The facts of the case appear sufficiently for the purposes of this report from the following

JUDGMENT.

The first objection taken in second appeal is that the Court of First Instance had no jurisdiction to hear and decide the suit, the value of the claim being below Rs. 2,500. This point was not raised in either of the Courts below, but we [274] are of opinion that an objection to the jurisdiction of the Court of First Instance may be taken for the first time in second appeal, inasmuch as an act done without jurisdiction is of no legal effect and must be set aside when the illegality is made apparent. But it is argued that, inasmuch as the appellant did not demur to the jurisdiction of the Lower Appellate Court, he must be held to have waived the right to raise the question of jurisdiction. Admittedly the Subordinate Judge had no jurisdiction to try the suit which should have been filed in the Court of the District Munsif; but it is contended that the Judge was competent to hear and decide the appeal, and reference is made to the Privy Council case of *Ledgard* v. *Bull* (2). In that case it was distinctly held by the Privy

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* Second Appeal No. 240 of 1889.

(1) 8 M. 235. (2) 9 A. 191.

Council that even an order transferring a case from one Court to another could not be validly made unless the suit was instituted in a Court of competent jurisdiction. An appeal could not be heard on the merits, unless the decree from which the appeal was preferred was passed by a Judge having jurisdiction over the matter in dispute. No doubt the District Judge was the appellate authority, whether the suit was heard and determined either by the Subordinate Judge or District Munsif, but it must be remembered that the Appellate Court is only a Court of error and the trial by the Appellate Court cannot be accepted in place of a trial by the Court of First Instance. In the case of *Ledgard* v. *Bull* (1) the Court to which by an irregular process the suit was transferred was competent to try the suit, and we cannot say that it is on all fours with the present, nor are we prepared to hold that this is a case to which the principle laid down by the Privy Council in that case can be extended. We must, therefore, set aside the decrees of both the Lower Courts, dismiss the suit, and direct that the plaint be returned to be presented in the proper Court.

As the second appeal was necessary, the respondent must pay the appellant's costs in this Court, but we direct that each party bear his own costs in the Courts below.

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13 M. 275.

[275] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

VENKATARAMA (*Defendant No.* 3), *Appellant v.* MEERA LABAI AND ANOTHER (*Plaintiffs*), *Respondents.**
[4th November and 20th December, 1889.]

Hindu law—Sale by a coparcener of his share in specific property—Rights of the vendee—Transfer of Property Act—Act IV of 1882, *Section* 44.

A purchaser from a member of an undivided Hindu family of that member's share in a specific portion of the ancestral family property cannot sue for a partition of that portion alone and obtain an allotment to himself by metes and bounds of his vendor's share in that portion of the property.

[**F.**, 24 B. 128 (134); 14 M. 183 (184); 23 M. 608 (611); **Appr.**, 20 M. 243 (244); **R.**, 25 M. 690 (716); 34 M. 269 (271) = 7 Ind. Cas. 559 = 20 M.L.J. 743 = 8 M.L.T. 269 = (1910) M.W.N. 380; 1 Bom.L.R. 620 (625); 15 C.P.L.R. 156 (159); 10 M.L.J. 141 (143); 23 M.L.J. 64 (69) = 11 M.L.T. 393 = 14 Ind. Cas. 524 (527); 32 P.R. 1908 = 75 P.W.R. 1908 = 151 P.L.R. 1908; 1 S.L.R. 133 (136) = 2 S.L.R. 43 (47); 1 S.L.R. 275; **D.**, 14 M. 324 (326); 15 M. 234 (235).]

SECOND appeal against the decree of C. Venkoba Rau, Subordinate Judge of Madura (West), in Appeal Suit No. 197 of 1888, affirming the decree of M. A. Tirumalachariar, District Munsif of Dindigul, in Original Suit No. 634 of 1886.

Suit for the partition and delivery to the plaintiffs of the first defendant's half share in certain land. Defendants Nos. 1 and 3 were brothers and the other defendants were their sons, and they formed together an undivided Hindu family: the land which was the subject-matter of the suit was part of their ancestral family property.

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* Second Appeal No. 531 of 1889.

(1) 9 A. 191.

1889 Dec. 20. — APPELLATE CIVIL. — 13 M. 275.

The first defendant, on 30th September 1885, sold to the plaintiffs his half share in the specific land, of which the plaintiff now claimed partition and delivery as above.

The District Munsif passed a decree as prayed, and the Subordinate Judge, on appeal, affirmed this decree.

The defendants preferred this second appeal.

Desikachariar and *Krishnasami Ayyar*, for appellant.

Subramanya Ayyar, for respondent.

JUDGMENT.

The question raised in this second appeal is whether a purchaser from one member of a Hindu undivided family of that member's share in a specific portion of the family property can sue for a partition of that portion alone and obtain [276] an allotment to himself by metes and bounds of his vendor's share in that portion of the property. The point appears not to have been expressly decided by this Court, for the *dictum* in *Chinna Sanyasi* v. *Suriya* (1) refers only to the case of a suit by a coparcener, and *Appasami* v. *Dorasami* (2) as correctly remarked by the Subordinate Judge, differs from this in that the plaintiff was the vendee of the share of the coparcener in the whole family property and therefore could have sued for a share of the whole. In the present case the plaintiffs are only purchasers of the share of their vendor in a portion of the family property, and therefore cannot demand a share in the whole, and the question is, are they precluded from suing for the share sold to them in the particular portion of the family property by the general principle, which has no doubt been firmly established by the decisions, that a suit for a partial partition of undivided family property will not lie, and we are of opinion that they are. The purchaser of a coparcener's share can take no higher right than his vendor possesses, and that is not a right to a certain share in each particular item of the family property, but a joint right with the other coparceners to the ownership and enjoyment of each individual item, with an incidental right to obtain a partition of the whole family property and have his share therein made over to him after due provision for the family debts and liabilities. The judgment in *Pandurang Anandrav* v. *Bhaskar Shadashiv* (3) points out the course to be taken by a purchaser of a share in part of the family property. He must file a partition suit against the other members of the family for the ascertainment of the share of his vendor and for the allotment to himself of his vendor's share in the particular portion in which he is interested; and we think that the rights of such a purchaser are not extended by Section 44 of the Transfer of Property Act. That section only gives him "the transferor's right to joint possession or other "common or part enjoyment of the property and to enforce a partition "of the same," and the transferor's right is not a right to enforce partition of a particular portion of the property; and even if Section 44 would otherwise enlarge the right of the purchaser, such an effect is precluded by Section 2, Clause (*d*) which declares that nothing in the chapter [277] which contains that section shall affect any rule of Hindu law. There is no doubt that the rule may work hardship in some cases by throwing upon the purchaser of a coparcener's share in some small portion of a large family estate the burden of a partition suit to ascertain his

(1) 5 M. 196.
(2) Second Appeal No. 626 of 1881 (not reported).
(3) 11 B.H.C.R. 72.

vendor's share in the whole estate, but those who deal with persons having the very limited power of alienation possessed by the members of an undivided Hindu family must take the consequences. The concession of any such power of alienation was to some extent a departure from the principles upon which the Hindu law of the undivided family rests, and there is no reason for extending that concession further than it has been already extended.

1889 DEC. 20. — APPELLATE CIVIL. — 13 M. 278.

We must hold that the suit in its present form will not lie. The decrees of both the Lower Courts will be reversed and the suit dismissed with costs throughout.

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13 M. 277.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

MAHOMED (*Defendant*), *Appellant v.* GANAPATI (*Plaintiff*), *Respondent*,* [15th October, 1889.]

Religious Endowments Act—Act XX of 1863, *Section* 7—*Regulation VII of* 1817 (*Madras*), *Section* 12—*Suit by a dharmakarta disaffirming the acts of his predecessor —Limitation.*

The plaintiff, who had been appointed in 1886 by the Sub-Collector to be dharmakarta of a Hindu temple, for which no committee had been appointed under Religious Endowments Act, Section 7, sued in 1886 to recover possession of land demised to the defendant on a perpetual lease in or about 1856 by a previous dharmakarta, who died in 1885 :

Held, (1) that Regulation VII of 1817 having been repealed as regards Hindu temples by Act XX of 1863, the appointment by the Sub-Collector gave the plaintiff no right to sue: accordingly it was necessary to determine the question whether he had such right apart from that appointment ;

(2) that if the above question were answered in the affirmative, the plaintiff, since he did not derive title through his predecessor in office (the grantor of the lease), would be entitled to disaffirm his acts ;

(3) that the period of limitation ran not from the date of the lease, but from the date of the accession of the plaintiff to his office.

[**F.**, 9 M.L J. 93 (97) ; **Appr.**, 18 M. 266 (273) ; 19 M. 243 (247) ; **R.**, 23 M. 439 (441) ; 15 Bom. L.R. 266 (272) ; 16 C.L J. 349 = 17 C.W.N. 873 (875) = 16 Ind. Cas. 927 ; 12 C.W.N. 63 (64) ; 8 Ind. Cas. 998 = 10 Ind. Cas. 573 (574) = 20 M.L.J. 781 = 9 M.L.T. 73 (74) ; 127 P.R. 1908 = 123 P W.R. 1908.]

278] SECOND appeal against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 141 of 1888, affirming the decree of M. A. Tirumalachariar, District Munsif of Dindigul, in original suit No. 643 of 1886.

Suit by the plaintiff as dharmakarta of a Hindu temple to recover certain land as part of the property of the temple. The defendant claimed to hold the land under a perpetual lease granted to him thirty years before suit by Raman Pujari, a former dharmakarta of the temple, who died in 1885.

The District Munsif passed a decree in favour of the plaintiff, which was affirmed on appeal by the District Judge, who observed with reference to the plaintiff's right to maintain the suit :—

" He was appointed by order of the Sub-Collector, communicated with Exhibit C on the 5th August 1886 ; and the argument used in appeal

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* Second Appeal No. 126 of 1889.

1889 Oct. 15. — Appellate Civil. — 13 M. 277.

is that the Sub-Collector's appointment had no effect, because Section 12, Regulation VII of 1817, under which it was made, was repealed by Section 1, Act XX of 1863.

"It appears to me that, notwithstanding the repeal of that section, the Collector (and equally the Sub-Collector) had the power to appoint as local agent of the Board of Revenue, until such power legally ceased and determined in the manner provided in Section 12, Act XX of 1863, and there has been no such cessation or determination in this case, because, admittedly, no committee has been appointed under Section 7 of the same Act to take the place of the Board of Revenue and the local agents in respect of the plaint temple. Reading Sections 3, 7 and 12 of the Act together, the appointment of plaintiff was legal and his right to maintain the suit cannot be questioned."

The defendant preferred this second appeal.

Rama Rau and *Mahadeva Ayyar*, for appellant.

Krishnasami Ayyar and *Subramanya Ayyar*, for respondent.

JUDGMENT.

SHEPHARD, J.—The defendant holds under a lease made thirty years ago by Raman Pujari, dharmakarta of the temple to which the lands belong. The plaintiff claims to recover the land as successor in office to Raman Pujari, who died in 1885. The first question is whether the plaintiff is entitled to the office of dharmakarta. I cannot agree with the Courts below in thinking that the Collector had in 1886 any statutory power to appoint dharmakartas. The Regulation VII of 1817 was, so far as concerned Hindu temples, unreservedly repealed by the Act of 1863, and it **[279]** cannot be contended that, owing to the neglect of Government to carry out the duties imposed upon them by Section 7 of that Act, the Board of Revenue can be deemed to be still invested with the powers and duties which attached to the Board under the Regulation. Whether or not the plaintiff is trustee of the temple independently of the appointment by the Sub-Collector is a question on which there is no decision. We must ask the District Judge to return a finding on that question. If the plaintiff, being dharmakarta, is entitled to sue to recover temple property, the further question arises whether the lease under which the plaintiff holds was of a character prejudicial to the interests of the temple, so that the plaintiff, as trustee, is entitled to have it set aside. It is found that the lease was a perpetual one, but that circumstance is not conclusive to show that it was a transaction of an improvident nature calculated to prejudice the interests of the temple. We must, therefore, direct the District Judge to return a finding on that question.

It was contended on behalf of the appellant that, granted that the lease was one which the late dharmakarta ought not to have granted, the present dharmakarta was not entitled to maintain this suit, and, further that, if the suit was maintainable, it was barred by limitation. In support of the former contention, we were referred to the case of *Maniklal Atmaram* v. *Manchershi Dinsha Coachman* (1), where the opinon was expressed that it was not competent for a trustee to sue to undo the act of his predecessor, though that act might have been done in breach of trust. "A trustee, it is said, as between himself and one to whom he "has conveyed trust property, is, I apprehend, as much concluded by his

(1) 1 B. 269 (279).

"own completed act as any other vendor. So again I apprehend the com- "pleted act of a former trustee, though in itself a breach of trust, is as "conclusive against a successor in the trusteeship where it is the successor "who in a suit against one claiming under, and by virtue of such act is "seeking to disaffirm and annul it." In the case in which this language "was used, the plaintiff was the son and heir of one to whom, on the revocation of the probate previously granted to the testator's widow, letters of administration with the will annexed were granted without prejudice to any act done in the due course of [280] administration by the widow. The plaintiff sued to set aside an alienation made by the widow in the defendant's favour of a house which under the will had been made the subject of a charitable trust. It was held that the plaintiff, not claiming any beneficial interest, but merely claiming to act as trustee under a will and seeking to undo an act of one who had also been a trustee under the same will, could not maintain the suit. From the language used it would seem that the plaintiff was treated as if he had derived title from the widow, as would be the case generally where one trustee under a will has succeeded another. And it is also to be observed that the learned Judge expressly refrained from deciding the question whether such a suit could be brought on behalf of the person for whose benefit the trust was created. In the present case, though the plaintiff may in point of time have succeeded the dharmakarta who made the alienation, he does not derive his title from that dharmakarta, and is, therefore, not bound by his acts. Subject to the law of limitation, the successive holders of an office, enjoying for life the property attached to it, are at liberty to question the dispositions made by their predecessors (*Papaya* v. *Ramana* (1), *Jamal Saheb* v. *Murgaya Swami* (2), *Modho Kooery* v. *Tekait Ram Chunder Singh* (3)), and it is equally clear that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, when only the successor became entitled to possession. Accordingly, Raman Pujari having died so recently as 1885, the plaintiff's suit cannot be barred by limitation.

It was finally contended on behalf of the appellant that he was entitled to notice before his lease could lawfully be determined by the plaintiff, and that it was not shown that any such notice had been given. No doubt, it has been held that, in a suit by a landlord to eject his tenant, not being a mere tenant-at-will, it is a part of the necessary proof of the plaintiff's title that he should prove notice to quit, and that it is competent to the defendant to take the objection of want of notice even on second appeal *Abdulla Rawutan* v. *Subbarayyar* (4). I do not think that ruling is applicable to the present case, for here the plaintiff has never admitted [281] the tenancy of the defendant, but is seeking to eject him as one holding under an invalid alienation. In the plaint, which was presented in November 1886, it is stated that the plaintiff came into office in July 1886, and in the following month called upon the defendant to relinquish the property. No issue was taken upon this allegation; and, in view of the allegations made on both sides in the pleadings, I think that it could not properly have been made the subject of an issue.

I think the District Judge should be asked to return findings on the two issues indicated above within six weeks from the date of the receipt of

(1) 7 M. 85. (2) 10 B. 35. (3) 9 C. 411. (4) 2 M. 346.

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this order, when seven days, after the posting of the finding in this Court, will be allowed for filing objections.

Both parties to be at liberty to adduce fresh evidence.

MUTTUSAMI AYYAR, J.—I concur.

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13 M. 281.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

LAKSHMAMMA (*Plaintiff*), *Appellant v.* KAMESWARA AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents.**
[2nd and 12th December, 1889.]

Registration Act—Act III of 1877, *Section* 17 (*b*) (*h*).

Where a deed of partition between a mother and her son declared certain existing rights in her over moveable and immoveable property above the value of Rs. 100:

Held, that, although the deed showed that the execution of another deed with reference to those rights was in contemplation, yet the deed was not admissible in evidence of the mother's title to either the moveable or immoveable property.

[R., 24 B. 615 (619); 12 C.L.J. 25 (29) = 15 C.W.N. 375 (378) = 6 Ind. Cas. 346; 12 M.L.T. 301; 119 P.L.R. 1906; D., 15 M. 336 (339).]

APPEAL against the decree of Venkata Rangayyar, Subordinate Judge of Ellore, in original suit No. 31 of 1886.

Suit by the plaintiff, who was the widow of one Venkatakrishnayya, to restrain the defendants from interfering with her enjoyment of certain jewels, to recover from the defendants cer-[282]tain moveable and immoveable property (the immoveable property being of the value of Rs. 1,200), and to compel defendant No. 1 who claimed to be the adoptive son of the late Venkatakrishnayya to execute to her deeds of transfer in respect of the abovementioned moveable and immoveable property as per Exhibit A.

Exhibit A was translated as follows:—

"To Velagapudy Venkata Lakshmamma Pinnigar (the plaintiff), who is equal to Ganga and Bhagirade.

"The manavi (representation) of Sevakudu Velagapudy Kameswara Rao.

"As my father Velagapudy Venkatakrishnayya died, what we intend in regard to division of moveable and immoveable property which was acquired by him and which we hold up to the present day is as follows:—I have given you without any share to me the inam lands which were previously purchased in Vijaiswaram, the silver and gold jewels of which you hold possession, cloths, cot and beds and all the silver things in your possession, as also the jewels which my father had, as also brass utensils which are engraved in your name. I have arranged that I shall hold without giving you any share the silver and gold articles, cloths, cot and bed which myself, my wife and my children hold and which are in my possession, as also the seri lands which stand in my name and in that of Suraparazu Gurumurty, as also the debts due to us from the people up to this day, *i.e.*, entire outstanding balance of debts due under bonds executed in my name after deducting payment as to the remaining silver, gold (articles),

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* Appeal No. 116 of 1888.

ready money and utensils which are forthcoming at present and which are in the house, the two houses and sites at Pentapadu, bandy and cattle I have agreed to divide them in equal shares. The pension rupees which are due to my father from the Sircar and the security money are to be divided equally when they come to us.

"I have agreed to give my father's mother Venkamma Garu Rs. 500 from our joint money on account of her maintenance and utensils for her use.

"We should both take the boxes in our respective possession. The remaining wooden and stone articles, which are in our house, should be divided equally. I won't make any kind of objection to the gift and sale of the moveable and immoveable property which may be made by you at any time as you please.

[283] "It is arranged that after we divide the property above referred to and take possession of our respective shares, a document shall be drawn up and registered.

(Signed) V. KAMESWARA RAU"
(defendant No. 1).

The Subordinate Judge held, on the authority of *Ramasami* v. *Ramasami* (1), that this document came within the purview of Registration Act, Section 17, Clause (*b*), and not within the exception in Clause (*h*), and accordingly ruled that it was not admissible in the evidence. He passed a decree in favour of the plaintiff for the delivery to her of certain moveable property, but otherwise dismissed the suit.

The plaintiff preferred this appeal.

Subba Rau, for appellant.

As to the admissibility of Exhibit A, see the Full Bench decision in *Jiwan Ali Beg* v. *Basa Mal* (2).

The Registration Act, like all disqualifying Acts, has to be construed strictly, and this document strictly creates no right in land, but merely gives a right to have a conveyance. See *Venkatagiri Zamindar* v. *Raghava* (3), *The Collector of Tanjore* v. *Ramasamier* (4) and *Annapa* v. *Ganpati* (5), *Ramasmi* v. *Ramasami* (1) does not govern this case, for it proceeds on the acknowledgment of the receipt of the price in the instrument merely following *Futteh Chund Sahoo* v. *Leelumber Singh Doss* (6).

The document is admissible to prove the agreement for the execution of a further document, to prove the compromise between plaintiff and defendant No. 1 and to confirm the evidence of the father's intention to divide. *Venkatarama Naik* v *Chinnathambu Reddi* (7).

Moreover, the document is divisible in the sense that it can be used as to moveable property, &c., though it cannot be used as creating an interest in land. *Krishto Lall Ghose* v. *Bonomalee Roy* (8), *Sham Narayan Lall* v. *Khimajit Matoe* (9), *Lachmipat Sing Dugar* v. *Mirza Khairat Ali* (10), *Vellaya Padyachy* v. *Moorthy Padyachy* (11).

[284] The Advocate-General (Hon. Mr. *Spring Branson*), for respondents.

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(1) 5 M. 115. (2) 9 A. 108. (3) 9 M. 142.
(4) 3 M. 342. (5) 5 B. 181. (6) 14 M.I.A. 129.
(7) 7 M. H. C. R. 1. (8) 5 C. 611. (8) 4 B L. R. F. B. 1.
(10) 4 B.L.R F.B. 18. (11) 4 M.H.C.R. 174,

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The case is precluded by the authority of *Ramasami* v. *Ramasami* (1) where a document, which is compulsorily registrable, is unregistered, its terms cannot be consulted—see also *Nangali* v. *Raman* (2); that authority is not affected by *Venkatagiri Zamindar* v. *Raghava* (3), which only decided that the fact of a tenancy can be put in evidence, though the lease may be inadmissible. Compare also *G. Lee Morris* v. *Sapamtheetha Pillay* (4) and *Somu Gurukkal* v. *Rangammal* (5) followed in *Sambhubhai Karsandas* v. *Shivaldas Sadashivdas Desai* (6) and see *Balaram Nemchand* v. *Appavalad Dulu* (7).

The Collector of Tanjore v. *Ramasamier* (8) and *Annapa* v. *Ganpati* (9) do not apply here: the first case was a decision on the terms of Stamp Act, Section 26, and in the latter case the document in question was not intended to affect land.

As to the admissibility of the document for the purposes suggested, *Sham Narayan Lall* v. *Khimajit Matoe* (10), is no authority for the appellant, for the suit being for the registration of the instrument, the instrument there had necessarily to be read; nor does *Venkatarama Naik* v. *Chinnathambu Reddi* (11), of which the head-note is incorrect, help the appellant, for the document in that case was not of the nature described in Registration Act, Section 17.

In the present case the document does not recite the father's will or the like, but sets out the terms of a partition then and there effected; nor is it an agreement of which specific performance is sought. Compare also *Mattongeney Dossee* v. *Ramnarain Sadkhan* (12), where Garth, C. J., discussed *Lachmipat Sing Dugar* v. *Mirza Khairat Ali* (13) and *Krishto Lall Ghose* v. *Bonomalee Roy* (14), which also, like the Madras case last cited, bears on the argument as to the divisibility of the document. As to this point see also *Lachman Singh* v. *Kesri* (15). *Velliya Padyachy* v. [285] *Moorthy Padyachy* (16) cited against me was overruled in *Achoo Bayamah* v. *Dhany Ram* (17). The document if registered would be a good conveyance if anything, as it is not registered it does not avail the appellant.

Subba Rau in reply.

JUDGMENT.

The plaintiff is the widow of one Venkatakrishnayya, who died on 21st February 1886. She sued to enforce an arrangement for partition, said to have been made with defendant No. 1 six days after her husband's death, and to compel defendant No. 1 to execute and register a formal deed in conformity with the terms of that arrangement. In the suit the plaintiff denied the adoption of defendant No. 1 by her late husband; but this point was decided against her and is not pressed in appeal. The question before us, therefore, is what effect, if any, can be given to the agreement (Exhibit A) executed by defendant No. 1 on 27th February 1886. The Subordinate Judge held the document purported to create and declare rights in immoveable property to the value of more than Rs. 100, and that registration was, therefore, compulsory. In appeal it was argued that the document was merely an agreement to carry out the wishes of

(1) 5 M. 115. (2) 7 M. 226. (3) 9 M. 142.
(4) 6 M.H.C.R. 45. (5) 7 M.H.C.R. 13. (6) 4 B. 89.
(7) 9 B. H.C.R. 121. (8) 3 M. 342. (9) 5 B. 181.
(10) 4 B.L.R.F.B. 1. (11) 7 M.H.C.R. 1. (12) 4 C. 83.
(13) 4 B.L.R.F.B. 18. (14) 5 C. 611. (15) 4 A. 3.
(16) 4 M.H.C.R. 174. (17) 4 M.H.C.R. 378.

the deceased Venkatakrishnayya expressed shortly before his death, and did not in itself operate to create a title in immoveable property, but was merely an agreement to execute another document, which should create such title.

This contention we do not consider to be tenable. The language of the document expressly declares existent rights in the plaintiff in immoveable property, and, though the last clause of Exhibit A contemplates the execution of another deed, it is clear that that future deed was only necessary because there was a certain amount of property as to which immediate division was not possible.

Nor do we think that the plaintiff's claim can be supported upon the alleged oral disposition of his property by her late husband. The evidence as to such disposition rests upon the testimony of the same witnesses who have been discredited with regard to the status of defendant No. 1 in the deceased's family; and, moreover, Exhibit A, which undoubtedly was executed immediately after Venkatakrishnayya's death is absolutely silent [286] as to any testamentary disposition made by him. Venkatakrishnayya was a Sub-Magistrate and a man of business; and had he intended to make any such disposition of his property before his death, it is not likely he would have left only oral declarations of his intentions when there was ample time during his last illness to express his wishes in writing. We are, therefore, of opinion that the plaintiff's claim must fail so far as she relies upon her husband's directions as the origin of her title.

The next contention is that even if the agreement (Exhibit A) is, through want of registration, inadmissible in evidence to prove the plaintiff's right to the immoveable property comprised therein, it may still be looked at as evidencing her title to the rest of the property. The learned Advocate-General, on the other hand, contends that the transaction is one and indivisible, and that the document cannot be looked at for any purpose whatever. This objection appears to us to be well founded. The document A, if carried out, is a deed of partition, and it is clear that as between mother and son there can be no such thing as partition apart from this document. The transaction evidenced by the agreement is, therefore, one and indivisible, and the partition of the moveable property cannot be separated from the partition of the rest. The document is not merely evidence of the transaction, but is the transaction itself—*Somu Gurukkal* v. *Rangammal* (1) and *G. Lee Morris* v. *Sapamtheetha Pillay* (2).

The case referred to by the plaintiff's pleader—*Krishto Lall Ghose* v. *Bonomalee Roy* (3)—is in reality against him, while that in *Vellaya Padyachy* v. *Moorthy Padyachy* (4) has been overruled by the Full Bench in *Achoo Bayamah* v. *Dhany Ram* (5). The same rule has been followed in *Mattongeney Dossee* v. *Ramnarain Sadkhan* (6) and *Lachman Singh* v. *Kesri* (7). The case of *Venkatagiri Zamindar* v. *Raghava* (8) was referred to, but it is not in conflict with these decisions. There it was merely decided that if a contract of lease is for want of registration inadmissible in evidence, the plaintiff can give other evidence of tenancy in a suit to eject.

[287] On these grounds we must hold that Exhibit A is altogether inadmissible in evidence. The appeal, therefore, fails, and we must dismiss it with costs.

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(1) 7 M.H.C.R. 13. (2) 6 M.H.C.R. 45. (3) 5 C. 611.
(4) 4 M.H.C.R. 174. (5) 4 M.H.C.R. 378. (6) 4 C. 83.
(7) 4 A. 3. (8) 9 M. 142.

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APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

VENKATACHALAPATI (*Defendant*), *Appellant v.* KRISHNA (*Plaintiff's Representative*), *Respondent.** [30th and 31st October and 27th November, 1889.]

Civil Procedure Code, Section 13—Res judicata —*Rent Recovery Act* (*Madras*)—*Decision of Revenue Court as to landlord's title.*

In a summary suit filed by a landlord against his tenant in the Court of the Deputy Collector under the Rent Recovery Act (Madras), Section 9, to enforce acceptance on a patta by the defendant, it appeared that, in a former suit between the same parties in the same Court, it had been decided that the defendant was the plaintiff's tenant and as such bound to accept a patta from him in respect of the land in question in the present suit :

Held, that the defendant was not entitled in the present suit to dispute the plaintiff's title, since the former decision constituted it *res judicata*.

[F., 30 M. 498 (499)=17 M L J. 433=3 M.L.T. 17 ; R., 30 M. 510 (514)=17 M.L.J. 518=2 M.L.T. 455 ; 35 M. 216 (218)=10 Ind.Cas. 75=21 M.L J. 344=10 M.L. T. 533 ; 17 Ind. Cas. 445 (459)=23 M.L.J. 543 (566)=12 M.L.T. 500=(1913) M.W.N. 1 (22) ; 2 M.L.J. 36 (38).]

SECOND appeal against the decree of J. A. Davies, Acting District Judge of Tanjore, in appeal suit No. 114 of 1886, confirming the decision of N. Krishnasami Ayyar, Acting Deputy Collector of Tanjore Division, in summary suit No. 224 of 1864.

Suit brought by a landlord against his tenant under Rent Recovery Act, Section 9, to enforce acceptance by the defendant of a patta tendered to him by the plaintiff, and the execution of a muchalka by him to the plaintiff.

The defendant disputed the title of the plaintiff. But it appeared that, in a former suit between the same parties in the same Court, it had been decided that the defendant was the plaintiff's tenant and as such bound to accept a patta from him in respect of the lands in question in the present suit.

[288] The Deputy Collector decided in favour of the plaintiff, and this decision was upheld on appeal by the District Judge on the ground that the pleas now raised by the defendant had been decided against him in the former suit.

The defendant preferred this second appeal against the decree of the District Judge.

Bhashyam Ayyangar, for appellant.

The District Judge was wrong in passing a decree for the plaintiff whose title was disputed by the defendant and had not been established by him; *Rama* v. *Tirtasami* (1) the decision of a Revenue Court in a summary suit has a binding force only for the current *fasli*, it cannot constitute any matter *res judicata*, for it operates merely with regard to the one patta to which alone it purports to relate.

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* Second Appeal No. 917 of 1888.

(1) 7 M. 61.

(COLLINS, C. J.—When it has once been decided that the plaintiff is your landlord, can you deny his title next year ?)

Yes, if the decision is a decision in a summary suit. Similarly, a Small Cause Court has, year after year, to try suits for rent in respect of the same premises. Nor does it make any difference that the second suit is a summary suit like the first—*Debi Prasad* v. *Jafar Ali* (1), *Chunder Coomar Mundul* v. *Nunner Khanum* (2), and *Boistub Churn Sein* v. *Trahee Ram Sein* (3). There is no hardship on the landlord who might obtain a final and conclusive decision in a Civil Court.

Pattabhirama Ayyar, for respondent.

The argument as to the tenant's liberty to deny his landlord's title seems to be inconsistent with the terms of Sections 9 and 10 of the Rent Recovery Act. Under these sections, the Collector must in the first place consider whether the tenant is obliged to accept a patta, &c., *i.e.*, whether the plaintiff is entitled to impose a patta, *i.e.*, whether he has title to the land. The question is not whether the summary decision would support the plea of *res judicata* in a civil suit. In the cases cited the second Courts were all cases of different jurisdiction, not as here where the Court is identical. In *Rama* v. *Tirtasami* (4) the first suit was a suit in a Revenue Court to enforce a patta, the second was a suit in a Civil Court by the tenant for a declaration. In *Debi Prasad* v. *Jafar Ali* (1) the [289] first suit was instituted in a Revenue Court, the second suit in a Civil Court for a declaration of proprietary right. In *Chunder Coomar Mundul* v. *Nunner Khanum* (2) the first suit was instituted in a Revenue Court, the second was a suit to obtain possession of the land. *Boistub Churn Sein* v. *Trahee Ram Sein* (3) was a case of a revenue suit followed by a civil suit. See also Evidence Act, Sections 109, 116 and Civil Procedure Code, Section 13. According to *Birchunder Manickya* v. *Hurrish Chunder Dass* (5) even an *ex-parte* decree passed in a Revenue Court supports plea of *res judicata*; and here there has not only been a series of petitions for very many years, but also a number of contested suits; the result has always been in favour of the landlord, whether in suits to enforce acceptance of pattas or in suits to set aside attachments.

The plea of *res judicata* must prevail even independently of Section 13 of the Civil Procedure Code resting on the maxim *nemo debet bis vexari eadem causa*, see *Krishna Behari Roy* v. *Brojeswari Chowdranee* (6).

Bhashyam Ayyangar, in reply.

The multiplicity of decisions does not affect the plea of *res judicata*. As to the case of *Birchunder Manickya* v. *Hurrish Chunder Dass* (5) the decision was not in Revenue Court, it only decides that the fact of a decree having been passed *ex parte* does not affect the plea of *res judicata* founded on it. Compare Bengal Act X of 1859 giving jurisdiction to revenue officers varied by Act VIII of 1869 which gives that jurisdiction of Civil Courts in these cases.

In *Manappa Mudali* v. *S. T. McCarthy* (7) the Full Bench held a Small Cause Court's incidental finding on title is good for the suit in question only; nor would it be valid to support the plea of *res judicata* even if confirmed in appeal by District Court sitting in appeal from the small cause side of a District Munsif's Court. Compare also *Anusuyabai* v. *Sakharam Pandurang* (8). The respondent's contention leads logically

(1) 3 A. 40. (2) 11 B.L.R. 434. (3) 15 W.R. 32. (4) 7 M. 61.
(5) 3 C. 383. (6) 2 I.A. 283. (7) 3 M. 192. (8) 7 B. 464.

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to the conclusion that the matter would be *res judicata* in a Civil Court; but this would clearly not be the case. See *Khugowlee Sing* v. *Hossein Bux Khan* (1).

JUDGMENT.

[290] The appellant in this second appeal was the defendant in a suit instituted before the Deputy Collector of Tanjore by the respondent, the inamdar of the village. The suit was brought under Act VIII of 1865 to compel appellant to accept a patta. He pleaded non-liability denying the plaintiff's title as landlord. In a former suit between the same parties in the same Court, it had been decided that the defendant-appellant was the tenant of the plaintiff-repondent and as such bound to accept the patta tendered and to grant his muchalka. This decree was confirmed on appeal by the District Court and there was no second appeal. Both the Lower Courts have held that the matter in issue between the parties having been heard and determined in the former suit, the appellant is estopped from raising the same defence in the present suit.

In second appeal it is argued that the decision of a Revenue Court cannot operate as *res judicata* in any subsequent suit between the parties, inasmuch as (1) the said decision is only binding for the *fasli* for which the suit is brought and (2) a Revenue Court can only decide a question of title incidentally and such a decision cannot operate as *res judicata*. The following cases were relied on in support of the appellant's argument: *Rama* v. *Tirtasami*(2) (*Chunder Coomar Mundul* v. *Nunner Khanum*(3), *Debi Prasad* v. *Jafar Ali* (4), and *Boistub Churn Sein* v. *Trahee Ram Sein* (5) but none of these cases are in point. In these cases it was held that the decision of a Revenue Court is no bar to a suit brought in the regular Courts. We have not been referred to any case in which it has been held that the doctrine of *res judicata* is not applicable to the Revenue Court and we do not think that the appellant's contention is sustainable.

In adjudicating on a suit to enforce the acceptance of a patta the first question which the Revenue Court has to decide is whether the party sued is bound to accept a patta and give a muchalka, in other words, whether the relation of landlord and tenant subsists (Section 10, Act VIII of 1865).

It is conceded that each year's rent is in itself a separate and entire cause of an action. It would therefore, at first sight, seem as if judgment obtained in a suit to enforce the acceptance of a [291] patta for one year would only extend to the subject-matter of the suit, leaving the landlord at liberty to bring a fresh suit in the following year and the tenant at liberty to raise any defence he thought proper. But seeing that in the former suit the whole question as to the relation in which the parties stood was substantially and necessarily tried and determined, and that the materials upon which the Judge would have to arrive at a decision are the same in the subsequent as in the prior suit, we are clearly of opinion that even if the former judgment does not bind as an estoppel, it affords such cogent evidence of the relation in which the parties stand that the Deputy Collector would have been perfectly justified in acting upon it, and deciding the question as to status in the affirmative. This was also the

(1) 7 B. L.R. 673. (2) 7 M. 61. (3) 11 B.L R. 434.
(4) 3 A. 40. (5) 15 W. R. 32.

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opinion of the Calcutta High Court—*Nobo Doorga Dossee* v. *Foyzbux Chowdhry* (1).

We are, however, of opinion that in law the former decision does act as an estoppel. The Revenue Court is empowered by law to determine the question of title and such determination of a matter directly and substantially in issue is a bar to the trial of the same matter in a subsequent suit between the same parties in the same Court, litigating under the same title. The adjudication as to the liability of the defendant to accept a patta having been decided by a competent Court is conclusive and binding on the parties in any subsequent litigation in the same Court—*Krishna Behari Roy* v. *Brojeswari Chowdranee* (2).

Reliance is placed on the decision of this Court in *Manappa Mudali* v. *McCarthy* (3), and it is argued that as the decision of a Small Cause Court in a case in which a question of title has been raised and decided incidentally is no bar to a suit upon the title, so the decision of the Revenue Court as to the status of the parties is no bar to the litigation of the same question in a subsequent suit. The argument might be sustainable if the subsequent suit was one brought in the Court of a District Munsif, but for many reasons we do not think it of any weight in this case. In the first place an incidental finding even of a District Court on a question of title in a case not admitting of further appeal could not operate as *res judicata* as to that point in a future suit. As remarked by Savigny (Syst. sec. 293) "everything that should have the authority of *res judicata* is and ought to be subject to appeal." Now [292] an appeal is allowed from the decision of a Revenue Court on the question of title, and in the present case the District Court in appeal confirmed the finding of the Deputy Collector.

Again the maxim *nemo debet bis vexari eadem causa* applies as much to the plea of the defendant in a case as to the case set up by the plaintiff. It would be intolerable if the defendant, who has been declared by a competent Court to be the tenant of the plaintiff and as such bound to accept a patta and grant a muchalka, were to be permitted to put his landlord, year by year, to the proof of his title. It was suggested by Mr. Bhashyam Ayyangar that the landlord's remedy is by suit in the regular Courts, but we see no reason why the plaintiff-respondent, who has obtained the final decision of a competent Court on the question, should be forced to bring a fresh suit to establish his title.

For these reasons we think the Lower Appellate Court was right in holding that the defendant-appellant was not at liberty to raise in this suit those questions which were decided against him in the former suit.

We are also of opinion that the District Judge was justified in finding that the contentions of the defendant were not *bona fide*. The Deputy Collector pointed out that the opposition to plaintiff-respondent had been got up by one Shesha Ayyangar, his avowed enemy, and by Kristna Homada, the headman of the caste to which the defendant belongs, that the defendant pleaded complete ignorance of the contents of his written statement and admitted that he gave no instructions to his vakil.

We dismiss this second appeal with costs.

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(1) 1 C. 202. (2) 2 I.A. 283. (3) 3 M. 192.

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[293] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

VENKATACHALAPATI (*Plaintiff*), *Appellant v.* SUBBARAYADU AND OTHERS (*Defendants*), *Respondents.**

[29th April and 2nd October, 1889 and 18th March, 1890.]

Civil Procedure Code, Section 11—*Hindu Marriage Act* (*Act XV of* 1856, *Section* 5)—*Hindu Law—Widow re-marriage—Exclusion from temple—Excommunication—Jurisdiction.*

The plaintiff, who was a *Smarta* Brahman, but had married a widow (whose first marriage had not been consummated), alleged that he had made a vow to present an offering in a certain temple, and that the defendants who were the committee of the temple, had obstructed and prevented him from entering the inner shrine (where orthodox Brahmans usually make their offerings), asserting that he was disqualified to enter by reason of his having married a widow contrary to Hindu *sastras*; and he sued for damages for the above obstruction and imputation, for a declaration that he was entitled to enter the shrine as a Brahman, and for an injunction restraining the defendants from interfering with his exercise of this right:

Held, (1) that the right claimed was of a civil nature and within the cognizance of the Civil Courts;

(2) that the question to be determined was not a question of the plaintiff's legal *status* since a Brahman widow is at liberty to re-marry under Act XV of 1856, but it was a question of caste *status* in respect of a caste institution;

(3) that in order to determine the above question, the Courts must inquire (*a*) what was the usage of the temple as regards admission into the inner shrine for the purposes of worship at the date of the suit, or the presumable intention of the religious foundation as regards such admission and (*b*) whether according to such usage or presumable intention of the foundation those who secede from the caste custom as to re-marriage of woman are outside the class of beneficiaries as regards the right of admission into the inner shrine as above.

[R., 23 B. 122 (125); 33 C. 789 (802) = 10 C.W.N. 581; 23 M. 171 (177); 30 M. 158 (165) = 17 M.L.J. 1 = 2 M.L.T. 69; 5 Ind. Cas. 57 = 7 M.L.T. 190; D., 18 B 115 (118); 11 M.L.J. 215 (221)]

SECOND appeal against the decree of Venkata Rangayyar, Subordinate Judge of Ellore, in Appeal Suit No. 321 of 1887, reversing the decree of O. S. R. Kristnamma, District Munsif of Ellore, in Original Suit No. 94 of 1886.

The defendants, who were the committee of a temple, had prevented the plaintiff from entering the inner shrine, alleging that he was disqualified to enter by reason of his marriage with a widow. The plaintiff sued for damages, and for a declaration of [294] his right to enter, and for an injunction to restrain the defendants from obstructing him in the exercise of this right.

The District Munsif passed a decree "that the plaintiff do have "such right as all the Brahmans have for going into the temple for "worship." On appeal the Subordinate Judge reversed the decree and dismissed the suit.

The plaintiff preferred this second appeal against the decree of the Subordinate Judge.

Pattabhirama Ayyar, for appellant.

Mr. Michell, for respondents.

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* Second Appeal No 1473 of 1888.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purposes of this report from the judgment of MUTTUSAMI AYYAR, J.

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JUDGMENT.

MUTTUSAMI AYYAR, J.—The appellant, Venkatachalapati Rau, is a *Smarta* Brahman of Tanuka, in the Godavari District, and the respondents are the *archaka* and members of the committee of management attached to Sri Markandesvara Swami's temple in the town of Rajahmundry. In June 1883, Venkatachalapati married a Brahman lady who was of his caste, but who had lost her husband before she attained her maturity and her marriage was consummated. The plaint stated that, during her subsequent illness, he made a vow to present an offering to the deity worshipped in the temple in question in case she recovered. For the purpose of performing the alleged vow, he attempted, in January 1886, to enter the inner precincts or the *sanctum sanctorum* of the temple where orthodox Brahmans usually make their offerings to the idol. But the respondents prevented him from doing so, the first asserting that he was disqualified from entering the inner shrine by reason of his having married a widow contrary to Hindu *sastras*. The appellant's case was that the imputation was defamatory, and the obstruction caused to his entering the inner shrine was wrongful. He asked, first, for a declaration that he was entitled to enter the inner shrine of the temple as a member of the Brahman community, secondly, for an injunction commanding the respondents not to interfere in future with the exercise by him of such right, and, thirdly, for an award of Rs. 100 as compensation for the injury already done to him.

The District Munsif of Ellore, by whom this suit was tried, observed that there was no evidence in support of the alleged vow and that the appellant entered the temple in pursuance of a plan [295] concerted with his friends in anticipation of opposition from the respondents in order to obtain a judicial declaration that widow marriage was in conformity with the Hindu *sastras*. He considered further that the appellant proved no actual loss, that the injury for which he claimed compensation was only sentimental, and that the respondents' statement that the appellant had become an out-caste by reason of his marriage with a widow was not malicious. On this view of the facts, the District Munsif disallowed the claim to an injunction and to damages, and the appellant preferred no appeal to the District Court from that portion of his decree. As regards the appellant's prayer for a declaration of his right to enter the inner shrine of the temple for the purposes of religious worship, the respondents contended that the appellant's marriage with a widow was opposed to Hindu law and custom, that he lost his *status* as a Brahman by contracting such marriage, and that in refusing him permission to enter the inner shrine, they acted *bona fide*, and were guilty of no actionable wrong. They raised also three preliminary objections to the suit, *viz.*, (1) that the appellant had no right to maintain the suit, (2) that the Civil Courts had no jurisdiction to entertain it, and (3) that the suit was bad for non-joinder as a defendant of Sankarachariar, the head priest or the ecclesiastical superior of *Smarta* Brahmans in that part of the country. The plea of non-joinder was disallowed by the District Munsif, and it was not pressed by the respondents on appeal. The other two objections rested on one and the same ground, *viz.*, that this suit relates to a religious matter, that Hindu marriage is a religious ceremony,

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that ecclesiastical superiors are alone competent judges of its efficacy, and that the ritual and usage of the temple in dispute are founded on the *agamam* or the code of temple ritual. The District Munsif considered that the right asserted in the plaint was one of a civil nature which vested in the appellant as a citizen and as a member of the Brahman community, that its connection with religious or caste observances was not of itself sufficient to preclude the appellant from complaining of what he considered to be an infringement of such right or the Civil Courts from adjudicating upon it and protecting its exercise if it really existed in law. Turning to the main question whether marriage with a widow was forbidden by Hindu law, he discussed it with reference first to *sruti*, next to *smriti*, and then to *puranas*, and after referring to the general **[296]** custom on the subject and its supposed origin, and to the canon of interpretation applicable when rules deducible from the several sources of Hindu law conflict with each other, concluded that widow marriage was not forbidden by the Hindu *sastras*, and that such marriage did not impair or taint the appellant's *status* as a member of the Brahman community. Accordingly, he passed a decree that "plaintiff do have such right as all the Brahmans have of going into the temple mentioned in the plaint." On appeal the Subordinate Judge set aside that decree and directed that the suit be dismissed with costs. He did not discuss separately the first and second issues and the fourth issue on the merits and record a distinct finding on each, but he observed (1) that it was an undisputed fact that the custom or the rule of caste obtaining among Brahmans and other regenerate classes prohibited widow marriage and condemned to exclusion from caste those who violated the rule of custom or caste, (2) that the custom was a matter of general notoriety and it was incumbent on the Civil Courts to take judicial cognizance of it, and that it was not necessary for him to go behind it and to follow the District Munsif in his discussion of the several sources of Hindu law. He next referred to the *srimukham* or letter of excommunication which emanated from Sankarachariar and which is referred to in the case of *The Queen* v. *Sankara* (1) and held that it amounted to an authoritative and binding declaration to the effect that those Brahmans who marry widows become outcastes, and that, by implication, it prohibited also the appellant's marriage with a widow. After remarking to what extent a Hindu temple was a public place, and that it was a caste institution, he held that the respondents were justified in obstructing the appellant's entrance into the temple and that the appellant's grievance was not an actionable wrong. Hence this second appeal.

As regards the two preliminary objections, the decision of the District Munsif is correct. The right which the appellant claimed in the plaint and which he asked the Court to protect was a right of access to the inner shrine or *sanctum sanctorum* of a Hindu temple for the purposes of religious worship, and the ground of claim was that prior to his marriage with a Hindu widow, he had that right, and that he did not since forfeit it by **[297]** reason of such marriage. The question whether with reference to its pre-requisites, the right continued to exist after his marriage was one which related to the merits, and whatever might be the decision in regard to it, the right was, in its nature, one which the appellant was at liberty to assert as a citizen and a Brahman and which the Courts were bound to adjudicate upon. It may be that an inquiry as to religious or

(1) 6 M. 381.

caste usage, or as to the religious foundation for the excommunication pronounced by the chief priest of *Smarta* Brahmans, is indispensable to coming to a correct decision, but when the right claimed is asserted to be of a civil nature and one which is within the cognizance of Civil Courts, they are bound to hold such inquiry as is ancillary to the exercise of the jurisdiction vested in them by law.

Before entering on the merits, however, it is desirable to note to what extent a Hindu temple is a public institution and what restrictions usually obtain as regards the right of access to different portions of the temple in dispute. The District Munsif observes "The temple is of "course intended for all castes, but there are restrictions of entry. Pariahs "cannot go into the Court of the even temple. Sudras and Baniyas can go "into the hall of the temple. Brahmans can go into the holy of the "holies." On this point, the Subordinate Judge remarks that a Hindu temple is not a public place in the sense in which a public road is a public place. It is open only to the persons belonging to the religious community for whose use and benefit it was dedicated. "Venkatachala-"pati (appellant) was only entitled to use the temple in question so long "as he remained a member of the community to which the temple "belongs." Here it must also be observed that the grievance of which the appellant complains is not his total exclusion from the temple, but the denial of his right of entry into the inner shrine which orthodox Brahmans are permitted to enter when they make their offerings. The matter in controversy is the effect which marriage with a Hindu widow has upon the appellant's right of access into the inner shrine of the temple. The respondents' case was that the appellant ceased to be on the same footing with other Brahmans and became an out-caste by reason of his marriage, whilst the appellant's contention was that the marriage was an act permitted by the Hindu *sastras*, and that it in no way impaired his caste *status* as a Brahman. The question for determination was what was the [298] nature and extent of caste *status* necessary according to the usage and recognized trusts of the temple to the exercise of the right.

The first contention on second appeal is that, assuming that the appellant became an out-caste by reason of his marriage, the right now claimed by him was saved either by Act XXI of 1850 or by Act XV of 1856. Section 1 of the first enactment provides that "So much of any law "or usage now in force within the territories subject to the Government "of the East India Company as inflicts on any person forfeiture of "rights or property or may be held in any way to impair or affect "any right of inheritance by reason of his or her renouncing, or "having been excluded from, the communion of any religion, or being "deprived of caste shall cease to be enforced as law in the Courts of the "East India Company and in the Courts established by Royal Charter "within those territories." Section 5 of Act XV of 1856 enacts that except as in the three preceding sections is provided "A widow shall not "by reason of her re-marriage forfeit any property or right to which she "would otherwise be entitled and every widow who has re-married "shall have the same rights of inheritance as she would have had, "had such marriage been her first marriage." It is on these provisions of law the contention is rested, but they do not appear to support it. They were clearly not intended to repeal the usage of Hindu temples or of religious or *quasi*-religious institutions controlling and regulating their management and prescribing rules as to the place where offerings are to be made and persons from whom they are to be accepted. In *Greedharee*

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Doss v. *Nundakissore Doss Mohunt* (1) and in *Genda Puri* v. *Chhatar Puri* (2). Her Majesty's Privy Council observed with reference to the right of succession to management that the law to be applied to *mutts* which are *quasi*-religious institutions is what is indicated by their usage. A rule of determination is looked for in the case of such institutions in their usage, because it is an index to the intention of those who founded and endowed them and who have since kept them up. A compliance with such intention is the accepted basis on which those who claim the benefit of worshipping in those institutions can sustain their right to such benefit and unless the appellant retains his *status* as a Brahman or a member of that section of the **[299]** community for whose benefit Hindu temples exist, it is difficult to see how he can be regarded as coming within the object with which they are founded and maintained.

The right asserted is from its very nature not an exclusive personal right, or a right of domestic or family worship, or a right of property which may be conceived to exist independently of caste or religion, but it is a joint right to be exercised in a religious institution conformably to caste usage to the extent recognized by it so as not to contravene the equal right of other members of the caste who are similarly interested in the institution. Any other view as to the basis of the appellant's right would be inconsistent with the doctrine of neutrality which forms part of the British judicial system as administered in India, and lead to the introduction into Hindu temples of Mahomedans, out-castes, and others who are outside their scope and for whose benefit they were neither founded nor are kept up. The ground of claim disclosed by the plaint itself was that the appellant's *status* as a Brahman received no taint from his marriage and the contention now urged apparently implies a change of front. The reasonable construction of the enactments cited as saving the appellant's right is that a right consisting in the participation, along with other members of a caste, in the benefits of a religious institution appropriated to the members of the caste is not within their purview.

The next contention which we have to consider is that relied on for the respondents as to the effect of the *srimukham* or edict of excommunication pronounced by Sankarachariar on those who were connected with two other widow marriages which took place at Rajahmundry on the 11th and 15th December 1881. The circumstances under which it was issued and the nature and extent of the ecclesiastical jurisdiction in the exercise of which it was issued are discused in the case of the *The Queen* v. *Sankara* (3).

Admitting the fact that the appellant and his wife are not named in that "*srimukham*" and that their marriage was subsequent to its promulgation, the Subordinate Judge considered that they were also excommunicated if not expressly, by implication, and that such implied excommunication was binding upon them. The appellant's Counsel argues, and I think very properly, that **[300]** this opinion of the Lower Appellate Court cannot be supported. In the first place there can be no valid excommunication by implication, for the presumption of law is against the forfeiture of one's *status*, civil or social, until it is affirmatively established. Again, there was no evidence in this case to show that at the time of his marriage the appellant was a disciple of Sankarachariar and amenable to his jurisdiction as spiritual superior. Neither was the appellant

(1) 11 M I.A. 405. (2) 13 I.A. 105. (3) 6 M. 381.

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heard as to whether he should be put out of his caste, and his marriage was in fact contracted after the publication of the "*srimukham.*" The Subordinate Judge apparently assumes that every *Smarta* Brahman, whether he will or no, must be a disciple of Sankarachariar and that if he does any act prohibited by the chief priest he forfeits his caste as a Brahman. Learned and pious Brahmans have often dissented from the views of Sankarachariar and of each other in regard to interpretation of *smritis* and vedic texts, and yet they have not forfeited their caste *status*. There is no legal warrant in Hindu *sastras* for the supremacy imputed to Sankarachariar and in *The Queen* v. *Sankara* (1) it is pointed out that it is not in his power to forbid any act which is permitted by the *sastras*. A *Smarta* Brahman is bound by his creed to acknowledge no other binding authority than that of the "*achara*" and law as laid down by *sruti*, *smriti*, and other recognized sources of law. Though the opinion of Sankarachariar may be evidence of *bona fides* on the part of those who act upon it and entitled to weight as the opinion of a learned religious ascetic and an ecclesiastical chief, yet it has no inherent authority and cannot of itself operate to cause a forfeiture of caste or to bar an inquiry into the real state of Hindu *sastras* bearing on the point. The conclusion to which I come on this part of the case is that the *srimukham* referred to by the Subordinate Judge cannot be accepted as conclusive.

The substantial question then for decision is what was the recognized general usage of the caste to which appellant belongs at the date of the suit, whether it was against his marriage with a widow, and, if so, whether a departure from it affected his caste *status* so as to deprive him of the right claimed in the plaint. The Subordinate Judge observes that the general usage of Brahmans forbids such marriage and condemns those who infringe [301] it to exclusion from caste, and that the custom is a general custom and one of general notoriety of which Civil Courts may take judicial cognizance. As to the custom of the caste being against the marriage, the District Munsif himself appears to entertain no doubt. In one part of his judgment he observes: "I have reserved to the last the "discussion of the question of custom. Since the commencement of the "*kaliyug*, about 5,000 years ago, it is said that no widow marriages have "taken place. That a different course prevailed before *kaliyug* has "already been shown. Why widow marriage in *kaliyug* has been "discontinued in the face of the sanction by Parasara is to be decided "now." He then refers to paragraphs 86 and 87 of Mayne's learned treatise on Hindu law where it is said that—"It is probable that the "change of usage on this point (re-marriage of women) arose in former "times from the influence of Brahminical opinion, marriage coming to "be looked upon as a sort of sacrament the effect of which was "indelible." The District Munsif also refers to the opinion of some writers who trace the custom to the effect of the celebrated war of the Mahabharat upon the proportion between the number of widows in this country and the number of males of a marriageable age. He then concludes the discussion with this observation:—"I have taken time and "given my best thought and consideration to the subject, and I am of "opinion that the custom ought to give way to law." Here it will be observed that he treats law and custom as antagonistic to each other. The preamble of Act XV of 1856 refers to the custom as an

(1) 6 M. 381.

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established custom and the Hindu law then administered by the Civil Courts as invalidating such marriage. Moreover, in *The Queen* v. *Sankara*(1) the general custom is referred to. Further, the two leading commentaries, the Mitakshara and the Dayabhaga, and the other commentaries, do not contemplate the case of a widow marrying and getting a son whilst enumerating the heirs of a deceased person. This indicates that the custom is at least as old as the period of the digests during which the Hindu law as deduced from diverse sources was consolidated by a process of interpretation into a homogeneous system. I am, therefore, of opinion that the finding of the Courts below that the general custom of the Brahman community as it stood prior to Act XV of 1856 is against the [302] marriage, is open to no legal objection and must be accepted in second appeal.

This being so, the further question arises, whether the Subordinate Judge is right in declining to go behind the custom and to examine whether it is deducible from the original sources of Hindu law. The District Munsif examines into these sources, states what inference may, in his opinion, be drawn from them, how orthodox Brahmans interpret them so as to support the general usage, and discarding their interpretation as unreasonable and incongruous concludes that his interpretation is the only reasonable construction which ought to be adopted. He then observes: "The oppositionists point to the custom of 50 centuries. But "we are cosidering a question of Hindu law purely on the stand point of "the law itself. It is incumbent therefore to see what it says on the "point of the custom." He then refers to the conventional rule as to the relative weight of the several sources of Hindu law, *viz.*, *Vedas* precede the *smritis* : *smritis* the *puranas* and then custom, &c., and cites a passage from the Mahabharat which is to the following effect:—"As to those who wish to know what *dharmas* are, for them the *veda* is the highest authority, the *smriti* the second, and custom the third."

This conventional rule of interpretation is acknowledged by all. But under the teaching of Sankara, another conventional rule came to be adopted together with it by commentators of authority who consolidated the diverse law-sources into a consistent system of law. They considered that all the recognized law-sources were inspired writings, and that if properly understood, they were capable of being reconciled, and attached great weight in connection with their interpretation to usage approved by learned and pious men. Thus a latitude of interpretation was introduced by them and their exposition of law which was at times wide both of the conventional rule first mentioned and of the rules of doctrinal interpretation, was in many cases readily adopted by the people as authoritative, and as a guide to their caste practice in consequence of the great respect which they had for their authority as men of learning and piety. After the practice of the people continued for some time, it reacted on the mode in which commentators reconciled the original law-sources with each other, and gave to what was originally a mere juristic thought the force of a rule of law. Whilst this accounts for the belief of the general commu-[303]nity that what they practise is consistent with the original law-sources as authoritatively interpreted and adopted for many generations, it suggests also the stand-point from which a reformer who desires to revive some practice of ancient times as being salutary may act. He may treat the authoritative commentaries as

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misinterpreting the original law-sources, and ignore the juristic thought which they contain as a legitimate factor in the development of Hindu law. The District Munsif apparently confounds the functions of the judiciary with those of the reformer. In administering Hindu law the former has only to see what is the Hindu law as received and practised by the Hindu community in general with the conviction that it is law, and to declare and enforce it when it is ascertained. It is not for him to go beyond, to resolve the Hindu law as received by the people into its historical factors, to see how far its historical development has diverged from the logical or philosophical development in the light of modern civilization, and to reconstruct a system of Hindu law which the people ought to have received and followed as consistent with their *sastras*.

This mode of reasoning is altogether inadmissible as a ground of judicial decision. It has for its object not to declare the Hindu law as it was received by the Hindu community and as proved by their usage prior to Act XV of 1856, but to criticize and reconstruct it upon speculations as to how Hindu law ought to have developed itself according to the relative weight of the original law sources for the purpose of evolving an antagonism between law and usage. If the Civil Courts are at liberty to travel back beyond the law and usage of *kali* age, and exmine into the ancient Hindu law and usage, it may be admitted, that texts may be cited from *vedas* and *smritis* which bear a construction in favour of remarriage of women, and that the interpretation adopted by the general Hindu community under the teaching of commentators of authority to reconcile them with the usage which came to prevail in the *kali* age is strained. It may be further admitted that traces do exist in ancient treatises of twice-married women and of their children forming a section of the Brahmanical community and of a gradual historical development under which restrictions on the remarriage of women gained ground step by step among Brahmans, until marriage came to be recognized as a sacrament of which the effect was indelible when it was once [304] contracted, and as complete when "*saptapadi*" was performed. With reference to speculations like these, their Lordships of the Privy Council observed in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1) as follows:—"Positive authority affords a foundation for the doctrine "(then in controversy) safer than any built upon speculations touching "the natural development of Hindu law or upon analogies real or supposed "between adoption according to the *dattaka* form and the obsolete practice "with which that form of adoption co-existed of raising up issue by "carnal intercourse with the widow. It may be admitted that the argu"ments founded upon the supposed analogy are in some measure confirmed "by passages in several of the ancient treatises referred to and in parti"cular by the Dattaka Mimansa of Vidya Narainsamy, the author of the "Madhaviya, but as a ground for judicial decision these speculations are "inadmissible, though as explanatory arguments to account for actual "practice they may be deserving of attention." If such speculations are inadmissible even for the purpose of declaring a rule by analogy as was done in that case, it must be much more so when the object is to declare the Hindu law, received as founded upon their *sastras* by the Hindu community at large to be the outcome of an illogical development, and to substitute in its place the District Munsif's conception of what ought to have been its proper development. When the Civil Courts find what the Hindu law is as evidenced by the usage of the community based on

(1) 12 M.I.A. 397 (441).

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the conviction that it is law, they light upon positive authority, to use the language of the Privy Council, serving as the basis of a judicial decision and it is immaterial to them how that usage historically originated and how the conviction of the orthodox Hindu community that what they practise is founded upon their *sastras* was generated. A disquisition into the several law-sources, such as *sruti*, *smriti*, and *mahapuranas*, and custom, is of a judicial value only for the purposes of elucidation and of tracing the consciousness of generations that have passed away that what is practised was law. If such disquisition leads them to a period when the law and usage were otherwise, such discovery should tend only to enable them to trace the origin and devolopment of the law and usage as they since came to prevail. It is not permitted to the judiciary to push [305] the disquisition beyond those legitimate limits, to treat the several law-sources as independent factors which he is at liberty to manipulate at his pleasure and by a process of reasoning to disintegrate the law as received and practised by the people, and to build up a fresh system of Hindu law, which though obsolete is, in his opinion, more in accordance either with the *vedas* or *smritis* than the usage adopted by the people as founded upon them. It must always be remembered that the Hindu law, which the Courts are bound to administer, is the law as received by the Hindu community and not as it stood either in the *vedic* or *smriti* period of their history, and that no other conception of Hindu law to be administered by the Courts is either judicial or rational. If it were otherwise, the Courts might have to force upon the Hindu community of this century the several portions of obsolete Hindu law which existed at some former time and have since fallen into disuse. What are the Courts to say if they are asked to revive the obsolete law of *niyoga* as the result of a disquisition into original law-sources? There is another defect which underlies the decision of the District Munsif. The question which he had to determine is no longer one of the appellant's legal *status*, for, a Brahman widow is now at liberty to re-marry under Act XV of 1856, but it is one of caste *status* in respect of a caste institution, which, it is asserted, recognizes, and is influenced by, the general religious usage of Brahmans and of the other regenerate classes.

The discussion in regard to the Hindu law administered prior to 1856 as founded upon such usage with respect to the re-marriage of woman, is material as indicating the general consciousness that the usage is in conformity to the Hindu *sastras*. If those who once conformed to such usage depart from it, the legal relation between them and those who still conform to the usage is that of the orthodox party and the secessionists in regard to a matter of doctrine or caste practice. There is no State church in India. Nor is there any recognized Ecclesiastical Court and the Hindu religion is not the State religion. The only jural basis on which their respective relations to religious or caste institutions can rest is that of viewing them as endowed institutions or voluntary associations founded or formed for caste or religious purposes as evidenced by their immemorial usage, endowment deeds, if any, and the presumable intention of those who founded them. It is [306] in such intention or the original trusts of the institution that a rule of decision must be found in the case of a dispute between the orthodox party and the dissenters. The same principle was laid down in *Attorney-General* v. *Welsh*(1) where an endowment was made for a

(1) 4 Hare 572.

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society of Presbyterians in communion with the Church of Scotland and the ministers and majority of the congregation seceded to the Free Kirk. It was held that the minority who still clung to the Church of Scotland was entitled to keep the endowments and to appoint another minister. Hindu temples being religious institutions founded, endowed, and maintained, for the benefit of those sections of the Hindu community who conform to certain recognized usages as those of the castes for whose benefit the temples are by immemorial usage dedicated as places of worship, persons who conform to those usages stand to the managers for the time being in the relation of *cestuis que trustent* by reason of an implied contract; and if a few secede and transgress such usages, the managers would be acting within their rights if they could say:—"We have according to the usage of the institution to admit into the inner shrine for the purposes of worship only those Brahmans who conform to the general usages of their caste: you have transgressed the caste usage in respect of marriage and we cannot admit you to that part of the temple to which those who conform to the usage are alone admitted according to the original trusts of the institution." I do not desire to be understood as detracting from the merits of those that secede from the orthodox usage. The secession may possibly mark an era of progress and reform, and it may in time produce important results, raise the condition of Hindu women and prove beneficial to the Hindu community. But these are considerations with which Courts of Justice have nothing to do if they are foreign to the original trusts of the temple in question. The only questions which we have to consider are what was the usage of the temple in dispute as regards admission into the inner shrine for the purposes of worship at the date of the suit, or the presumable intention of the religious foundation as regards such admission, and whether according to such usage or presumable intention of the foundation those who secede from the caste custom as to re-[307] marriage of women are outside the class of beneficiaries as regards the specific right in contest, *viz.*, of admission into the inner shrine of the temple for purposes of worship.

Before answering these questions further inquiry appears to be necessary. No specific issue was recorded with reference to the usage of the temple or its original trusts. Nor is any evidence referred to as to the continuance of the general caste custom subsequently to 1856. The Subordinate Judge apparently presumes from the custom as it obtained prior to Act XV of 1856 that it has since continued, and that those who transgress it are condemned to exclusion from caste and therefore from the temple. He states in his judgment that this is an admitted fact. But it is denied before us that such admission was ever made and we find no note of it on the record. Though there may be a presumption that the general usage which existed prior to 1856 since continued unless the contrary is shown, yet the contention for the appellant that he must be given an opportunity of showing a change of custom before a finding is judicially recorded is well founded. The Subordinate Judge further prefers finally to rest his decision on the question of jurisdiction. We must therefore direct that the following specific issues be tried and findings returned thereon :—

(i) "Whether the general custom of Brahmans worshipping or entitled to worship, in the temple mentioned in the plaint, continued to prohibit, at the date of the suit, marriage with a widow?"

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(ii) If so, whether according to the usage of the temple mentioned in the plaint or according to the original and recognized intention of the foundation, regard being had to its nature and character as a religious and caste institution and to the customary mode of treating those who transgress general caste customs, and thereby lose or impair their caste *status*, those Brahmans who marry widows are excluded from the inner shrine of the temple by the original and recognized trusts of the institution."

The finding is to be returned within two months from the date of the receipt of this order, and seven days after the posting of the finding in this Court will be allowed for filing objections. Both parties to be at liberty to adduce fresh evidence.

SHEPHARD J.—I concur.

[308] [The Subordinate Judge having recorded on the above issues findings in favour of the respondents, this second appeal came on for rehearing, and their Lordships delivered judgment as follows :—

JUDGMENT (FINAL).

The finding is that, upon the evidence recorded, the plaintiff is, under the circumstances, excluded by the usage of the temple and the intention of the founder from the inner shrine of the temple.

The objections have not been pressed.

We accept the findings and dismiss the appeal with costs.]

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SAMBAYYA (*Defendant*), *Appellant v.* GANGAYYA (*Plaintiff*), *Respondent.** [20th and 30th January, 1890.]

Registration Act—Act III *of* 1887, *Sections* 17 *(d)*, 49—*Covenant in unregistered lease—Specific performance.*

The plaintiff leased a house to the defendant for three years by an unregistered instrument which contained a covenant by the lessee that he would purchase the house at a certain price on an event which took place. The plaintiff now sued for specific performance of this covenant :

Held, that the unregistered instrument was not admissible in evidence and the suit should be dismissed.

SECOND appeal against the decree of W. H. Welsh, Acting District Judge of Cuddapah, in Appeal Suit No. 81 of 1888, affirming the decree of Mahomed Abdul Allam Saheb Bahadur, District Munsif of Madanapalli, in Original Suit No. 374 of 1887.

Suit for specific performance of a covenant for the purchase of a house, contained in an unregistered lease. The facts of the case are stated sufficiently for the purposes of this report in the judgments of the High Court.

The District Munsif passed a decree as prayed, and this decree was affirmed in appeal by the District Judge.

The defendant preferred this second appeal.

* Second Appeal No. 185 of 1889.

Sadagopa Chariyar, for appellant.
Subbayya Chetti, for respondent.

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JUDGMENTS.

[309] MUTTUSAMI AYYAR, J.—The appellant rented a house from the respondent for three years and executed a kararnama in his favour on the 5th September 1884 undertaking to keep the premises in repair during the period and to restore possession on the expiration of the lease. The document provided further that, if the appellant either failed to execute the necessary repairs or to restore possession, he should pay the respondent Rs. 60, and take a sale-deed from him regarding the house. It has been found by the Courts below that the appellant lived in the house but for six months, and then left the village where it is situated, refused to make over possession to the respondent on the ground that he (appellant) was entitled to remain in possession for three years, and continued to occupy the house whenever he came to the village.

It has also been found that the appellant failed to repair the house and that it became dilapidated and ceased to be habitable. Upon these facts, the District Munsif directed the respondent to pay the appellant Rs.60, and the appellant to execute and register a sale-deed in respect of the house. On appeal, the District Judge agreed with the District Munsif, and held that the omission to register the kararnama or lease for three years did not preclude the appellant from enforcing specific performance of the covenant for the purchase of the house. The contention in second appeal is that the kararnama acquired no legal force for want of registration, that the lease for three years which it purported to create was not a valid transaction, that the covenant for purchase was likewise invalid, and that the document was not admissible in evidence to prove either the lease for three years or the stipulation for the purchase.

The transaction evidenced by document A, or the principal contract which forms the foundation for the respondent's claim, is the lease for three years, and the covenant which the respondent sued to enforce was part of, and depended on, the principal contract. Document A was compulsorily registrable under Section 17, clause (*d*) of Act III of 1877, and under Section 49, it was ineffectual for the purpose of creating a lease of the house for three years and inadmissible as evidence of any transaction affecting the house. As the principal contract failed, the covenant depending upon it likewise failed. *Venkatrayudu* v. [310] *Papi* (1). The decision in *Muttukaruppa Kaundan* v. *Rama Pillai* (2), on which the Judge relies proceeded on the ground that when a document is merely evidence and not of the essence of a transaction, the statement of a party to a suit is admissible original evidence as against him to prove the contents of a document which is not admissible in evidence under the Stamp Act. But in the case now before us registration is of the essence of the transaction, and the question is whether the covenant for purchase ought not to stand or fall with the principal contract. The question to what extent a document, which is a subject of compulsory registration but not registered is admissible in evidence for the purpose of proving a money claim, was considered by this Court in *Stri Seshathri Ayyengar* v. *Sankara Ayen* (3) and *Guduri Jagannadham* v. *Rapaka Ramanna* (4). The course of decisions on this point has been influenced

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(1) 8 M. 182.
(2) 3 M.H.C.R. 158.
(3) 7 M.H.C.R. 296.
(4) 7 M.H.C.R. 348.

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by the language of the Registration Act in force at the time when the document sued on was executed. The first case is that of *Achoo Bayamah* v. *Dhany Ram* (1) decided in 1869 with reference to Act XX of 1866. The words of Section 49 of that enactment were as follows:—"No instrument "required by Section 17 to be registered shall be received in evidence in "any civil proceeding in any Court or shall affect any property comprised "therein, unless it shall have been registered in accordance with the "provisions of this Act." The question decided in that case was whether an unregistered instrument of mortgage might be admitted in evidence for the purpose of proving the covenant to repay the debt and enforcing the personal obligation only. Three of the learned Judges of this Court held that it was not admissible and relied on the general words: "No document shall be received in any Court." But the learned Chief Justice, Sir Colley Scotland, dissented and observed that, "An instrument which "has the twofold operation of a simple contract or bond to pay a debt and "a collateral security for the debt is admissible in evidence, though "unregistered, for the purpose of proving the simple contract debt."

When Act VIII of 1871 was passed the language of Section 49 was modified and rendered less stringent, the words being, "No docu-"ment required to be registered shall, unless registered, [311] be "received in evidence of any transaction affecting any immoveable "property comprised therein." The cases decided under this Act are *Stri Seshathri Ayyengar* v. *Sankara Ayen* (2), *Guduri Jogannadham* v. *Rapaka Ramanna* (3), and it was held in both that the unregistered document, though a subject of compulsory registration, was admissible in evidence for the purpose of enforcing the personal liability of the person executing the document. In the second case this Court observed that the new law (Act VIII of 1871) explicitly adopted the doctrine which the late Chief Justice believed to be derivable from the old. The language of the present registration Section 49 is same as that of Act VIII of 1871; and the test therefore is whether the transaction evidenced by the particular instrument is single and indivisible, or whether it really evidences two transactions which can be severed from each other, the one as creating an independent personal obligation and the other as merely strengthening it by adding a right to proceed against immoveable property. But it should be remembered that it is not enough that there is an obligation to pay a sum of money, but that it is also necessary that the obligation should have an independent existence, and be in no way contingent or conditional on the breach of some obligation relating to immoveable property created by the same instrument, for the contingency or the condition and the obligation would then be parts of one indivisible transaction. This principle was recognized in *Venkatrayudu* v. *Papi* (4) decided in 1884, in which there was a covenant in a deed of sale for a term of years to the effect that if the grantor failed to observe the stipulations relating to the land mentioned in the unregistered instrument, he was to pay the principal debt after deducting the profits and interest received from the date of the document. The present case is on all fours with the above and it is further a suit by the vendor to enforce the specific performance of a covenant relating to immoveable property. I would reverse the decrees of the Courts below and direct that the suit be dismissed.

(1) 4 M.H.C.R. 378.
(2) 7 M.H.C.R. 296.
(3) 7 M.H.C.R. 348.
(4) 8 M. 182.

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BEST, J.—The question for decision in this appeal is whether the Lower Appellate Court is right in giving the plaintiff a decree on the so-called admission of the defendant, notwithstanding that the karar on which the suit is based is inadmissible in evidence by reason of its not being registered.

[312] In the case of *Muttukaruppa Kaundan* v. *Rama Pillai* (1), to which the Judge refers in support of his finding that the admission is sufficient, it appears that the then defendant had "himself admitted before the Court the contents of the counterpart, which had been admittedly executed by him, and such admission was held to be *primary* evidence of the terms of the tenancy" upon which the plaintiff was entitled to rely without producing the written instrument or accounting for its absence. In the present case, though the defendant appears to have admitted the existence of a karar such as is mentioned in the plaint, he does not appear to have stated what were the contents of such karar, or to have expressly admitted that it contained a stipulation such as is now sought to be enforced; and the mere fact that an allegation in a plaint is not traversed does not relieve a plaintiff from the burden of proving his case—*Mulji Bechar* v. *Anupram Bechar* (2).

If authority were required for the proposition that when a document is inadmissible in evidence no *secondary* evidence of its contents can be admitted, it is found in the very case relied on by the Judge, namely, that in *Muttukaruppa Kaundan* v. *Rama Pillai* (1), wherein it was held that the plaintiff's admission of the want of stamp precluded secondary evidence of the contents of the counterpart. Further, as observed by West, J., in *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (3) (at page 153 of the report), "if, the document being pronounced absolutely invalid for some "purpose on considerations of public policy, it were sought to defeat the "law through the effect usually given to an admission in pleading such "an attempt could not be allowed to succeed." Compare also *Varada* v. *Krishnasami* (4) and *Venkatrayudu* v. *Papi* (5).

The covenant now sought to be enforced being a contract depending on the lease, and the latter being invalid for want of registration, the former must also fail.

This appeal must therefore be allowed, and the decrees of both the Lower Courts being set aside, plaintiff's suit must be dismissed and the respondent (plaintiff) directed to pay the appellant's (defendant's) costs of this appeal. Each party is directed to bear his own costs in the Lower Courts as the ground on which the suit is now found to fail was not taken in the original Court.

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(1) 3 M.H.C.R. 158. (2) 7 B. H.C.R. A.C.J. 136.
(3) 5 B. 143. (4) 6 M. 117. (5) 8 M. 182.

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[313] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

BEEMABAI (*Plaintiff*), *Appellant v.* YAMUNABAI AND ANOTHER (*Defendants Nos.* 1 and 2), *Respondents.** [13th March, 1890].

Civil Procedure Code, Section 13—Res judicata—*Partition suit—Non-joinder—Declaratory decree.*

A suit for partition of certain land was withdrawn as against one of the defendants who was entitled to part of the land. The plaintiff and the remaining defendants entered into a compromise in the terms of which the Court passed a decree for delivery of a share of the land to the plaintiff. The decree-holder having died without executing the decree, his heir now sued for partition of the land and delivery of the above share, joining as defendants the various persons entitled to shares:

Held, that the decree in the former suit could only operate as a declaratory decree and did not preclude the plaintiff from bringing the present suit.

SECOND appeal against the decree of G. W. Fawcett, Acting District Judge of Tanjore, in appeal suit No. 614 of 1888, reversing the decree of T. A. Krishnasami Ayyar, District Munsif of Mannargudi, in original suit No. 344 of 1887.

Suit for partition and delivery to the plaintiff of ½ veli of land part of 2½ velis in the possession of defendants Nos. 1 and 2. The plaintiff sued as widow and heir of one Tiruvadamarudur Krishnasami Royar, deceased, who in 1878 had brought a suit (original suit No. 41 of 1878) against the present first defendant, who was his daughter-in-law, her father (Ramachandra Royar) and Srinivasa Royar, the present second defendant, for partition of the land now in question, and for delivery to him of 1 veli. It was admitted in the plaint in both the suit of 1878 and the present suit that Srinivasa Royar was entitled to three-fifths of the land; but the plaint in the suit of 1878 having been returned for amendment, the suit was withdrawn as against him, and the prayer for the division of the land and the delivery of the plaintiff's [314] share was withdrawn. Subsequently, however, the then plaintiff and the remaining defendants entered into a *razinamah* and a decree was passed as follows:—

"Plaint presented by the plaintiff valuing the suit at Rs. 2,111-4-0 "was filed on the 26th February 1878. It is set forth in the plaint that "about 18 years ago plaintiff purchased in the name of the said Vasudeva "Royar, who was the husband of the first defendant and undivided son "of plaintiff, and who was then a minor, the plaint mentioned veli of "nanjai land situated in the village of Samudaya karai, in Mannargudi "taluk, and they were enjoying the same; that the said Vasudeva Royar "died eight years ago; that from the year 1871 the defendants have "wrongfully taken possession of and been enjoying the same and that 2½ "velis of land made up of the abovesaid land and the 1½ velis of Srinivasa "Royar not included in the plaint being common, a decree may be passed "directing delivery of possession to plaintiff from the defendants of 1 veli "of nanjai land generally, valued at Rs. 2,111-4-0 and appertaining to the "2⅖ pangu, being the balance after deducting the ⅗ pangu of the said "Srinivasa Royar out of the said land including his land, and awarding "subsequent profits and costs.

* Second Appeal No. 672 of 1889.

"In accordance with the razinamah presented by the plaintiff's "vakil Singaniengar and the plaintiff, and the defendants' vakil Sreenivasa "Iyengar and Kavarohaniyar and the second defendant who appeared "before Venkatarayer Avergal, District Munsif of Mannargudi, in South "Tanjore district, the Court doth decree that, towards the land, profits, "and amount of costs, &c., claimed in the said suit, the first defendant "do surrender to the plaintiff, within two weeks from this date, a moiety "of the suit 1 veli of land along with all the samudayams including the "excess and deficit appertaining thereto, and the produce, and with regard "to good and bad soil; that each party do bear his or her own costs "incurred in this suit; and that the first defendant do pay to the plaintiff "the expenses of executing this decree."

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The decree holder applied for execution of his decree by delivery to him of the ½ veli therein referred to, but his application was rejected on the ground that the decree to which Srinivasa Royar was not a party was not an executory decree. The decree-holder died in 1884 and the plaintiff now sued as above to recover the ½ veli.

[315] The District Munsif passed a decree as prayed, but his decree was reversed on appeal by the District Judge, who held that the matter in dispute was *res judicata* by reason of the decree in original suit No. 41 of 1878.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Kishnasami Ayyar*, for appellant.

Pattabhirama Ayyar, for respondents.

JUDGMENT.

The suit has been dismissed on the ground that the matter is *res judicata* as against the first defendant. It is contended here that the judgment is wrong inasmuch as the plaintiff's husband did not and could not in the former suit ask for partition. He sought to recover the whole veli from the daughter-in-law, and as the plaint originally stood joined the present second defendant; when the plaint was amended and the defendant's name struck out, it is clear that the suit was no longer maintainable as a partition suit. This being so, the decree ought not to have been drawn up in the form in which it was drawn, for it could only operate as a declaratory decree. We think we may construe it in that way in order that justice may be done between the parties. But as this second suit has had to be brought on account of the laches of the plaintiff's husband, we do not think the first defendant ought to suffer for it. While reversing the decree of the District Judge and restoring that of the District Munsif, we must direct that the plaintiff do bear the costs of the first defendant in this and in the Lower Appellate Court.

The second defendant must pay the plaintiff's costs in this and in the Lower Appellate Court.

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APPELLATE CIVIL.

13 M. 316.

13 M. 316.

[316] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

TATAYYA AND OTHERS (*Plaintiffs*), *Appellants v.* PICHAYYA AND OTHERS. (*Defendants*), *Respondents.** [13th February, 1890.]

Civil Procedure Code, Section 375—*Transfer of Property Act—Act* IV *of* 1882, *Section* 83.

A sum of money having been deposited in Court under Transfer of Property Act, Section 83, by a vendee of the mortgagor, the mortgagee refused to accept it in discharge of his mortgage except on the terms that the depositor should convey to him part of the mortgage premises, which he consented to do. This agreement was not communicated to the Court and the depositor refused to carry it out when the mortgagee had withdrawn the money as above:

Held, that the mortgagee was entitled to a decree for specific performance of the agreement to convey.

SECOND appeal against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 362 of 1888, reversing the decree of M. Ramayya, District Munsif of Bapatla, in original suit No. 6 of 1888.

Suit for possession of certain land (acres 3-67), and for the execution of a conveyance thereof by the defendants to the plaintiffs.

Akkayya (deceased), the father of the plaintiffs, obtained a mortgage with possession of certain land to secure an advance of Rs. 4,000 on 16th February 1878. On 10th and 11th April 1882 the mortgagor sold 40 acres, part of the mortgaged land, to a third party for Rs. 3,000 under two sale-deeds, which provided that the vendee should pay the purchase money to the mortgagee towards the mortgage-debt on 30th June 1886, and that the mortgagor should pay the balance then due, if any, and deliver possession to the vendee. On 30th June 1886 the vendee, who had in the interval sold his interest in the land to the defendants tendered the sum of Rs. 3,000 to the mortgagee and, on his refusal to accept it, paid Rs. 3,400 into the District Court under Transfer of Property Act, Section 83, and notices were issued to the mortgagor and mortgagee. The latter raised certain objections to the applica-[317]tion under Section 83; but a compromise was arrived at to the effect that these objections should be withdrawn and that the defendants should pay Rs. 400 to the mortgagor and should convey the land in question in the present suit to the mortgagee in consideration of which he should surrender his mortgage lien.

Petitions were accordingly, on 25th February 1887, presented to the District Court praying that the money deposited be paid out of Court to the mortgagee. But the petitions were rejected as the money had been attached on the previous day in execution of a decree against the depositor who, however, raised a similar sum elsewhere and paid it to the mortgagee. The present suit was brought by the sons of the mortgagee (since deceased) to enforce the terms of the compromise.

The District Munsif passed a decree as prayed. But his decree was reversed on appeal by the District Judge, who (after stating the facts summarized above) said :—

"The question then arises whether this is a contract which the Courts "will enforce. No mention of this contract was made in the petitions (Ex- "hibits III and IV) presented to the District Court under Section 83 of

* Second Appeal No. 327 of 1889.

"the Transfer of Property Act. The petition of Vemulapalli Akkaya "under that section must be verified as a plaint and the decision of the "District Court under that section resembles the decision of a suit. "Does not the spirit and intention of Section 375 of the Code of Civil "Procedure apply here?

"In argument on this point at the hearing of the appeal the plaintiff "cited the following decisions:—*Ruttonsey Lalji* v. *Pooribai* (1), *Karuppan* "v. *Ramasami* (2), and *Appasami* v. *Manikam* (3).

"The point decided in these cases was that, if the parties to a suit "come to an agreement and afterwards disagree, the Court may, never-"theless, pass a decision under Section 375 in accordance with the agree-"ment. This does not affect the point now in question. Section 375 "directs that the decision given in accordance with an agreement shall be "final, so that, if there is any portion of the agreement kept back from "the knowledge of the Court and not included in the decision, that por-"tion of the agreement cannot afterwards be enforced. I consider that [318] "the same rule applies to proceedings under Section 83 of the Trans-"fer of Property Act . . . . . Vemulapalli Akkayya accepted this tender. "I consider that his heirs cannot now contend that there was a further "tender of four acres which was kept from the knowledge of the Court. "Upon this ground I reverse the decision of the District Munsif and dis-"miss the plaintiffs' suit with costs throughout."

The plaintiffs preferred this second appeal.

Bhashyam Ayyangar, for appellants.

Sundaram Sastryar, for respondents.

JUDGMENT.

The Judge finds there was an agreement to sell three acres of land and that there was consideration to support it. This being so the appellants were clearly entitled to a decree for its specific performance. We do not consider that the omission to refer to the agreement is fatal to the claim. There is nothing on the record to show that the District Court in which the money was deposited ordered it to be paid to the appellants' father. On the other hand the money in deposit was attached and Rs. 3,400 were borrowed elsewhere and paid to Akkayya. On referring to Section 83 of Act IV of 1882, we find that it simply provides a mode whereby a mortgage may be satisfied through the Court, and we do not think that the petition filed under that section and the order made upon it can be treated as proceedings in a regular suit. In the case before us the appellants' father did not draw the money in deposit, and his petition proved infructuous. The direction that the petition be verified in the manner prescribed by law for verification of plaints does not warrant the inference that the order made upon it has the force of a decree in a regular suit.

We are also unable to concur in the opinion of the Judge that Section 375, Civil Procedure Code, can be extended by analogy to proceedings held under Section 83 of Act IV of 1882, and that if extended it would invalidate the agreement on which this suit was brought. We set aside the decree of the Lower Appellate Court and restore that of the District Munsif. The respondents will pay the appellants' costs both in this Court and in the Lower Appellate Court.

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(1) 7 B. 304. (2) 8 M. 482. (3) 9 M. 103.

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APPELLATE CIVIL.

13 M. 319.

13 M. 319.

[319] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

KRISHNASAMI (*Plaintiff No.* 2), *Appellant v.* VENKATARAMA AND OTHERS (*Defendants Nos.* 2 *to* 5) *and Plaintiff No.* 1), *Respondents.** [18th and 21st February, 1890.]

Revenue Recovery Act (Madras)—Act II of 1864, *Section* 2—*Remedies of assignee from Government of land revenue—Land security for revenue.*

The land revenue payable on certain land having been assigned to a temple by Government, which, however, continued to issue a patta for the land, the panchayat of the temple are entitled to bring the land to sale to discharge arrears accrued due.

[R., 13 M.L.J. 248 (250).]

SECOND appeal against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 169 of 1888, modifying the decree of S. Subba Ayyar, District Munsif of Negapatam, in original suit No. 410 of 1886.

Defendant No. 1 was the owner of certain land. The Government revenue on it was assigned over by the Government to a temple at Teruvalur in lieu of the mohinee or annual money allowance which the Government had been paying to that institution. Defendant No. 1 mortgaged his land; the mortgagee obtained a decree for his debt and brought the mortgaged property for sale in execution, and defendants Nos. 3 to 5 and the mortgagee became the purchasers in August 1885. Defendant No. 2 bought from the mortgagee the portion of the land purchased by him.

Defendant No. 1 did not pay the revenue due on the land for fasli 1293 (1883). The plaintiffs (the panchayat of the temple) brought this suit to recover the amount due fron defendant No. 1 and by the sale of the land on which it was due. Subsequently defendants Nos. 2 to 5, being in possession of the property, were joined as defendants on the plaintiffs' application.

The District Munsif passed a decree as prayed. The Subordinate Judge on appeal modified the decree by exonerating the land.

[320] Plaintiff No. 2 preferred this second appeal, defendants Nos. 2 to 5 and plaintiff No. 1, who was a minor, being joined as respondents.

Krishnasami Ayyar, for appellant.

Subramanya Ayyar, for respondents Nos. 1 to 4.

JUDGMENT.

PARKER, J.—The plaintiffs are assignees of the kist due on the patta of defendant No. 1, and are not farmers of land revenue under Government. They are not, therefore, landlords within the meaning of the Rent Recovery Act. The patta is still granted by the Government to defendant No. 1. Defendants Nos. 2 to 5 are purchasers in execution of decrees against defendant No. 1. As the whole land in a patta is liable for the revenue due on the holding, the shares purchased by them are undoubtedly liable for the kists due on the whole patta.

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* Second Appeal No. 169 of 1889.

1890 FEB. 21. — APPELLATE CIVIL. — 13 M. 319.

It has never been asserted that the plaintiffs as assignees of the Government revenue have all the powers which Government possesses under Act II of 1864. They have, however, as assignees a right of suit for the kists due to them, and under Section 2 of Act II of 1864 the land itself is security for the revenue due thereon.

The decree of the District Munsif appears to me to be correct. I would reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs in this and in the Lower Appellate Court.

SHEPHARD, J.—I have felt some doubt on the question whether the kists payable to the appellant in virtue of the arrangement with Government could be considered as secured by a charge on the lands in the appellant's favour. It is argued that on any assignment of revenue made by Government to a private person the amounts payable cease to be public revenue within the meaning of the Act of 1864, and, therefore, are no longer secured by a charge on the land. In the present case, however, the patta is still granted by Government, and it does not appear that Government has parted with the right to the revenue. The fact that the Collector has temporarily appropriated a part of the public revenue to the liquidation of a public charge cannot, I think, deprive it of the character of public revenue. The District Munsif was, therefore, right in the conclusion he arrived at on the fourth issue.

I agree with PARKER, J., as to the decree which should be drawn up.

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13 M. 321.

[321] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

ARUMUGAM (*Defendant No.* 1), *Appellant v.* SIVAGNANA AND OTHERS (*Plaintiff and Defendants Nos.* 2 *and* 3), *Respondents.**
[27th February, 1890.]

Transfer of Property Act (Act IV of 1882), *Section* 68—*Sale of mortgaged premises under Land Acquisition Act—Personal suit by mortgagee.*

The sale of mortgaged premises under the Land Acquisition Act is not a destruction of the security within the meaning of Section 68 of the Transfer of Property Act and does not enable the mortgagee to sue the mortgagor personally.

[R., 17 P.R. 1907=2 P.L.R. 1908=67 P.W.R. 1907; 22 P.R. 1910=29 P.W.R 1910.]

SECOND appeal against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 646 of 1888, reversing the decree of T. V. Anantan Nayar, Principal District Munsif of Calicut, in original suit No. 837 of 1887.

Suit by a mortgagee to recover from the mortgagor personally Rs. 1,332-2-6, principal and interest of the mortgage-debt. The debt had not become payable by the mortgagor under the terms of the mortgage instrument at the date of the suit, but it appeared that part of the mortgage premises had been purchased by Government under the Land Acquisition Act.

The District Munsif dismissed the suit, but his decree was reversed in appeal by the Subordinate Judge.

The defendant preferred this second appeal.

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* Second Appeal No. 693 of 1889.

1890 FEB. 27. — APPELLATE CIVIL. — 13 M. 321.

Sankaran Nayar, for appellant.
Mahadeva Ayyar, for respondent No. 1.

JUDGMENT.

As to land No. 1, of which the plaintiff was entitled to possession under the mortgage, it is not shown that the plaintiff has been deprived of possession of it, and, therefore, whether the suit is regarded as a suit for damages or a suit under Section 68 of the Transfer of Property Act; it is premature with regard to the other item, the only question which can possibly arise is whether the plaintiff is entitled to relief under the last paragraph of Section 68:—Clause (*b*) cannot apply, because no **[322]** default is charged, and clause (*c*) cannot apply, because plaintiff was not entitled to possession.

We are of opinion that the sale of the land under the Land Acquisition Act has not operated to effect any destruction of the property within the meaning of that paragraph. The only effect of the sale is to change the nature of the security. The land was converted into money to which the plaintiff might have made good his claim under the Act. Whether or not he has made good this claim, he can have no personal remedy against the mortgagor.

The appeal must be allowed and the suit dismissed with costs throughout.

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13 M. 322.

APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

ASHTAMURTHI (*Plaintiff*), *Appellant v.* SECRETARY OF STATE FOR INDIA (*Defendant*), *Respondent.** [17th March, 1890.]

Forest Act—Act V of 1882 (*Madras*), *Section* 33—"*Jointly interested.*"

The Government having possession of a forest under a mortgage is jointly interested therein with the mortgagor within the meaning of Madras Forest Act, Section 33.

SECOND appeal against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 905 of 1888, affirming the decree of A. Annasami Ayyar, District Munsif of Ernad, in original suit No. 243 of 1888.

Plaintiff, the uralan and representative of the Trikalayar devasom, sued the defendant, to obtain a declaration that the two notifications issued by the Government of Madras under Section 33 (*a*) of the Madras Forest Act V of 1882, published in the *Fort St. George Gazette* on the 17th and 24th January 1888, relating to the management of 49 items of forest lands situated in Ernad and Calicut Taluks and mentioned in the schedule attached to the plaintiff are invalid and not binding upon his devasom.

[323] The forest land to which the above notifications related were admittedly the property of the plaintiff's devasom; but it appeared that under Exhibit A, executed on the 10th December 1840, the plaintiff's predecessor mortgaged the land to Government under the following among other conditions:—It was agreed that the mortgagee was to be put in possession, that the mortgagor was not to demand surrender on payment

* Second Appeal No. 888 of 1889.

of the mortgage money as long as the mortgagee wished to continue in possession, and that the demise was to be renewed every 30 years when a renewal fee at the rate of 20 per cent. of the mortgage money was to be paid.

1890 MARCH 17. — APPELLATE CIVIL. — 13 M. 322.

The plaintiff's case was that the Government and the appellant were not jointly interested in the forest land in question, and that consequently the provisions of Section 33 of the Madras Forest Act (V of 1882) were not applicable to them.

That section provides as follows:—

"If the Government and any person or persons are jointly interested in any forest or waste land, or in the whole or any part of the produce thereof, the Government may either

(*a*) undertake the management of such forest, waste land or produce, accounting to such person for his interest in the same; or

(*b*) issue such regulations for the management of the forest, waste land or produce by the persons so jointly interested, as it deems necessary for the management thereof and the interests of all parties therein.

"When the Government undertakes, under clause (*a*) of this section, the management of any forest, waste land or produce, it may by notification in the *Fort St. George Gazette* and in the official gazette of the district declare that any of the provisions contained in Chapters II and III of this Act shall apply to such forest, waste land or produce, and thereupon such provisions shall apply accordingly."

The District Munsif dismissed the suit and his decree was affirmed on appeal by the District Judge.

The plaintiff preferred this appeal.

Bhashyam Ayyangar and *Govinda Menon*, for appellant.

The Government Pleader (Mr. *Powell*), for respondent.

JUDGMENT.

We see no reason to differ from the construction put by both the Lower Courts on the term "jointly interested" occurring in Section 33 of Madras Act V of 1882. The words **[324]** used may not be (as a term of art) altogether appropriate, but the section appears to us clearly to refer to cases in which Government have a partial or limited interest in a forest along with a private individual, and this is precisely the state of affairs which on the terms of the lease put before us exists in this case.

We think then that the Government were jointly interested along with plaintiff in the forest within the meaning of Section 33 of the Act.

The appeal is dismissed with costs.

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APPELLATE CIVIL.

13 M. 324.

13 M. 324.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

KANNAN AND ANOTHER (*Defendants, Nos.* 8 and 9), *Appellants v.* KRISHNAN AND OTHERS (*Plaintiff and Defendants, Nos.* 1, *to* 7), *Respondents.** [25th October, 1889 and 14th February, 1890.]

Registration Act—Act III of 1877, *Section* 48—*Transfer of Property Act—Act IV of* 1882, *Section* 54—*Oral agreement for sale of land—Subsequent conveyance with notice—Delivery of possession—Priority—Specific Relief Act—Act I of* 1877, *Sections* 27, 42—*Specific performance—Declaratory suit—Consequential relief.*

Plaintiff being in possession of certain land as an incumbrancer under a registered instrument agreed orally with the mortgagor in 1885 to purchase it. The mortgagor subsequently sold the land to others who took the conveyance which was registered with notice of the plaintiff's mortgage and of the oral agreement with him. Plaintiff now sued for a declaration that the conveyance was not binding on him and for specific performance of the oral agreement:

Held, (1) that the suit was not bad for want of a prayer for delivery up, and cancellation of the conveyance;

(2) that the plaintiff's possession under his incumbrance together with the agreement to sell was equivalent to delivery of possession within the meaning of Registration Act, Section 48;

(3) that the plaintiff was entitled to have the oral contract specifically enforced notwithstanding the subsequent registered sale.

[F., 18 P.R. 1913; Rel., 15 Ind Cas. 552 (553); R., 16 C.L.J. 119 (122) = 13 Ind. Cas. 637; P.L.R. 1900 (353).]

SECOND appeal against the decree of A. F. Cox, Acting District Judge of North Malabar, in Appeal Suit No. 351 of 1887, confirming the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in Original Suit No. 44 of 1886.

[325] Suit for a declaration that a registered sale-deed, dated 19th September 1885, and executed by defendants Nos. 1 to 7 to defendants Nos. 8 and 9 was not binding on the plaintiff, and for specific performance of an oral agreement entered into on 27th January 1885, for the sale by defendants Nos. 1 to 7 to the plaintiff of the land purported to be conveyed by the instrument of 19th September 1885. The plaintiff was in possession of the land in question as an incumbrancer (whether ottidar or kanomdar) under a registered instrument, dated 12th October 1867. Defendants Nos. 8 and 9 had notice at the date of the sale to them, of both the instrument of October 1867 and the oral agreement for sale of 27th January 1885.

The instrument of 12th October 1867 was as follows:—

"Kanom deed executed, on the 27th Kanni 1043, or 12th October 1867 to Ammalil Kvtheri Krishnan, of Vattoli desom, Kannanam amshom, Kottayam taluq, residing in Kanakath house by Matayatti Pakra of Kottayam Nagaram. The loan obtained by me from you to-day to liquidate my tarwad debts, &c., is Rs. 2,312-8-0. For these Rs. 2,312-8-0, properties Nos. 1 to 9 mentioned below, which are my jenm, are granted to you on kanom. Holding the above-mentioned lands and paying the revenue, you will take the remaining income on account of interest on the said kanom amount. For the security of the kanom the jenm deeds of properties Nos. 1 to 5 are herewith given. As I have filed the jenm deeds of property No. 7 in Suit No. 341 of 1866 on the file of the District

* Second Appeal No. 1447 of 1888.

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Munsif's Court of Chavasheri, that and the document in respect of No. 8 are not herewith given. The marupats obtained on giving these lands to tenants on simple kozhu right are also herewith given. Enak to tenants is also given so that the tenants who hold the property may attorn with you, that this year's rent may be paid to you, and that in future you may do as you please. This and all other documents should be returned on paying of the kanom amount."

The further facts of the case appear sufficiently for the purpose of this report from the judgment of Muttusami Ayyar, J.

The Subordinate Judge passed a decree as follows:—

"It is declared that the jenm deed executed by defendants Nos. 1 to 7 to the defendants Nos. 8 and 9 on 19th September 1885, in respect of the plaint lands, is not binding on plaintiff or on the plaint lands, and it is further ordered and decreed, that on [326] plaintiff paying the balance purchase-money, *viz.*, Rs. 2,394 into Court for payment to defendants Nos. 1 to 7 within six months from this date, the defendants Nos. 1 to 7 do execute to him (plaintiff) a deed conveying to him the plaint lands in jenm, and that the defendants do pay plaintiff's costs."

The District Judge on appeal confirmed this decree.

Defendants Nos. 8 and 9 preferred this second appeal.

Mr. *Wedderburn*, Mr. *Ramasami Raju* and *Sankaran Nayar*, for appellants.

On the pleadings the Lower Courts have granted relief to which the respondents were not entitled. Defendants Nos. 1 to 7 were not entitled to the decree which has been passed. Moreover the registered sale-deed of September 1885 remains unaffected by the decree though it is impeached as fraudulent in the pleadings. In the view taken by the Courts it could have been cancelled, accordingly the plaint praying for a declaratory decree and not for this consequential relief was bad under Specific Relief Act, Section 42, and the suit should have been dismissed. This is not a suit by an ottidar to enforce his right of pre-emption for he does not allege any tender by him to the purchasers of the sum paid by them. *Vasudevan* v. *Keshavan* (1). But in fact the document does not purport to be an otti—it is a mere kanom without a provision for payment of rent. See Wigram's Malabar Law, pp. 100—132, and the Lower Courts were not entitled to employ the alleged enaks or notices by the mortgagor to third parties to show that the document was what it does not purport to be. See Evidence Act, Sections 94, 95 and 98.

As to the transaction of January 1885, the plaint refers to it as an agreement to sell while the Lower Courts seem to regard it as a sale. If it was a sale, it is invalid under Transfer of Property Act, Section 54; if it was an agreement for sale, then the instrument of September 1885 has priority under Registration Act, Section 48, in spite of the finding as to notice, for the words "accompanied or followed by delivery of possession" cannot mean merely accompanied by possession and so apply to the case of a sale to one already in possession.

(HANDLEY, J.—Cannot the Court, in spite of Registration Act, Section 48, set aside the subsequent conveyance?)

[327] The object of the Registration Act must not be defeated. See *Nallappa* v. *Ibram* (2), *Madar* v. *Subbarayalu* (3), *Muthanna* v. *Alibeg* (4), *Kirty Chunder Haldar* v. *Raj Chunder Haldar* (5), and see per

(1) 7 M. 309. (2) 5 M. 73. (3) 6 M. 88.
(4) 6 M. 174. (5) 22 W. R. 273.

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Hutchins, J., in *Kadar* v. *Ismail* (1). The case of *Narasimulu* v. *Somanna* (2) proceeded on the finding as to fraud not notice: the Act says I may buy with notice.

[It was also argued that the agreement of January 1885 was not valid by Malabar Law.]

Bashyam Ayyangar for respondent No. 1, the plaintiff in the suit.

Specific Relief Act, Section 42, does not apply, for in fact consequential relief is asked for in the prayer for the execution of a conveyance to the plaintiff; the delivery up and cancellation of the prior instrument would not have been appropriate relief.

As regards the transaction of January 1885 it is proved that it was an agreement to execute a conveyance, so no question arises under either Registration Act, Section 48, or Transfer of Property Act, Section 54. The rulings cited amount only to this, that the mere fact of notice does not take away the priority given by registration; but here the sale to defendants Nos. 8 and 9 was fraudulent within the meaning of the Transfer of Property Act, Section 53. Specific Relief Act, Section 27, is not applicable where the plaintiff is wanting in *bona fides*, or contracts with notice of prior rights. As to Registration Act, Section 48, see *Bhandu Rajaram* v. *Damaji Jivaji* (3).

(HANDLEY, J.—The words in Section 48 are agreement or declaration.

MUTTUSAMI AYYAR, J.—Probably that section has to be read with Specific Relief Act, Section 27, and the question arises how far they affect each other.

Mr. *Wedderburn.*—Section 4 of the Specific Relief Act saves the Registration Act).

In the Act of 1866 it was expressly provided that no effect was to be given to an oral agreement such as that now in question, but the Act of 1871 introduced the phrase as to delivery of possession in Section 48. If that section has to be applied here I say that [328] there was delivery of possession in the same sense as when by a conveyance to a lessee his tenancy is terminated and his possession becomes that of a vendee.

(HANDLEY, J.—The policy of the Act has to be considered.)

Yes: but the finding as to notice alters the matter with reference to "delivery." Compare the cases of gifts held to be valid from the date of such delivery as the subject-matter admits of.

As to the document of October 1867 it is clearly an otti and not a kanom. See Ramachendrier's Malabar Law, p. 97. Moreover there is the fact that no rent was reserved.

(MUTTUSAMI AYYAR, J.—This matter is of the less importance as it was the plaintiff's own case that the right of pre-emption had at the date of the suit merged in the agreement).

Govinda Menon, for respondents Nos. 2—8, defendants Nos. 1 to 7 in the suit.

Mr. *Wedderburn* in reply.

JUDGMENT.

MUTTUSAMI AYYAR, J.—This was a suit for the specific performance of a contract of sale, and the land agreed to be sold had been in the plaintiff's possession under Exhibit B from October 1867. The contract

(1) 9 M. 119. (2) 8 M. 167. (3) 6 B.H.C.R. 59.

was oral and it was made on the 27th January 1885, and the price agreed on was Rs. 5,000 inclusive of the amount due under Exhibit B, and a sum of Rs. 293 8-0 was paid as an advance at the date of the contract. Defendants Nos. 1 to 7 are the jenmis or owners of the land in dispute, and defendants Nos. 8 and 9 purchased it for Rs. 5,000 under a registered sale-deed on the 19th September 1885 (Exhibit I). Exhibit B, which evidences the prior mortgage in favour of the plaintiff, is also a registered document, and it is found by the Courts below that defendants Nos. 8 and 9 had, at the date of their purchase, notice of document B and of the oral contract of sale. The Lower Courts were also of opinion that document B evidenced an otti, and not a mere kanom as suggested by defendants Nos. 8 and 9, and decreed the claim declaring the sale in favour of defendants Nos. 8 and 9 void as against the plaintiff and directing defendants Nos. 1 to 7 to execute a conveyance in his favour on receipt of the balance of the purchase money. Defendants Nos. 8 and 9 have preferred this second appeal.

It is first urged on their behalf that Exhibit B evidences, on its true construction, only a kanom; but it would not be necessary to consider that question if the prior oral contract should prevail **[329]** against the subsequent sale as held by the Courts below. The main question for decision therefore is whether the oral contract ought to be specifically enforced, notwithstanding the subsequent registered sale in favour of the appellants.

The appellants' Counsel relies on Section 54 of the Transfer of Property Act and Section 50 of the Registration Act and argues that there was no registered instrument and therefore no valid sale, whilst the oral contract for sale created no interest in the property agreed to be sold under Section 54 of the first-mentioned enactment; and that even if this contention should fail, the registered sale should prevail against the prior oral agreement since the land in dispute was not delivered at the time of the agreement.

It is true that the oral contract did not in itself operate to create an interest in immoveable property, but it was accompanied by an agreement to execute and register a sale-deed within five days. Such a contract, even when in writing, need not be registered under Section 17, Clause (*h*) of the Registration Act, for the intention of the parties was to obtain another document which, when executed and registered, would create such interest. Section 54 of Act IV of 1882 does not apply, because there was no sale creating a present interest and there was only a contract for a future sale as expressly noticed at the end of that very section. Nor does Section 48 of the Registration Act apply, for it presupposes a competition between a registered instrument and an unregistered instrument which purports to create a present interest. Until a vested interest is created as prescribed by Act IV of 1882, Section 54, and in accordance with the provisions of the Registration Act, the obligee under the contract of sale has only a right to demand that a sale shall take place in accordance with its terms subject to certain contingencies, the remedy for its breach being a suit for specific performance. The Specific Relief Act is a special enactment prescribing rules as to the party against whom the remedy is available and the conditions subject to which it may be enforced against third parties who may claim an interest in the same property. It is provided by Section 27, Clause (*b*), that specific performance may be granted against a third party claiming under a title arising subsequently to the

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contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. The words used are transferee for value and they signify a person to whom the property is trans- [330] ferred for value which can alone be under a registered instrument when the value exceeds Rs. 100. The intention is to adopt the equitable doctrine of notice in suits for specific performance, to protect *bona fide* purchasers for value, and to treat at the same time purchasers with notice as persons purchasing subject to the vendor's pre-existing contractual obligation, or with notice of a trust in favour of the party entitled to specific performance. Neither the Transfer of Property Act, nor the Registration Act overrides this provision of the Specific Relief Act. Section 2 of Act IV of 1882 repeals Act I of 1877 only to the extent mentioned in the schedule attached to it, and the extent mentioned in the schedule consists in the omission of the words "in writing" in Sections 35 and 36, which omission has the effect of including oral contracts among those entitled to the specific relief provided by those sections. Section 48 in protecting oral agreements accompanied with or followed by delivery of possession against the rule of priority contemplates oral alienations referred to in paragraph 3 of Section 54 of Act IV of 1882, and has the effect of treating delivery of possession as equivalent to registration. But there is no trace in either enactment of an intention to override Section 27 of Act I of 1877, and contracts of sale are expressly excluded from both as creating no present interest in immoveable property. The contention for the appellants that notice is not sufficient to defeat the claim of priority under the Registration Act except as provided by Section 48 is no doubt supported by a series of decisions. But on referring to them it will be seen that they rest on the ground that the Legislature intended to encourage registration, and departed from the ordinary rule of equity that a party taking with notice is affected with knowlege of the title of which he has notice and that it cannot be defeated by his act. But a contract for sale creates no present interest in immoveable property, and is not therefore intended to defeat the policy of the Registration Act, a future registered document being contemplated. Those decisions have no reference to Section 27 of Act I of 1877 which adopts the principle on which the Court of Equity refuses specific performance only against *bona fide* purchasers for value. The decided cases bearing on the point are *Chunder Nath Roy* v. *Bhoyrub Chunder Surma Roy* (1), *Nemai Charan Dhabal* v. [331] *Kokil Bag* (2), *Waman Ramachandra* v. *Dhondiba Krishnaji* (3), and *Kadar* v. *Ismail* (4), a decision of three Judges of this Court, in which specific performance of an unregistered agreement was decreed against a purchaser under a registered sale with notice of the prior instrument. As pointed out in that case by Mr. Justice Parker the competition is not between the unregistered instrument which created no present interest and a registered instrument which created a present interest, but it is between the decree which may be passed on the former and the latter instrument. The same principle, it seems to me, governs this case. The conclusion to which I come is neither Act IV of 1882, nor the Registration Act, nor the decisions as to the effect of notice with reference to Section 50 of the last-mentioned enactment override the doctrine of equity embodied in Section 27 of the Specific Relief Act. Even on the view that under Section 4 of Act I of 1877, Section 27 of that Act is displaced by Section 48 of the Registration Act, the plaintiff was already in possession

(1) 10 C. 250. (2) 6 C. 534. (3) 4 B. 126. (4) 9 M. 119.

under his kanom, and such possession together with the agreement to sell is equivalent to a delivery of possession under the oral agreement.

Another contention is that the plaint contains no prayer for a direction that the registered sale deed in favour of defendants Nos. 8 and 9 be cancelled and delivered up, and though it prays for a declaration that the sale is void as against the plaintiff, it is open to the objection that a declaration is asked for without asking for consequential relief. This was a suit for specific performance and the appropriate relief is the execution of a sale-deed by defendants No. 1 to 7 pursuant to the contract sought to be specifically enforced. The cancellation and delivery up of the sale-deed in favour of the appellants is a species of auxiliary equitable relief which the plaintiff is not bound to claim under Section 42. The proviso of that section is applicable only to such relief as is appropriate to and consequent on the right asserted, *viz*, the execution and registration of a sale-deed and the transfer of possession when the plaintiff is not in possession. The next contention is that the decree appealed against contains no provision for a refund of the purchase-money which the appellants have paid. There was no claim advanced to a refund of the [332] purchase-money in the written statement, nor is the plaintiff liable for such refund. If they have really paid the purchase-money to defendants Nos. 1 to 7, their remedy lies in a fresh suit against them when the sale in their favour is declared to be inoperative.

I am of opinion that this second appeal fails and it must be dismissed with costs.

HANDLEY, J.—The first objection taken to the decree upon second appeal is that the suit is wrongly framed and that no relief such as has been given is allowable under Section 42 of the Specific Relief Act, because it is in effect a suit for a declaratory decree, and consequential relief, *viz.*, the execution of a deed of sale by defendants Nos. 8 and 9 to plaintiff could have been sought and granted. I think there is nothing in this objection. Consequential relief is sought for and given by the decree. *viz.*, the execution of a jenm deed by defendants Nos. 1 to 7 to plaintiff, and the suit being one for specific performance of an agreement by defendants Nos. 1 to 7 to sell to plaintiff the relief sought for, *viz.*, a declaration that the subsequent sale to defendants Nos. 8 and 9 is void as against plaintiff, and a decree compelling defendants Nos. 1 to 7 to carry out their contract with plaintiff by conveying the jenm to him, was the relief appropriate to the cause of action.

It is objected that the decree as it stands leaves the registered sale-deed by defendants Nos. 1 to 7 to defendants Nos. 8 and 9 in their hands and the money they paid to defendants Nos. 1 to 7 still in the hands of those persons who will thus be paid twice over for the same thing. Strictly speaking the Court should have ordered under Section 39 of the Specific Relief Act that the sale deed to defendants Nos. 8 and 9 should be delivered up to be cancelled, and that a copy of the decree should be sent to the Registration Office. The plaintiff however does not object to the decree on this ground and defendants Nos. 8 and 9 have no right to do so. As to the purchase-money alleged to have been paid by defendants Nos. 8 and 9, they can sue for its recovery if they have in fact paid it. They did not object to the decree on this ground in their appeal to the Lower Appellate Court and there is no reason to think any injustice will be done to them by the decree as it stands.

The next ground of second appeal relied on is that the Lower Courts are in error in holding that plaintiff's mortgage was an [333] otti and

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not a kanom. The deed of mortgage, Exhibit B, speaks of the transaction simply as a kanom, and the District Judge is apparently wrong in supposing that any such words as "purapad adakki kanom" * appear in it.

But the fact that no rent was reserved by the deed remains and this, though not conclusive as to the character of the transaction, is some evidence that it was an otti, and I think that the Lower Courts were right in holding that the enaks or notices to tenants issued at the date of the mortgage (Exhibits G and H) were admissible in evidence to show what the transaction was. It appears however that these documents were not proved and therefore there is nothing in evidence to show that the mortgage was an otti, but the deed itself, and that is not decisive on the point. In this state of the evidence I should not have been disposed to concur with the finding of the Lower Court that the transaction was an otti. In my view however that question is of no importance. The plaintiff sued upon an express agreement for sale and both Courts have found that agreement to be proved and that defendants Nos. 8 and 9 had notice of it. It is argued that if there was any sale to plaintiff it was invalid by Section 54 of the Transfer of Property Act, not being by registered instrument. As to this it is clear that what was set up and proved by plaintiff was an agreement for sale, and that it was contemplated by the parties that a regular jenm deed should be executed on payment of the balance of the purchase-money. Such a transaction need not be by registered instrument under Section 54 of the Transfer of Property Act, for the latter part of that section expressly declares that it does not create any interest in the property. Then it is contended for the appellants that by Section 48 of the Registration Act the subsequent registered sale-deed to defendants Nos. 8 and 9 must prevail over the oral agreement for sale to plaintiff, and that whether defendants Nos. 8 and 9, had notice of the agreement with plaintiff or not.

The respondent's vakil relies upon Section 27 of the Specific Relief Act, and Section 53 of the Transfer of Property Act as protecting the first purchaser against the subsequent purchaser with notice, but I think the appellants' Counsel is right in his contention that these provisions do not override those of Section [334] 48 of the Registration Act. Section 4 of the Specific Relief Act expressly saves the operation of the Registration Act, and Section 2(*a*) of the Transfer of Property Act by saving the operation of any enactment not thereby repealed has the same effect.

The question then is does Section 48 of the Registration Act operate to make the registered conveyance to defendants Nos. 8 and 9 prevail over the prior oral agreement for sale to plaintiff, defendants Nos. 8 and 9 being found to have notice of that agreement?

The result of the decisions both of this Court and the other High Courts upon the question is that notice is immaterial except as evidence of fraud, and that taken by itself it is not sufficient evidence of fraud to deprive the subsequent purchaser of his priority under the Registration Act. Most of the Madras decisions are upon Section 50 of the Registration Act; but the principle is the same.

In the present case there does not seem to be any evidence of fraud beyond the fact of notice. But the section exempts from its operation cases where the oral agreement or declaration has been accompanied or

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* Kanom, free of rent.

followed by delivery of possession. Here plaintiff was in possession already under his mortgage, so that actual delivery of possession was impossible; but I think his remaining in possession is a constructive delivery of possession within the meaning of the section.

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In *Palani* v. *Selambara* (1), where the land was in the occupation of tenants, it was held that a notice to them by the vendor to pay rent to the purchaser and attornment by them accordingly to him were sufficient constructive delivery of possession to entitle the purchaser to the benefit of the exception in Section 48, and I consider that the same principle may be extended to cases where possession is already with the purchaser and he retains it under the agreement. Such delivery of possession as is possible under the circumstances is made and that I think is sufficient to satisfy the requirements of the section, the object being that possession shall not remain with the vendor, whereby persons dealing with him subsequently might be deceived.

I would confirm the decree of the Lower Appellate Court and dismiss this second appeal with costs.

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13 M. 335.

[335] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

ASUPATI (*Defendant No.* 2), *Appellant v.* NARAYANA AND ANOTHER (*Plaintiff and Defendant No.* 1), *Respondents*.*
[25th and 26th November, 1889.]

Landlord and tenant—Estoppel—Collusion.

The plaintiff in an ejectment suit had established in a former suit that land formerly the property of the second defendant's father had been sold under a decree and purchased *benami* for him (the plaintiff), and that a rent agreement in respect of the same lands entered into between the ostensible purchaser and the first defendant had also been entered into by the former on his behalf; and possession had been formally delivered to the plaintiff under process of Court. It now appeared that the second defendant, who contested the validity as against him of the decree under which the land was sold, having withdrawn a suit filed by him to declare the sale invalid as against him after his father's death, had colluded with the first defendant and collected rent from him:

Held, that the second defendant, having come in by collusion with the first defendant, was precluded from denying the plaintiff's title and was liable to the plaintiff for the rent collected by him from the first defendant.

[R., 36 B. 185=13 Bom.L.R. 1200 (1204)=12 Ind. Cas. 913; 33 M. 366 (370)=5 Ind. Cas. 84=20 M.L.J. 355=7 M.L.T. 140; 16 M.L.J. 351.]

APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in original suit No. 11 of 1884, remanded for trial by order of the High Court in appeal suit No. 89 of 1885.

The plaintiff was the Zemindar of Kurapam. In 1866 Annapa Raju, Zemindar of Pachipenta and father of the second defendant, borrowed Rs. 4,000 and executed to Lakshmayya, sheristadar of the plaintiff, a document mortgaging as security for the debt some villages of the Pachipenta estate.

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* Appeal No. 76 of 1888.
(1) 9 M. 267.

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Default having been made in payment, Lakshmayya sued Annapa Raju in original suit No. 18 of 1869, obtained a decree, brought the villages to sale in execution and became the purchaser.

Lakshmayya died in 1878, leaving a son, Ramamoorthy. Disputes arose between plaintiff and Ramamoorthy, and the plaintiff filed against him original suit No. 22 of 1880 to establish that he and not Lakshmayya (whom he represented as a mere name-lender) was the real purchaser at the Court sale. The suit was [336] compromised. Ramamoorthy admitted the plaintiff's claim, and in execution the plaintiff was formally placed in possession of the villages sold. These villages, however, were never separated from the rest of the Pachipenta zemindari, and as part of that zemindari were under attachment by Government for arrears of peishcush until November 1882.

The plaintiff's present case was that the first defendant had for some years been the cultivating tenant of the lands now in suit (admittedly part of the property purchased by Lakshmayya) and that as such he had exchanged pattas and muchalkas with Lakshmayya in 1879. Soon after the lands were released from the Government attachment, the plaintiff called on the first defendant to pay to him the arrears of rent due for Fasli 1292 and to exchange pattas and muchalkas with him for Fasli 1293. This the first defendant refused to do, and continued to occupy and cultivate the land, paying no rent to the plaintiff and ignoring altogether his title. The plaintiff sought in this suit to recover possession of the land with arrears of rent.

The District Judge passed a decree for the plaintiff rendering defendant No. 2 liable for the amount of the rent for Faslis 1292 to 1296.

Defendant No. 2 preferred this appeal.

Mr. *Michell*, for appellant.

Subba Rau, for respondent No. 1.

JUDGMENT.

The plaintiff is the Zemindar of Kurapam, the second defendant (appellant) is the Zemindar of Pachipenta, and the first defendant is the tenant in possession of the land in dispute. In original suit No. 18 of 1869 the plaintiff's sheristadar Lakshmayya obtained a decree upon a bond executed in his name by the second defendant's father, and, in execution of the same, he purchased the land on the 30th May 1876. By right of purchase he was placed in possession under process of Court, and the first defendant executed Exhibit K (a kadapa or rent agreement) in his favour, promising to pay Rs. 342 a year as rent. Meanwhile, Lakshmayya died, and the plaintiff instituted original suit No. 22 of 1880 against his son, alleging that the several transactions in the name of Lakshmayya were *benami*, and that they were really concluded on his behalf and for his benefit. His claim was decreed, and, in execution, possession was formally delivered to him under process of Court. The plaintiff's account showed that [337] the first defendant paid Rs. 80 for rent due for 1289. In the meantime, the second defendant brought original suit No. 7 of 1880 to set aside the Court sale on the ground that the transactions entered into by his father were not binding upon him. His father dying meanwhile, he withdrew the suit with permission to sue again. He has, however, brought no suit since, but colluded with the first defendant and collected rent from him for Faslis 1292 to 1296. Upon these facts, the Judge considered that the first defendant held possession as the appellant's tenant and that the second defendant could not be permitted

to set up the first defendant to defy the plaintiff so as to force him to establish his title not only against the first defendant, but also against himself. He accordingly decided in the plaintiff's favour and directed the second defendant to pay to the plaintiff Rs. 1,482, the rent which he had collected from the first defendant, and costs, leaving him to institute a fresh suit to set aside the Court sale under which the plaintiff claims if he should be so advised to do. It is urged in appeal that the Judge should have determined in this suit whether the Court sale is binding upon the second defendant without referring him to a fresh suit to establish his title. We see no reason to doubt that Exhibit K is genuine and that the first defendant held possession under it and as the plaintiff's tenant. We also agree with the Judge that the appellant, after the death of his father, withdrew original suit No. 7 of 1880, and, colluding with the first defendant, contrived to collect rent from him. The only question then is whether the second defendant came in under the first defendant. It appears, after contending that the Court sale was invalid, he took advantage of his father's death, withdrew his suit, and, gaining over the first defendant, contrived to collect rent from him, and thereby enabled him to dispute the landlord's title in this case. This is an act of collusion, and but for it he would not be in a position to say that the plaintiff could not eject him without showing that the Court sale was binding upon him. It lay upon him to set aside the sale by a suit, and if his contention in appeal were to prevail, he would be enabled to better his position by his own wrong. In *Doe d Bullen* v. *Mills*(1), it was held that a party obtaining possession of premises held by a tenant by paying £20 to him and claiming them by a title adverse to that **[338]** of the lessor could not set up his adverse title against the landlord as a valid defence in an action of ejectment. The principle is that he came in by collusion with the tenant who could not deny the landlord's title, and that unless he was also precluded from denying the landlord's title, the tenant would have only to part with the property to another person in order to bring the landlord's right in dispute. Our former order of remand did not preclude the Judge from declining to adjudicate on the question if such adjudication became unnecessary upon the facts found by him. Nor is the refusal to adjudicate on the question for the purposes of this suit a bar to the second defendant seeking to set aside the Court sale by a fresh suit if he should be advised to do so, and if he is not barred on other grounds. The decision of the Judge is right, and we dismiss this appeal with costs.

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13 M. 338.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

GNANASAMBANDA (*Petitioner*), *Appellant v.* VISVALINGA AND ANOTHER (*Counter-petitioners*), *Respondents.**

[18th and 24th February, 1890].

Civil Procedure Code, Section 244—Appeal against order—Nomination by a pandaram under a decree—Revocation of such nomination by the pandaram's successor.

The pandaram of a mutt being empowered under a decree to nominate a person to be the head of a subordinate mutt, subject to the approval of the Subordinate

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* Appeal against Order No. 104 of 1889.

(1) 2 A. & E. 17.

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Court, made a nomination and died before the Subordinate Court had come to a determination as to the fitness of his nominee. His successor in office was brought on to the record and revoked his nomination and made a fresh nomination. The Subordinate Court treated the fresh nomination as a nullity and made an order confirming the first. The pandaram appealed against this order :

Held, (1) that an appeal lay against the order complained of;

(2) that the person, whose nomination had been confirmed, was a necessary party to the appeal ;

(3) that the nomination first made was revocable for good cause, and that the fitness of the person nominated by the appellant should be investigated by the Subordinate Judge.

[339] APPEAL against the order of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, on execution petition No. 18 of 1889 in original suit No. 38 of 1881.

The facts of original suit No. 38 of 1881 appear in the report of the appeal against the original decree, see *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (1).

The final decree passed by the High Court in the above appeal was (so far as relates to the subject of the present report) as follows :—

"This Court doth order and decree that the appellant's claim that "the properties at Tiruppanandal and Benares belong to the Adhinam at "Dharmapuram and to the possession of those properties be, and is, "hereby dismissed; that his claim to a declaration of his right to appoint "tambirans to management at Tiruppanandal and Benares and to a direction that possession of the said properties be transferred to a tambiran "whom he may appoint, be, and is, hereby dismissed ; that, in other "respects, the decree of the Lower Court is reversed; that it is hereby "declared that the appointment of Kumarasami, the original defendant "by Ramalingam as his junior and successor and the will in favour of "the said Kumarasami are illegal; that such appointment and will are "hereby set aside so far as they relate to the mutts at Tiruppanandal and "Benares and other subordinate mutts and their endowments and the endowments of the Benares and other charities in the plaint mentioned; "that the respondent has no right or title to the aforesaid mutts or properties; that the appellant is entitled, as the head of the Dharmapuram "Adhinam, to see that a competent Dharmapuram tambiran is appointed "as the head of the mutt at Tiruppanandal ; that the Subordinate Judge of "Kumbakonam, in order to fill up the now vacant office of tambiran of the "Tiruppanandal mutt, do direct the appellant to name a tambiran from "among the tambirans of his Adhinam, competent to discharge the duties "of managing tambiran of the Benares (Kasi) mutt at Tiruppanandal; "that if the Subordinate Judge sees no objection to the fitness of the person "so named for the office aforesaid, he do appoint him as such managing "tambiran, but that in case the Subordinate Judge should object to the "person so named by the appellant as aforesaid, the Subordinate Judge do "appoint a competent tambiran of the Dharmapuram Adhinam as managing "tambiran of the Benares mutt at Tiruppanandal; that he do thereupon "direct the appellant to invest him with arukuttu, sundaravadam and "cloth as usual and to certify to such investiture; that upon such investiture being certified, the Subordinate Judge do place the person so "appointed and invested in possession of the Benares mutt at Tiruppanandal of the immoveable properties mentioned in the schedule annexed "to the plaint, &c."

(1) 10 M. 375.

On 21st January 1889 the plaintiff presented execution petition No. 18 of 1889 and prayed that proceedings be taken for the appointment of a tambiran. The Subordinate Judge accordingly directed the petitioner to nominate a competent tambiran; and on 11th February 1889 he nominated Ponnambala Tambiran. The **[340]** Judge issued a public citation with reference to Ponnambalam's fitness for the appointment and fixed 2nd March for the determination of the matter. The plaintiff died, and on the last-mentioned date his successor, as pandaram of Dharmapuram, applied to be brought on to the record in his stead. His application having been granted, he withdrew the nomination of Ponnambalam, alleging that he was not a fit person for the appointment, and sought to nominate Saminatha Tambiran in his stead. The Subordinate Judge held that he was not entitled to revoke the nomination made by his predecessor or to make one himself. It accordingly became necessary to proceed with the enquiry into the eligibility of the original nominee. This was done by the successor in office of the Subordinate Judge who made the orders above referred to, and in the result he made an order (which was the order now appealed against) confirming the nomination of Ponnambalam and directing the pandaram to invest him with *arukuttu*, &c., as provided in the decree of the High Court.

The pandaram preferred this appeal, the representative of the defendant in original suit No. 38 of 1881 and Ponnambala Tambiran being joined as respondents.

Bhashyam Ayyangar, for respondent No. 2, objected that no appeal lay against the order of the Subordinate Judge. [A question was raised by the Court as to the *locus standi* in the appeal of respondent No. 2 on the ground that since his appointment had not been finally confirmed he might be regarded as merely a candidate for the office; but the argument was allowed to proceed.] The above objection was based on the contention that neither Clause (*c*) nor any other clause of Section 244 of Civil Procedure Code was applicable to the case; but the objection was overruled.

The Advocate-General (Hon. *J. H. Spring Branson*) and *Krishnasami Ayyar*, for appellant.

The evidence shows clearly that respondent No. 2 is unfit for the office and his nomination cannot be allowed to stand. The appellant is the holder of the office to which the right of nomination is attached under the decree and he is entitled to submit to the Court the name of a person whom he regards as fit. Nothing was in fact done on the nomination of the late pandaram. If the view were correct that the right of nomination under the decree was personal to him his death certainly before making a **[341]** nomination, and probably in the event which occurred results in a dead lock.

Bhashyam Ayyangar and Pattabhirama Ayyar, for respondents.

As to the inference drawn from the evidence, the duty of the Court is to see whether the nominee is reasonably competent: it has not to enquire whether the best possible nomination has been made. In any view the appellant's nomination is invalid, for the decree does not admit of a second nomination in the event of the first not being accepted; in such a case the matter rests in the hands of the Court alone. The nomination under the power created by the decree is not revocable: compare the case of a power limited to a certain class under a will.

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For the case of an attempt to make an appointment with the power of revocation, see *Piper* v. *Piper* (1), *Worrall* v *Jacob* (2) and compare *Eastwood* v. *Clark* (3).

JUDGMENT.

This is an appeal from the order of the Subordinate Judge appointing one Ponnambala Tambiran as the head of the mutt at Tiruppanandal in execution of the decree in appeal No. 13 of 1885. The late Pandara Sannadhi at Dharmapuram nominated him on the 11th February 1889, and thereupon the Subordinate Judge issued a citation in order to ascertain if there was any objection to his appointment. Meanwhile the Pandara Sannadhi died, and his succcessor, the appellant before us, put in a petition on the 11th March withdrawing the nomination made by his predecessor and nominating one Saminatha Tambiran instead. On the 16th March the late Subordinate Judge held that the appellant had no right to withdraw the nomination made by his predecessor and that the power to nominate given by the decree had been exhausted by the nomination already made. He then called for evidence to see if Ponnambalam was fit for the office for which he had been nominated, and the present Subordinate Judge completed the enquiry and made the order appealed against.

In connection with the citation issued, he referred to a number of petitions (which are, however, no legal evidence) and mahazarnamahs from several persons residing in Southern India and interested in the mutt, and stated that a great majority of them showed that the person named by the appellant was most eligible. [342] He then proceeded to consider the specific objections urged as to Ponnambalam's fitness and held that no misconduct nor incompetency for the appointment was sufficiently proved. He accordingly appointed him as the head of the mutt at Tiruppanandal and directed the appellant to invest him with *arukuttu* and *sundaravadam*, the insignia of the office. Hence this appeal.

It is contended that no appeal lies, and that Ponnambalam was not a party to the decree in appeal No. 13 of 1885, but the appellant's predecessor was a party to the decree and it declared his right to see a competent tambiran appointed to Tiruppanandal. The appellant is, therefore, clearly entitled to object by way of appeal to any improper appointment made by the Subordinate Judge, which is, in his opinion, prejudicial to the interests of the institution. In order that Ponnambalam's interest may not be prejudiced, we consider that he is a necessary party to this proceeding as the person to whose appointment the appellant objects.

We have no doubt that the late Subordinate Judge was in error in holding that a nomination once made cannot be withdrawn for good cause. The late Pandara Sannadhi, and, therefore, the appellant was entitled to withdraw it, if there was any valid objection to it. Until the Subordinate Judge acted upon the nomination, there was a *locus poenitentiæ*. The person nominated may die or refuse the appointment, or it may be that some misconduct or valid ground of unfitness was discovered subsequent to his nomination. Neither the terms of the decree nor the intention which is to be collected from them support the anomalous construction put by the Subordinate Judge upon the decree. As regards the objection urged

(1) 3 M. & K. 159. (2) 3 Merivale 256. (3) L.R. 23 Ch. D. 136.

against Ponnambalam's appointment, we do not consider it necessary to discuss the evidence at length. It may be that misconduct is not sufficiently proved to warrant the dismissal of a trustee from office, but we are satisfied that there was enough in the evidence to disallow Ponnambalam's claim as a candidate for the responsible and important position of trustee of the mutt at Tiruppanandal. We must observe with reference to the specific charges brought against him concerning his conduct, whilst in charge of Rajan Kattalai at Teruvarur, there are several matters against him in evidence, which he ought to have explained, but has not explained satisfactorily. We are unable to say that his own evidence is not, as pointed out by the learned Advocate-General, extremely unsatisfactory. We, **[343]** therefore, set aside his appointment and direct the Subordinate Judge to enquire if there is any objection to the appointment of the person nominated by the appellant, and, if his appointment is also found on enquiry to be open to objection, to proceed to appoint a competent Dhurmapuram Tambiran to Tiruppanandal.

The Advocate-General has also filed a petition for revision of the order of the Subordinate Judge. We do not consider it necessary to pass a separate order upon it.

The respondents will pay the appellant's costs.

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13 M. 343=2 Weir 389.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

QUEEN-EMPRESS v. GURUVADU AND ANOTHER.*

[26th March, 1890.]

Criminal Procedure Code, Section 307—Duty of Sessions Judges as to referring cases tried with a jury.

The discretionary power to refer cases conferred on Sessions Judges by Criminal Procedure Code, Section 307, should always be exercised when the Judge thinks that the verdict is not supported by the evidence.

APPEAL against the conviction and sentence in sessions case No. 56 of 1889, Bellary.

The Acting Sessions Judge said :—

"The jury found the prisoners guilty of theft. It is a question of "credibility, and I do not think it incumbent on me to send the case to "the High Court, though being personally doubtful whether the verdict is "justified by the evidence. There will probably be an appeal."

Mr. *Wedderburn*, for the Crown.

JUDGMENT.

This is another case of the unsatisfactory result of a trial by jury under the present law. The Sessions Judge says that he is personally doubtful whether the verdict is justified by the evidence, but that he does not think it incumbent upon **[344]** him to send the case to the High Court. He observes that there will probably be an appeal. He should have remembered that there is no appeal on the facts, and the result of his not choosing to refer the case to this Court is that prisoners are convicted on evidence as to the sufficiency of which he is doubtful.

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* Criminal Appeal No. 46 of 1890.

1890 MARCH 26. — APPELLATE CRIMINAL. — 13 M. 343= 2 Weir 389.

Section 307 leaves the referring of a case to the High Court entirely to the discretion of the Judge, for it is only when he disagrees with the verdict of the jury "so completely that he considers it necessary for the ends of justice to submit the case to the High Court" he should do so. This discretion should, however, always be exercised when the Judge thinks that the verdict is not supported by the evidence. It is the only way in which the miscarriage of justice by a perverse verdict of a jury, which is of too frequent occurrence, can be remedied by the High Court.

Under these circumstances, we reluctantly feel bound to dismiss the appeal.

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13 M. 344.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

SIMSON (*Plaintiff*) *v.* MCMASTER (*Defendant*).*
[10th March, 1890.]

Civil Procedure Code, Sections 525, 526, 646B—*Provincial Small Cause Courts Act—Act IX of* 1887, *Schedule II*, *Clause* 24.

A suit to recover a sum of money as payable to the plaintiff under an award which was contested was filed in a Subordinate Court on the small cause side. The Subordinate Judge returned the plaint, being of opinion that the suit was not cognizable by a Court of Small Causes. The plaint was then presented in the Court of the District Munsif as an ordinary suit, but the District Munsif returned it on the ground that the suit was cognizable by a Court of Small Causes. The plaintiff then applied to the District Judge to submit the record for the orders of the High Court :

Held, (1) that the District Judge was bound to submit the record under Section 646B of the Code of Civil Procedure on the requisition of the plaintiff although the plaintiff might have appealed to the District Court against the order of the District Munsif;

[345] (2) that the suit was cognizable by a Court of Small Causes and accordingly that the order made by the Subordinate Judge returning the plaint was wrong.

[R., 3 O.C. 20 (21).]

CASE of which the record was submitted for the orders of the High Court by C. A. Bird, District Judge of Godavari, under Section 646B of the Code of Civil Procedure.

The case was stated as follows :—

" The facts of the case are that the suit was first filed in the Subor-" dinate Court, Cocanada, on the small cause side, but the Subordinate " Judge returned the plaint for presentation in a proper Court, on the " ground that the suit does not lie on the small cause side. The plaint " was then presented in the District Munsif's Court of Cocanada on the " original side, but it was returned by that Court on the ground that it " must be brought on the small cause side. On this the plaintiff put in a " petition in the High Court under Section 622 of the Code of Civil " Procedure, but the High Court returned the same for an appeal under " Clause (6), Section 588 of the Code of Civil Procedure to be presented to " the District Judge.

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* Referred Case No. 4 of 1890

"The plaintiff then applied to this Court under Section 646B of "the Code of Civil Procedure to submit the record for the orders of the "High Court whichever order this Court thinks wrong. The "Court considers the suit one to contest an award. It appears to matter "little whether the plaintiff prays to set aside an award, or whether he "prays to enforce a contested one."

The order of the Subordinate Judge returning the plaint was as follows :—

"The suit is for recovery of a sum of money awarded by an arbitrator "by his award. Defendant contends that the award is unenforceable, as "the same relates to certain lotteries which are not legal, and as the "arbitrator acted improperly, in that he heard plaintiff in the absence of "defendant.

"In this case plaintiff's right to the relief sought by him depends "upon a determination of the question whether the award is enforceable "or not. That question cannot be finally determined by this Court. "Besides, the suit is one for enforcement of an award. An award is, "under Section 30 of the Specific Relief Act I of 1877, placed on the same "footing as a contract for the purposes of that Act, and a suit for specific "performance of a contract cannot be taken cognizance of by a Small "Cause Court.

[346] "If suit to contest an award cannot be brought as a small "cause, a suit in which an award is impeached by defendant cannot be "tried by a Small Cause Court either. I think the plaint must be return- "ed to plaintiff for presentation to a proper Court. I return it accord- "ingly and make no order as to costs."

Counsel were not instructed.

JUDGMENT.

Muttusami Ayyar, J.—The District Judge was bound to make this reference to this Court under Section 646B, one of the parties having required him to do so. The fact that an appeal lay to him from the order made by the District Munsif does not preclude him from making the reference. I do not consider that the Judge is right in holding that a suit to contest an award or to set it aside is the same as a suit to enforce a contested award. In the first case the Small Cause Court has no jurisdiction under Clause 24 of the Second Schedule attached to Act IX of 1887. In the second case the suit is practically one to file an award under Section 525 and Section 526 of the Code of Civil Procedure, and these sections are extended to Courts of Small Causes by the Second Schedule attached to the Civil Procedure Code. I am of opinion that the order made by the Subordinate Judge is wrong, that it must be set aside and that he should be directed to readmit the plaint and deal with it under Section 525 and Section 526, Civil Procedure Code.

Handley, J.—I agree that the District Judge having referred the case, as he was bound to do on the requisition of a party under Section 646B of the Civil Procedure Code, this Court is bound to dispose of it under that section notwithstanding that plaintiff has not filed an appeal to the District Court under Clause 6 of Section 588, Civil Procedure Code; and I also agree that the jurisdiction of the Small Cause Court to entertain the suit is not barred by Clause 24 of Schedule II of the Provincial Small Cause Courts Act, 1887, as held by the Subordinate Judge. He also apparently considers the jurisdiction of the Small Cause Court is excluded by Clause 15 of the same schedule. I think the suit may be treated either

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as one to recover money payable under an award or as an application to file an award under Section 525 of the Civil Procedure Code, and in either case the Small Cause Court has jurisdiction. I would set aside the order of the Subordinate Judge and direct him to receive the suit on the Small Cause Court side and dispose of it according to law.

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13 M. 347.

[347] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

RAMASAMI (*Petitioner*), *Appellant v.* ANDA PILLAI (*Counter-petitioner*), *Respondent.** [14th April, 1890.]

Civil Procedure Code, Sections 231, 232—*Joint decree-holder—Application for execution of decree—Limitation Act, Act XV of* 1887, *Schedule II, Article* 179.

A Hindu obtained in 1878 a decree for partition of certain property and applied in 1888 to have it executed. It appeared that the decree-holder's son, having obtained against him in 1881 a decree for a share of whatever he should acquire under the decree of 1878, had applied for execution of the last-mentioned decree; and reliance was now placed on that application to save the bar of limitation:

Held, that assuming the decree of 1881 had effected an assignment by operation of law of the decree of 1878, the father and son were not joint decree-holders within the meaning of Civil Procedure Code, Section 231, and the father's application for execution was barred by limitation.

APPEAL under Section 15 of the Letters Patent from the order of Mr. Justice Wilkinson, dated 5th September 1889, made on appeal against appellate order No. 2 of 1889, reversing the order of H. T. Knox, Acting District Judge of Tanjore, made on civil petition No. 387 of 1888.

The above order of the District Judge was made on appeal from the order of A. Kuppusami Ayyangar, District Munsif of Kumbakonam, on execution petition No. 252 of 1888. This petition prayed for the execution of the decree passed in favour of the petitioner in original suit No. 245 of 1878 (which was a suit for partition between the petitioner and other members of his family) and it was preferred after the lapse of more than three years from the last application for execution made by the petitioner. It appeared however that in original suit No. 29 of 1881, the petitioner's son obtained a decree against the petitioner establishing his right to a one-fifth share of whatever the latter acquired by virtue of the decree in the earlier suit; and that the son had since applied for execution of the decree now sought to be [348] executed stating that he made the application alone because his father refused to join him in it, and notice of this application was served on the father who did not contest the son's right to have the decree executed for the benefit of all.

The District Munsif, and on appeal the District Judge, held that by reason of the son's application, the present petition was not barred by limitation.

Upon this point the District Judge said:

"The sole question now raised in the hearing of the appeal is, does "that application operate to save limitation under Article 179 of Schedule "II of Act XV of 1877; for if not, this application is barred. I hold

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* Letters Patent Appeal No. 20 of 1889.

"that it does so operate. There was not only an application to execute, "but an actual step taken in execution. It is too late for the defendant "to contend that the application was not in accordance with law. The "proceedings taken have established that the decree was executed on "behalf of the father as well as on behalf of the son, and the point cannot "be now re-opened. The son by the effect of the decree in original suit "No. 29 of 1881 became an assignee of the decree, and on that ground "alone was entitled to take out execution as he in fact did."

1890 APRIL 14. — APPEL-LATE CIVIL. — 13 M. 347.

The counter-petitioner, against whom it was sought to execute the decree, preferred the above appeal to the High Court.

Sivasami Ayyar, for appellant.

Ramanuja Charyar, for respondent.

WILKINSON, J.—The only question for determination is whether the application by the son takes the case out of the Statute of Limitation. I think the question must be answered in the negative; neither Section 231 nor Section 232 of the Code appears to me to apply. The decree obtained by the father does not become a joint decree, because the son subsequently obtained a decree against the father declaring his (the son's) right to a one-fifth share of the debt due under the former decree. The father would be liable to the son whether or not he had realised the decree debt. Nor do I think it can be said that the effect of the decree in the partition suit was to assign to the son the decree obtained by the father against the third party. Even if it did so operate, the son was only entitled to a one-fifth share, and could not therefore take out execution of the whole. The fact that defendant (appellant) did not oppose the son's execution does not estop him from now pleading that the execution by the father is **[349]** barred. The orders of the Lower Courts must be reversed and the application for execution dismissed with costs throughout.

The petitioner preferred this appeal under Letters Patent, Section 15, against the above order of Wilkinson, J. The case came on for hearing before MUTTUSAMI AYYAR and HANDLEY, JJ.

Ramanuja Charyar, for appellant.

Sivasami Ayyar, for respondent.

JUDGMENT.

The decision appealed against is correct. Assuming that there was an assignment by operation of law in consequence of the decree in the partition suit, the assignment operated not to make the son a joint decree-holder with his father in respect of the entire decree, but to entitle him only to a fifth share of the decree debt in severalty. The father and the son were not therefore joint decree-holders within the meaning of Section 231 of the Civil Procedure Code, and the application for execution made by the latter cannot save the limitation in favour of the former under Article 179 of the Act of Limitation. Nor can the order made on the son's application operate against the judgment-debtor as an estoppel. The decision of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (1) can only apply when the parties to both applications are the same.

This appeal fails and we dismiss it with costs.

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(1) 8 I.A. 123.

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APPELLATE
CIVIL.

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13 M. 349.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

TIRUNARAYANA (*Respondent No.* 1 *in Appeal No.* 144 *of* 1886), *Petitioner v.* GOPALASAMI AND OTHERS (*Appellants Nos.* 1 *to* 4 *and Respondents in Appeal No.* 144 *of* 1886), *Counter-petitioners.** [25th March, 1889.]

Civil Procedure Code, Section 595—Final decree—Leave to appeal to Privy Council.

The plaintiff in a suit to recover certain property set up an adoption. The Court of First Instance held that the adoption was not proved and dismissed the suit without trying the issues framed with reference to other allegations in the [350] pleadings. On appeal by the plaintiff the High Court passed a decree setting aside the decree of the Court of First Instance, declaring the alleged adoption to be established and remanding the suit for the trial of the remaining issues. The defendants sought to appeal to Her Majesty in Council against the decree of the High Court.

The defendants' application was refused on the ground that that decree was not a final decree.

[R., 1 O.C. 207.]

APPLICATION for leave to appeal to Her Majesty in Council against the decree of the High Court in appeal suit No. 144 of 1886, dated 6th July 1888.

The appeal above referred to was presented against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in original suit No. 30 of 1886.

The plaintiff claimed certain property as the adopted son of one Tiruvengada Pillai. The Subordinate Judge held that the adoption of the plaintiff was not proved and dismissed the suit without trying all the issues raised. The plaintiff appealed against the decree of the Subordinate Judge, and the High Court, on appeal, declared that the appellant was the adopted son of Tiruvengada Pillai and remanded the suit for the trial of the untried issues.

The defendants now sought to appeal to Her Majesty in Council against the decree of the High Court before the trial of the above issues.

Mr. *W. Grant* and *Balaji Rau*, for petitioner.

Subramanya Ayyar, for counter-petitioner No 1.

Rama Rau, for counter-petitioners Nos. 2 to 4.

JUDGMENT.

We will follow the decision in *Mahant Ishvargar Budhgar* v. *Caudasama Amarsang* (1), and hold that the decree made on the 6th of July 1888 is not a final decree within Section 595, Civil Procedure Code, and we refuse to allow an appeal to the Privy Council. When the other issues not tried shall have been tried and accounts are taken, then the parties will probably be entitled to appeal to the Privy Council. The motion is refused.

Petitioner to bear the costs of first respondent, and no costs to defendants Nos. 2, 3 and 4.

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* Civil Miscellaneous Petition No. 975 of 1888.

(1) 8 B. 548.

13 M. 351=1 Weir 651.

1889 Nov. 1.

APPELLATE CRIMINAL.

13 M. 351= 1 Weir 651.

[351] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

CALURAM (*Complainant*) *v.* CHENGAPPA AND ANOTHER (*Petitioners*).*
[24th October and 1st November, 1889.]

Criminal Breach of Contract Act—Act XIII of 1859—*Labourer—Carrier by boat.*

An advance was made under a contract by which the party who received the advance undertook to convey salt by boat, but did not bind himself to render personal labour. The party who received the advance broke the contract:

Held, the parties to the contract were not an employer of labour and a labourer respectively, and consequently the contract did not fall within the provisions of Act XIII of 1859.

[F., Rat. Unrep. Cr. Cas. 537 (538).]

CASES referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by J. Lee Warner, District Magistrate of Chingleput.

The case was stated as follows:—

"The appellant is a boat-owner, who plied his boat up on the "Buckingham Canal. He engaged to carry salt for the complainant, "whom for some reason or other he failed. For this default, he was "convicted by the Second-class Magistrate of Ponneri under Act XIII "of 1859; and on his appeal to the Deputy Magistrate, that officer rules "that a boat-owner is a labourer, and that, as such, he comes within the "scope of the Act referred to.

"I think that the Deputy Magistrate's opinion is bad in law, the "boat-owner coming under the definition of a common carrier, and being "therefore liable for the loss caused to the respondent under Act III of "1865; and I make this reference because applications of this sort to "enforce Act XIII of 1859 against boat-owners are of very frequent "occurrence in this district. It seems to me to make no difference "whether the boat-owner works along with his boatmen in bringing the "boat along or not."

[352] Mr. *Kernan*, for the accused.

Mr. *R. F. Grant*, for complainant.

JUDGMENT.

The complainant is a contractor for the transport of salt to Madras from certain factories in the Ennore Circle, and on 6th March 1889 entered into an agreement with the defendant, which is termed a "salt transport agreement," by which the latter bound himself to convey salt to Madras in his boat from 5th April to 30th September. The boat was to be used for this service exclusively, the loads and rates being fixed in the agreement and an advance of Rs. 120 paid. The defendant bound himself to give a bond for the amount of license tax required for the boat, which tax was to be paid by the complainant. It was further provided that at the close of the contract accounts were to be settled, and if it was found that defendant was in plaintiffs' debt, his boat was pledged as security for the balance due.

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* Criminal Revision Cases Nos. 428 and 429 of 1889.

1889 Nov. 1. — Appellate Criminal. — 13 M. 351 = 1 Weir 651.

Though by the agreement the defendant pledged himself to convey salt in the boat, there is nothing to show he was himself to render personal labour. It does not appear to us to fall within the provisions of Act XIII of 1859. It was an agreement for the carriage of salt, but we do not think that the complainant can be termed an employer of labour, or the defendant a labourer, within the meaning of Act XIII of 1859. The case appears to us analogous to that reported in High Court Proceedings of 13th July 1877, No. 1427, relating to contracts with cartmen. (Weir's Criminal Rulings, 3rd edition, page 461.)

The orders of the Magistrate must be set aside.

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13 M. 353 = 2 Weir 1.

[353] APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

QUEEN-EMPRESS *v.* CHERIA KOYA AND OTHERS.*
[10th and 21st March, 1890.]

Penal Code—Act XLV of 1860, *Sections* 1, 2—*Criminal Procedure Code, Section* 1—*Scheduled Districts Act—Act XIV of* 1874, *Sections* 1 *to* 7 *and* 11—*Laws Local Extent Act—Act XV of* 1874, *Sections* 3, 4—*Criminal Procedure in the Laccadive Islands.*

The Scheduled Districts Act having been extended to the Laccadive Islands, but no notifications having been made under that Act with regard to the criminal law to be administered there, the Penal Code and the Criminal Procedure Code are in force.

Accordingly, when the Sub-Collector of Malabar, as such, tried and sentenced certain persons on one of the Laccadive Islands, not observing the procedure prescribed by the Criminal Procedure Code:

Held, that the proceedings were void and should be quashed.

[D., 14 M. 121 = 2 Weir 7.]

PETITIONS praying the High Court to revise the findings and sentences of J. Twigg, Sub-Collector of Malabar, in calendar cases Nos. 1, 3 and 4 of 1889.

Mr. *K. Brown*, for petitioners in Petitions Nos. 30 and 47, supported the petitions, firstly, as being preferred under Criminal Procedure Code, Sections 435 and 439; secondly, if the Criminal Procedure Code was held to be inapplicable, as being preferred under the High Court Charter Act for the exercise of the inherent revisional jurisdiction of the High Court, and referred to *Empress* v. *Burah and Book Singh* (1) and *Empress* v. *Burah* (2).

Ryru Nambiar, petitioner in petition No. 46.

The Government Pleader and Public Prosecutor (Mr. *Powell*), for the Crown.

The facts of these cases and the further arguments adduced at the hearing appear sufficiently for the purposes of this report from the following

JUDGMENT.

In these cases we are asked to revise the proceedings of Mr. Twigg, Sub-Collector of Malabar, in cases Nos. 1, [354] 3 and 4 of 1889,

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* Criminal Revision Cases Nos. 30, 46 and 47 of 1890.

(1) 3 C. 63 (78, 122). (2) 4 C. 172 (176).

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convicting certain inhabitants of the Island of Androth, one of the Laccadive group of islands situated in the Indian Ocean, of the offences of rioting, causing hurt and committing affray.

From the record it is gathered that, sometime during the year 1889, serious breaches of the peace occurred in the island and were reported, after some delay, to the authorities on the mainland, *viz.*, the district authorities of Malabar. The matter was brought to the notice of the Madras Government, and on the 7th December the following telegram was despatched by the Government of Madras to the Collector of Malabar:—

"No. 443. Man-of-war *Griffon* placed at our disposal by India; will "be at Calicut twelfth instant. Government desires Twigg proceed in "her with small force police to Androth. His stay there should not "exceed two or three days. Issue necessary orders."

It does not appear from the record what orders were issued to Mr. Twigg in compliance with the direction of Government to the Collector of Malabar "to issue necessary orders;" but the record shows that Mr. Twigg, being at the time on the Island of Androth, held an inquiry on the 13th, 14th and 15th December 1889, and on the date last mentioned convicted and punished certain accused persons, the present petitioners, as follows:—

(*a*) The nine persons concerned in criminal revision case No. 30 of 1890 he convicted of rioting and punished with fines varying from Rs. 10 to Rs. 100; he also, in addition to the sentence of fine, sentenced one of the accused, Kunnangelath Cheria Koya, to be rigorously imprisoned for three months, and he directed that all the convicted persons be bound over in a sum of Rs. 500 to keep the peace and to be of good behaviour for a period of two years.

(*b*) The two persons, who are petitioners in criminal revision case No. 46 of 1890 he found guilty of having committed the offences of committing an affray and causing hurt, and he sentenced one of the persons convicted, *viz.*, Tanga Koya, to be rigorously imprisoned for two months and the other, Kasim Koya, to pay a fine of Rs. 100. He passed also an order similar to the order passed in criminal revision case No. 30 of 1890 in respect of taking security to keep the peace and be of good behaviour.

[355] (*c*) The eight persons to whom criminal revision case No. 47 of 1890 relates he found guilty of the offence of causing hurt and sentenced to pay fines varying from Rs. 10 to Rs. 100. He also, as in the preceding cases, required all the convicted persons to give security to keep the peace and be of good behaviour.

It has here to be observed that the proceedings of Mr. Twigg convicting the petitioners purport to have been taken by that officer in the capacity of a Revenue officer, *viz.*, Sub-Collector of Malabar, and not in the capacity of a Magistrate. The copies of the judgments laid before us are headed "In the Court of the Sub-Collector of Malabar."

In this connection it may also be observed that in his judgment and in the record of the proceedings, Mr. Twigg has employed the terminology of the Indian Penal Code, and that in binding over the convicted persons to keep the peace and be of good behaviour he has apparently followed a procedure specially provided in the Criminal Procedure Code.

Although these last-mentioned circumstances might seem at first sight to point to Mr. Twigg having been at least to some extent guided

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in his proceedings by the Indian Penal and Procedure Codes, it is nevertheless clear on the face of the proceedings, and it is not, we believe, seriously disputed that Mr. Twigg purported to act as Sub-Collector and not as a Magistrate deriving his powers under the Code of Criminal Procedure, and the first objection to Mr. Twigg's proceedings taken before us is that, as Sub-Collector of Malabar, Mr. Twigg had no jurisdiction to try the accused.

Assuming for argument's sake that Mr. Twigg could be taken to have acted as a Magistrate under the powers derived from the Code of Criminal Procedure, it is argued that the proceedings are vitiated by material irregularities, such as the omission apparently to affirm the witnesses, the adoption of a summary mode of procedure in respect of cases not summarily triable, and by other matters that need not be specially noticed.

On the state of circumstances above set out, the question which we have to determine is whether the Indian Penal Code and the Indian Criminal Procedure Code are or are not in force in the Island of Androth.

This island, with the other islands of the southern group of the Laccadives, formed part of the territory of the Beebee of [356] Cannanore, and by the storm and conquest of Cannanore towards the end of the year 1791 fell into the possession of the Honourable East India Company along with the rest of the Beebee's dominions. The same islands were also included in the cessions of Tippu's entire dependencies in Malabar made at the peace of Seringapatam in 1792. They thus became an integral portion of the territories which became vested in Her Majesty by the Statute 21 and 22 Vic., Cap. 106, and, though, as appears from the subjoined brief narrative * of the history of the islands extracted

* In the Cannanore family, which, in addition to their estates on the mainland, held possession of the Southern Laccadive Islands, the chief male representative of the family was called Ally Rajah or Audy Rajah, the prince of the sea. The last of these was succeeded by his niece, whose husband died during the siege of Cannanore in 1790. This lady was succeeded by her daughter and grand-daughter. The last died in October 1861 and was succeeded by her son Ally Rajah, who died in 1870, and was succeeded by his nephew, the present Ally Rajah. This family, at first tributary to the Rajahs of Colatoonad, became independent about the middle of the last century. After Hyder Ally's conquest of Malabar in 1766, the representative of the family became his ally. Cannanore was taken by the British during the war with Tippoo in 1784, an indemnity was exacted from the Beeby, and a tribute of one lakh of rupees was imposed upon her. On the conclusion of peace with Tippoo, matters reverted to their former position; but when, in 1790, war again broke out with Tippoo, the Beeby instigated the Moplahs against the Nayars, the Company's allies. Cannanore was taken by storm, the possessions of the Beeby became the right of the British Government by conquest, and were included in the cessions made by Tippoo. She was, however, allowed to retain her possessions on condition of paying a moiety of the produce of her country, both on the mainland and in the five islands, amounting in all to Rupees 4,340, and Rupees 10,000 per annum as a similar share of the produce and commercial advantages accruing from the Laccadives. She also executed an agreement in 1793 engaging to submit to the sequestration of the Laccadives if it should be ordered by the British Government. Commissioners were sent to investigate the resources of the islands, the treatment of the islanders by the Beeby, the abuses connected with her monopoly of coir and similar matters. After a tedious negotiation, a provisional agreement was, in 1796, signed by the Beeby, subject to ratification by Government, by which she engaged to pay Rupees 15,000 per annum to the Brish Government, but the rights of Government to the islands under the agreement of 1793 were in no way altered or done away with. Owing to the breaking [357] out of the war with France and other considerations, negotiations for the surrender by the Beeby of her sovereignty of the islands, for the reform of the administration and for the freedom of trade were not completed, and for many years the Laccadive Islands remained unnoticed. In 1848 petitions from the islanders complaining of the oppression of the Beeby attracted attention, and a British officer was deputed to report on the subject.

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from the Manual of the Administration of the Madras Presidency, a large share of administrative independence in their internal management was, till the year 1875, left in the hands of the Beebee and her successors, it is clear, having regard to the provision of Sections 1 and 2 of the Indian Penal Code and of Section 1 of the Code of Criminal Procedure that the provisions of these codes apply to the islands, unless it can be shown that they are expressly rendered inapplicable by special legislation.

Such special legislation, if it exits, must be sought for in the enactments of the Government of India known as the Scheduled [357] Districts Act and the Laws Local Extent Act, Acts Nos. XIV and XV of 1874.

The Scheduled Districts Act provides in Section 1 that the Act extends, in the first instance, to the whole of British India other than the territories mentioned in the first schedule hereto annexed, and it shall come into force in each of the scheduled districts on the issue of a notification under Section 3 relating to such district. Section 2 of the Act declares that certain enactments set out in Schedule II of the Act shall be repealed. Then Section 3 of the Act provides that the local Government, with the previous sanction of the Governor-General in Council, may, from time to time, by notification in the Gazette of India and also in the Local Gazette—

(*a*) declare what enactments are actually in force in any of the scheduled districts or in any part of any such district;

(*b*) declare of any enactment that it is not actually in force in any of the said districts or in any part of any such district.

[358] Section 4 of the Act provides that on the issue under Section 3 of a notification declaring what enactments are in force or not in force in any scheduled district, the enactments so notified shall be deemed to be in force or not in force according to the tenor of the notification in such district, and every such notification shall be binding on all Courts of law.

Section 5 gives to the local Government, with the previous sanction of the Governor-General in Council, power to extend, by notification, to any scheduled district or to any part of any such district, any enactment

The Beeby's resources having been much crippled by the damage caused by a recent storm, she was compelled to ask for a remission of the peshcush which had fallen much into arrears. The request was granted on condition of her introducing the necessary reforms into her administration, but as she declined to do so, the offer of remission was recalled and her lands at Cannanore were attached for arrears of peshcush. In 1854 the Laccadives were sequestrated on a similar account and brought under British management. The island of Minicoy, which the Beeby claimed as her private property, offered open resistance to the authority of Government, and was not finally brought under control till 1858. The islands were restored to the Beeby shortly before her death in 1861 with a distinct intimation that, in the event of any acts of oppression or extortion being proved against her or her agents, Government would sequestrate the islands in order to compel the introduction of good Government. During the rule of her son and successor, Ally Rajah, the same mal-administration continued. While complaints on his part regarding the evasion by the islanders of the monopoly of coir were frequent, counter-charges were brought by them of oppression on the part of the Rajah and his agents in collecting the dues. Inquiries conducted on the spot showed that the Rajah's authority was completely in abeyance in the three principal islands, and that he was powerless to enforce the monopoly. Ally Rajah died in 1870 and was succeeded by Moosa Ally Rajah, the present head of the family; but no improvement took place in the relations between the Rajah and the islanders. At length as there was no hope of any reform in the administration as the Rajah declined to abolish the monopoly, and as the arrears of peshcush had again accumulated to a large sum, the islands were attached and their administration was assumed by the British Government in 1875.

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which is in force in any part of British India at the date of such extension.

Then Section 6 authorizes the local Government from time to time—

(a) to appoint officers to administer civil and criminal justice and to superintend the settlement and collection of the public revenue and all matters relating to rent, and otherwise to conduct the administration within the scheduled districts;

(b) to regulate the procedure of the officers so appointed, but not so as to restrict the operation of any enactment for the time being in force in any of the said districts;

(c) to direct by what authority any jurisdiction, powers or duties incident to the operation of any enactment for the time being in force in such district shall be exercised or performed.

Section 7 preserves and continues pending express alteration the authority of all heretofore existing rules and all previously appointed officials.

Finally, Section 11 of the Act provides that nothing contained in this Act or in any notification issued under the powers thereby conferred shall be deemed to affect any law other than laws contained in Acts or Regulations or in Rules made in the exercise of powers conferred by such Acts or Regulations.

In the first schedule to the Act under the heading "Scheduled Districts, Madras," we find as part IV the Laccadive Islands, including Minicoy.

Turning to the Laws Local Extent Act XV of 1874, we find in Section 3 that the Acts mentioned in the first schedule thereto annexed are now in force throughout the whole of British India, except the scheduled districts. In the first schedule referred to, [359] it has to be noted, neither the Indian Penal Code nor the Code of Criminal Procedure is mentioned, although the Code of Civil Procedure is mentioned.

The above examination of these special enactments shows that the Scheduled Districts Act comes into force in each of the scheduled districts only on the issue of the notification under Section 3 of the Act. Section 3 says the local Government may, by notification, declare what Acts are and what are not in force, and Section 4 shows that it is only on the issue of such a notification that the enactments notified shall be deemed to be or not to be in force, and the notification thereof to be binding on all Courts of law.

Now it is admitted that so far the only notification issued by the Local Government in any way affecting these islands is a notification, dated 19th February 1889, in the following terms:—

"No. 83. In exercise of the powers conferred by Section 3 of "the Scheduled Districts Act, 1874, the Governor of Fort St. George "in Council is pleased, with the previous sanction of the Governor "General in Council, to declare that the Act is in force in all scheduled districts of Madras in which it has not already been declared in "force."

The effect of this notification, as we understand it, is to place all the Madras scheduled districts in a position to be operated on by further notifications under Section 3 of the Act, declaring that such and such Acts are in force or are not in force in such districts. These islands have, however, not been operated upon by any such further notification or

notifications, and as far therefore as the Scheduled Districts Act is concerned, the position is that the laws applicable to British India generally and not specially excluded from operation by the mere fact of a district being a scheduled district are in force in these islands. Section 2 of the Scheduled Districts Act read with Schedule II of that Act and the Laws Local Extent Act, Section 3 read with Schedule I of the latter Act show that the Code of Criminal Procedure and Penal Code are not excluded from applicability to a scheduled district by the mere fact of such district being declared to be a scheduled district.

It may here be noticed that the Local Government by a notification of the same date as that already referred to, *viz.*, 19th February 1889, declared certain sections of the Code of Civil [360] Procedure to be in force in the Madras scheduled districts. This action on the part of the Government declaring certain provisions of the Civil Procedure Code applicable to the islands is significant. It may be taken by implication to show that the local Government did not intend to exclude the operation of the Penal Code and Criminal Procedure Code from these islands.

The same inference is also derivable from a number of other notifications issued by the local Government from time to time in respect of certain specified Madras scheduled districts. These notifications are set out in a work * compiled by authority, and their effect is to show that the Madras Government has, when so advised or when it has thought proper, declared certain enactments to be in force in certain of the Madras scheduled districts other than those with which we have to deal. It has also, acting under the authority conferred in that behalf in Section 6 (*b*) of the Scheduled Districts Act framed rules for the guidance of the officials administering certain scheduled districts.

In the course of the argument, it has been stated by the learned Government Pleader that in 1876 the Government considered that it was not desirable to bring these islands under the general criminal law in force in the mainland. Whatever may have been the views of Government on the subject, it has been admitted, as already stated, that no notification under the Scheduled Districts Act affecting these islands has been issued other than the notification of 19th February 1889 already referred to.

The conclusion, therefore, which we arrive at on an examination of the special legislation contained in these two Acts is that the Penal Code and the Criminal Procedure Code, not having been by any notification under Section 3 of the Scheduled Districts Act expressly declared to be inapplicable to the Laccadive Islands, are in force in such islands. Any act done in these islands contrary to the provisions of the Penal Code can, therefore, under the provisions of Section 2 of that code and of Section 5 of the Criminal Procedure Code, be inquired into and tried only in accordance with the provisions of the latter code. In the cases now before us it has been found that Mr. Twigg, although he holds the office of Joint Magistrate of Malabar, and as such possesses the powers of a First-class Magistrate, did not exercise authority or [361] purport to exercise authority in the islands in virtue of his office of Joint Magistrate of Malabar, but in virtue of his office of Sub-Collector of Malabar.

* List of notifications and rules issued and published under the provisions of Acts and Regulations, printed at the Government Press in 1887.

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This being so, we must hold that in convicting and punishing the accused whose cases are now before us, he acted without authority, and that his proceedings were void and must be quashed.

The proceedings being void *ab initio* for the reasons stated, it becomes unnecessary to notice the other irregularities alleged against Mr. Twigg's proceedings. These latter would only require consideration in case it had been shown that Mr. Twigg had proceeded or professed to proceed under the Indian Penal Code or Criminal Procedure Code.

For the reasons stated, we quash the proceedings and direct that the accused Kunnangelath Cheria Koya and Tanga Koya be set at liberty and that the fines imposed on all or any of the accused, if they have been paid or collected, be refunded.

The orders requiring the accused to give security to keep the peace and be of good behaviour are also quashed.

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13 M. 361.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

EASWARA DOSS (*Plaintiff*), *Appellant v.* PUNGAVANACHARI AND OTHERS (*Defendants*), *Respondents.** [14th February, 1890.]

Rent Recovery Act (Madras)—Act VIII of 1865, Sections 3, 7, 51, 87—Jurisdiction of Civil Courts—Suit to enforce acceptance of improper patta—Decree for rent—Limitation—Evidence of local usage—Judgments not inter partes.

A landlord sued his tenants in the Court of a District Munsif to enforce acceptance of pattas and the execution of muchalkas by them, and to recover arrears of rent. The suits were filed more than thirty days after tender of the pattas, which were found to contain certain improper stipulations :

Held, (1) the suit was not barred by the rule of limitation in Rent Recovery Act, Section 51 ;

(2) the Civil Court had jurisdiction to entertain the suit and to modify the pattas where they were found to be improper and to enforce the execution of corresponding muchalkas ;

[362] (3) the claim for rent should have been disallowed on the ground that the pattas as tendered were improper pattas—*Narasimma* v. *Suryanarayana* (1) distinguished.

Pur cur.—"The decisions [as to rates of rent] in previous suits are admissible "as evidence of local usage, though the tenants in the cases before them were "not parties to them."

[Overruled, 14 M. 441 (F.B.); R., 23 B. 602 (607) ; 27 M. 143 (148) = 8 C.W.N. 162 = 14 M.L.J. 1 = 6 Bom. L.R. 241 (P.C.).]

SECOND appeals against the decrees of S. T. McCarthy, District Judge of Chingleput, in appeal suit No. 182 of 1888, &c., modifying the decrees of S. A. Krishna Row, District Munsif of Poonamallee, in original suit No. 302 of 1885, &c.

Suits by the Zemindar of Pallavaram against his tenants to enforce the acceptance of pattas and the execution of muchalkas and to recover arrears of rent for *Faslis* 1291-93. The suits were filed more than two months after the tender of the pattas. The further facts of these cases appear sufficiently for the purpose of this report from the judgment of the High Court.

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* Second Appeals Nos. 197 to 203, 265 and 541 to 551 of 1889.

(1) 12 M. 481.

The District Munsif and, on appeal, the District Judge made certain alterations in the pattas with reference to stipulations for the payment of merais, but in other respects their decrees were in accordance with the prayer of the plaint.

The plaintiff preferred second appeal No. 197 of 1889, &c., against the decrees, so far as they modified the pattas, and the tenants preferred second appeal No. 541 of 1889, &c., against the decrees on the ground (among others) that they had been passed without jurisdiction.

Mr. *Subramanyam*, for appellant in second appeal No. 197 of 1889 and for respondent in second appeal No. 541 of 1889.

Parthasaradhi Ayyangar, for respondent in second appeal No. 197 of 1889 and for appellant in second appeal No. 541 of 1889.

JUDGMENT.

In these cases, the plaintiff is the Zemindar of Pallavaram, and the defendants are his Sukavasi tenants. He sued in the Court of the District Munsif of Poonamallee to compel them to accept either the pattas tendered by him or such other pattas as the Court might consider proper, to execute muchalkas in accordance with them and to pay the rent due for three years, *viz.*, *faslis* 1291-93. The Judge held that the tenants were at liberty to pay merais to those who were entitled to them direct, and that no tank merai was payable to the plaintiff, and he [363] decreed the claim except so far as it related to the merais. The plaintiff appeals in second appeals Nos. 197 to 208 and 265 of 1889 and contends that the merais should also have been decreed to him. The defendants appeal in second appeals Nos. 541 to 551 of 1889 and object to the rest of the decree on several grounds. It is first urged on their behalf that a suit to enforce the acceptance of a patta is a special remedy provided by a special Act, and that it can only be available in a Revenue Court. But it was held by this Court in *Karim* v. *Muhammad Kadar* (1) in 1879 that a regular suit might be maintained in a Civil Court to enforce the acceptance of a patta. The plaintiff in that case asked that the defendant who denied the tenancy might be directed to accept a patta and to execute a muchalka and it was decided that the remedy by summary suit was originally given as an alternative remedy as pointed out in *Gopalasawmy Mudelly* v. *Mukkee Gopalier* (2), and that there was nothing in Act VIII of 1865 to show that the landlord was debarred from the remedy by a regular suit. It was observed that Section 3 of Act VIII of 1865, imposed on a landholder the obligation to enter into written engagement with his tenants, and that if the action of the tenants precluded him from doing what the law enjoined him to do, and without which he was disabled from making use of the summary remedies under the Act, he would have the right of action to compel the tenants to do that which would enable him to conform to the law, unless such right of action was taken away by other provisions of the law. We may add that the landlord is also precluded by Section 7 of the Rent Recovery Act from suing for rent or otherwise enforcing the terms of a tenancy in a Civil Court unless pattas and muchalkas have been exchanged as directed by Section 3, or unless the party attempting to enforce the contract has tendered such a patta or muchalka as the other party was bound to accept or execute or unless both parties have agreed to dispense with pattas and muchalkas. The principle recognized by the decision was that a suit to enforce the

(1) 2 M. 89. (2) 7 M.H.C.R. 312.

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acceptance of a patta is, when brought in a Civil Court, a remedy necessary to the fulfilment of the obligation imposed upon the landlord by Section 3, and to the exercise of his right to sue in a Civil Court for arrears of rent or for enforcing other terms of the tenancy which he is at [364] liberty to do under Section 87 of Act VIII of 1865. The decision in *Narasimma* v. *Suryanarayana* (1) to which our attention has been drawn is not in conflict with the case already cited. It was observed in that case also that the object of the Act in requiring the exchange of patta and muchalka was to ensure the existence of evidence of the terms of the holding, and that, in order to secure this evidence, a landlord might maintain a declaratory suit and the execution of a muchalka by the tenant might be treated as a relief consequential on such declaration. It is open to the landlord to ask for a declaration that the patta tendered by him was the one which it was lawful for him to tender, and if it was not, what was a proper patta which he was bound to tender, and the observation, therefore, that the Court was not at liberty to amend the patta had reference to the frame of the plaint in that particular case and the form in which a declaration ought to be made with reference to it. We also find that *Karim* v. *Muhammad Kadar* (2) was not cited and overruled in *Narasimma* v. *Suryanarayana*(1). The first objection must therefore be disallowed.

Another contention is that the Courts below were in error in decreeing rent whilst they found that the patta tendered required to be modified so far as it related to the merais claimed from the tenants. They considered that the rates of rent claimed were proper and that the insertion in the pattas of the item of merais which were in their opinion not due to the landlord either wholly or partly was not important. But it is provided by Section 4 of Act VIII of 1865 that the pattas shall also include the fees payable with the rent according to local usage, and if they were not really due and yet were included in the patta tendered by the landlord, we cannot say that the patta was one which the tenant was bound to accept within the meaning of Section 7 of Act VIII of 1865. The patta must be regarded as indivisible, otherwise the terms of the tenancy will be left in part uncertain and the intention of the legislature thereby frustrated. We must set aside the decree of the District Judge so far as it directs payment of rent and order that the claim for rent be disallowed on the ground that the patta tendered was not the proper patta.

The next objection taken before us is that the suit was barred by Section 51 of Act VIII of 1865. The remedy sought to be [365] enforced is not under the Act, but it is a regular suit for a declaration with such consequential relief as may be lawfully awarded. We are, therefore, of opinion that Section 51 is no bar to the suits before us.

Nor do we consider that the Judge's finding as to the rates at which rent is payable is open to any valid objection. The decisions in previous suits are admissible as evidence of local usage, though the tenants in the cases before us were not parties to them. There is also other evidence on the record in support of the finding.

It is urged on behalf of the plaintiff, who is the appellant, in second appeals Nos. 197 to 208 and 265, that merais are payable to him according to local usage. On this point the evidence was conflicting, and, though the District Munsif decided in his favour except as to the tank merai and the merai payable to Village Officers, the Judge disagreed with him and

(1) 12 M. 481. (2) 2 M. 89.

found that the merais were payable by tenants so far as they were due direct to the parties entitled to them. *Prima facie* tenants are liable to pay only to the parties who are entitled to them, unless a special usage to the contrary is clearly established. There was evidence upon which the Judge was entitled to come to the conclusion at which he arrived and we are not at liberty to interfere with his finding in second appeal.

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In modfication of the decree of the District Court, we direct that the plaintiff's suit be dismissed so far as it relates to rent and that the decree be otherwise confirmed. The costs of second appeals preferred by the tenants, in Nos. 541 to 551, will be assessed proportionately. The second appeals preferred by the landlord, in Nos. 197 to 208 and 265, are hereby dismissed with costs.

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13 M. 366.

[366] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Handley.

GURUVA (*Defendant No.* 1), *Appellant v.* SUBBARAYUDU (*Plaintiff*), *Respondent.** [10th and 27th March, 1890.]

Civil Procedure Code, Section 283—*Party to execution proceedings—Limitation Act—Act XV of* 1877, *Schedule II. Article* 11.

A in execution of a decree against B attached a house. C intervened and the property was released from attachment. A then brought a suit against B and C to establish the title of B to the house and obtained a decree. B was *ex parte* throughout. In an appeal by C a decree was passed by consent of A and C reversing the decree appealed against. B now sued C and another, more than a year from the date of the order removing the attachment, to obtain a declaration of title to the house :

Held, that since there was nothing to show that the order releasing the attachment was an order against the plaintiff, the suit was not barred by limitation.

[**Appr**, 31 M. 163 (168) = 18 M.L J. 26 = 3 M.L.T. 256 ; 13 M.L.J. 367 (368) ; **R.**, 35 M. 35 (39) = 21 M.L.J. 756 = 8 M.L.T. 381.]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 776 of 1888, reversing the decree of O.V. Nanjundayya, Acting District Munsif of Guntur, in original suit No. 128 of 1888.

Suit to declare the plaintiff's title to a certain house which defendant No. 2 purported to have mortgaged to defendant No. 1.

In original suit No. 281 of 1880 one Subba Reddi obtained a decree against the plaintiff and attached this house. Defendant No. 2 intervened and the property was released from attachment. Then Subba Reddi filed original suit No. 139 of 1881 to establish the title of his judgment-debtor to the house. It was dismissed, but Subba Reddi filed appeal No. 105 of 1882 before the District Court and there obtained a decree. Second appeal No. 679 of 1883 was then made to the High Court by Subba Reddi. The present plaintiff did not appear, but defendant No. 2 appeared. Subba Reddi's decree being satisfied, the parties entered into a compromise and the High Court, by consent of the parties, passed a decision reversing the decree of the District Court and dismissing the suit.

The defendants contended that the order releasing the property from attachment on the petition of defendant No. 2 remained [367] good, and

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* Second Appeal No. 890 of 1889.

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that under Section 283 of the Civil Procedure Code it was conclusive against plaintiff who did not bring a suit within a year.

The District Munsif held that the above plea should avail and dismissed the suit. On appeal the District Judge reversed the decree of the District Munsif and passed a decree as prayed observing with reference to the above plea:—

"The Full Bench decision in *Metietom Perengaryprom* v. *P. Damodren* "*Nambudry* (1) shows that such an order is binding between the "judgment-debtor and the intervening claimant, but I understand that "plaintiff's reply to this is that the Courts must deal with this question in "a manner similar to the mode of dealing with *benami* transactions. "Plaintiff says that in the previous proceedings he and second defendant, "who is his mother, were in collusion to delay or defeat the satisfaction "of the decree held by the creditor Subba Reddi, and that their collusive "pleas even if successful then against the creditor ought not to prevent "an inquiry upon the merits into the present dispute between the two "parties who then colluded. I consider that there is much force in this "answer and that it must be allowed."

Defendant No. 1 preferred this second appeal.

Subba Rau, for appellant.

Bhashyam Ayyangar and *Desika Charyar*, for respondent.

JUDGMENT.

The District Munsif was clearly wrong in dismissing the suit on the ground that plaintiff is debarred from suing by the decree in second appeal No. 679 of 1883. In the first place, that was a decree by consent of the only parties who appeared in the appeal, *viz.*, the plaintiff in that suit, Subba Reddi, and the present defendant No. 2. And the result was that there was no adjudication in that suit upon the rival titles of the present plaintiff and second defendant. The suit which Subba Reddi had brought to establish the title of his judgment-debtor, the present plaintiff, to the house in question as against the present defendant No. 2 was dismissed by consent of Subba Reddi and the present defendant No. 2 Subba Reddi's claim having apparently been satisfied. But it is argued for defendant No. 1, the appellant in this second appeal, that at least the result of the consent decree in second appeal No. 679 of 1883 dismissing the suit was to leave matters as they were before the suit was filed, *viz.*, that the **[368]** claim by the present defendant No. 2 in the execution proceedings against the present plaintiff had been allowed and Subba Reddi's attachment had been released; and it is further argued that the present plaintiff being a party to those execution proceedings is bound by them, not having brought a suit to establish his right within the one year prescribed by Article 11 of Schedule II of the Limitation Act. With the first part of this argument as to the result of the consent-decree dismissing the suit we agree, but not with the latter. Whether the present plaintiff is barred by Article 11 of Schedule II of the Limitation Act depends upon whether he was the party against whom the order allowing the present second defendant's claim was made within the meaning of Section 283 of the Civil Procedure Code. It is contended that he was so, on the authority of the Full Bench decision of this Court in *Metietom Perengaryprom* v. *P. Damodren Nambudry* (1). That decision though doubted in *Arakel Kunhi Kuttiyali* v. *Imbichi Ammah* (2), and dissented

(1) 4 M.C.H.R. 472. (2) 6 M.C.H.R. 416.

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from by the High Courts of Calcutta and Bombay in *Kedar Nath Chatterji* v. *Rakhal Das Chatterji* (1), and *Shivapa* v. *Dod Nagaya* (2) has never been overruled and is still binding on this Court; but it really amounts to no more than this, that a judgment-debtor may be the party against whom an order upon a claim in execution proceedings is made so as to be bound by the special rule of limitation prescribed for suits by such a party. Whether he is such a party or not must depend upon the facts of each case. It is obvious that in some cases he could not be the party against whom an order on a claim is made, for the order may be made without notice to him, and, even if he has notice, the order may not be one in any way affecting his title. For instance, the attachment might be released on the ground that the property was not at the time of the attachment in the possession of the judgment-debtor. It is, we think, for the person who sets up the special bar of limitation against the judgment-debtor to show that he was a party to the execution proceedings and that the order was an order against his interest. In the present case there is nothing to show whether the order releasing the attachment was against the interest of the judgment-debtor, the present plaintiff. Apparently it was not against his inclination **[369]** for he was found to be colluding with the claimant, the present defendant No. 2. We think it is not shown that plaintiff is barred by Article 11 of Schedule II of the Limitation Act. The District Judge finds on the evidence that the house is the property of plaintiff and not of his mother, defendant No. 2. That he says that his conclusion is the same as that of his predecessor in the Court does not make the finding on the evidence less binding in second appeal and upon that finding his decision is correct.

The fifth ground of second appeal appears to be founded on a mistake. We understand the case of the two brothers, the plaintiff in this suit, and the plaintiff in original suit No. 119 of 1888, to have been not that they divided the houses, but that they built the houses and that each took one as his share. But whether this be so or not, no question was raised by defendant No. 1 as to the plaintiff being only entitled to half of the house and we cannot allow that plea to be set up for the first time in second appeal.

The second appeal fails and is dismissed with costs.

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13 M. 369.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar, and Mr. Justice Shephard.

SECRETARY OF STATE FOR INDIA (*Defendant No.* 14), *Appellant v.* KADIRIKUTTI AND OTHERS (*Plaintiffs and Defendants Nos.* 4 *and* 5), *Respondents.**

[14th October and 11th November, 1889 and 18th March, 1890.]

Accretion—Alluvion—Tidal navigable river—Cause and nature of variation in high water line.

The rules of English law, according to which the rights of the Crown or of riparian owners to accretions caused by alluvion are determined with reference to the character of the river and the manner in which the accretion is occasioned, are applicable in British India unless excluded by enactment or local usage.

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* Second Appeal No. 7 of 1889.

(1) 15 C. 674.

(2) 11 B. 114.

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13 M. 369.

Accordingly, where a rapid variation in the natural high water line of a tidal navigable river in Malabar had been caused by acts unlawfully done by the tenants of the riparian owner:

Held, that the Crown was entitled as against the riparian owner to the accretion caused by such variation.*

[F., 33 M. 1=5 Ind. Cas. 882 (883)=20 M.L.J. 66=7 M.L.T. 128; R., 36 M. 57 (61)=(1911) 2 M.W.N. 261.]

[370] SECOND appeal against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 522 of 1887, affirming the decree of J. A. deRozario, District Munsif of Pynad, in original suit No. 81 of 1886.

Suit to recover possession of certain land, of which part was in the possession of defendants Nos. 1—13, under an expired demise from the plaintiffs' karnavan, and part (consisting of accretions to the land, the subject of the above demise, resulting from recession of a river) was in the possession of Government.

The District Munsif passed a decree as prayed, and his decree was affirmed on appeal by the District Judge.

The Secretary of State (defendant No. 14) preferred this second appeal.

The Government Pleader (Mr. *Powell*), for appellant.

As far as this Presidency is concerned, this case is one of first impression. Many cases have arisen in Bengal both as to new formation by the process of alluvion and as to reformation after diluviation; they were all, however, governed by the Bengal Regulation XI of 1825, which proceeds on the assumption that the beds of navigable rivers are the property of the Crown. See *Felix Lopez* v. *Muddan Thakoor* (1), *Pahalwan Singh* v. *Maharajah Muhessur Bukhsh Singh Bahadoor* (2), and compare *Baban Mayacha* v. *Nagu Shravacha* (3). In *Doe d. Seebkristo* v. *The East India Company* (4), however, the Privy Council lay down in general terms the proposition that the East India Company, as representing the Indian Government, had a freehold estate in the beds of navigable rivers in India, apparently regarding it as a proposition applicable to the whole country unlimited by any question of custom and independent of any evidence as to the assertion of the right. In deciding that appeal, the Privy Council referred to, and were guided by, the common law as to the right of the Crown in such property in England; and that is the course which the Lower Courts should have adopted here. The judgment of the District Court in the present case, however, would imply that the Crown has no such right in Malabar, because it has been held that the Government has no right to waste there; whether or not the decision referred to goes further than to establish that the Government has not the same right to waste lands there as elsewhere [371] in India, it cannot affect its rights as regards rivers or the foreshore. And the District Munsif has suggested the Hindu common law as a guide to a decision, but a rule which recognized as owner the first person who made a beneficial use of the soil would be impracticable and would be the cause of endless confusion.

According to the English law, the soil of the sea estuaries and of navigable rivers is *prima facie* the property of the Crown (see *Hale de jure*

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* Compare *North Shore Railway Company* v. *Pion*, L.R. 14 App. Cas. 612, [Reporter's note.]

(1) 5 B.L.R. 521. (2) 9 B.L.R. 150. (3) 2 B. 40. (4) 6 M, I.A. 267.

Maris, pp. 12, 25) and *Malcomson* v. *O'Dea*(1). See also *Gann* v. *Free Fishers of Whitstable*(2), *Lyon* v. *Fishmongers' Company*(3), in which it was laid down as an axiom that the soil of tidal navigable rivers was *prima facie* the property of the Crown. To determine the line of demarcation between the property of the Crown in such rivers and the property of the riparian owners, the rule is that up to the line of medium high tides throughout the year the soil vests in the Crown. See *Attorney-General* v. *Chambers* (4).

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The principle according to which the results of alluvion or imperceptible accretion are given to the owner of the lands adjoining the sea estuaries and tidal rivers appears to be inapplicable to cases where the original boundary line between the shore and the land can be made out clearly by marks or otherwise. In such cases no reason can be assigned why the Crown should be deprived of its property, see per *Lord Chelmsford* in *Doe d. Seebkristo* v. *The East India Company*(5). The case should probably be remanded for complete findings as to the character of the river, but in any case the plaintiff here cannot be said to have established the title set up by him.

Sankara Menon (*Bashyam Ayyangar* with him), for respondents Nos. 1 and 2.

The plaintiff is entitled under the common law of England as a riparian owner to the property in the soil of the river bed up to the middle line. Angel on Water-courses, p. 16. He can also rely on the rules stated in 2 Blackstone, 262, that where alluvion is so gradual as not to be perceived as it progresses, the proprietor, whose bank on the river, is increased, is entitled to the addition—see *Scratton* v. *Brown* (6). *Hull and Selby Ry. Co.* (7), *The King* [372] v. *Lord Yarborough* (8). But in Malabar all the soil belongs to private owners, *Secretary of State* v. *Vira Rayan* (9), and see Sir C. Turner's Minute, p. 23 ; so the Crown has not the right claimed, and the plaintiff should succeed as owner of the land to which the land in question has become annexed.

Even, if it is conceded that the case must be governed by the English law, and that the first of the above rules does not apply where the river is a public tidal navigable river, still the appellant cannot succeed, for he has not proved its navigability, &c. As to navigability, it is a question of fact, see *Chunder Jaleah* v. *Ram Churn Mookerjee*(10). A public navigable river is a river which is actually navigable, and in which the tide ebbs and flows ; all other rivers on which navigation is carried on are private rivers over which the public have acquired a right or easement of navigation, see per *Denman*, C.J., in *Mayor of Colichester* v. *Brooke*(11), *Horne* v. *Mackenzie* (12), Coulson and Forbes on the Law of Water, p. 58. Moreover a river may be public and tidal in part only, see *Bickett* v. *Morris* (13), *Hargreaves* v. *Diddams* (14), *Bristow* v. *Cormican* (15).

Though the flux and reflux of the tide is *prima facie* evidence that a river is navigable, it does not necessarily follow that because the tide flows and reflows in a particular place that the river is therefore a public navigable river although of sufficient size. The importance to be attached to

(1) 10 H.L.C. 593. (2) 11 H.L.C. 192. (3) L.R.I. App. Ca. 662.
(4) 4 De. Gex. M. & G. 206. (5) 6 M.I.A. 267.
(6) 4 B. & C. 485. (7) 5 M. & W. 327.
(8) 3 B. & C. 91=2 Bligh N. S. 147. (9) 9 M 175.
(10) 15 W. R. 212. (11) L. R. 7 Q. B. 339. (12) 6 Cl & F. 628.
(13) L. R. 1 Sc. & D. App. 47. (14) L. R. 10 Q. B. 582.
(15) L. R. 3 App. Ca. 641.

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that circumstance must depend on the nature and situation of the channel. The best evidence is the actual user of a tidal river for navigation by the public, but even such evidence will not suffice if the user is only temporary and by small boats. *The King* v. *Montague* (1), *Chunder Jaleah* v. *Ram Churn Mookerjee* (2).

Assuming the navigability, &c., of the river, still, land gained from it by alluvion or gradual accretion goes to the owner of the adjoining land. *Attorney-General* v. *Chambers* (3). 2 Blackstones' Commentaries, 262, Hunt's Law of Boundaries and Fences, p.30. Moreover, the rules that hold good as to accretions arising from natural causes seem equally applicable to cases of accretions resulting from artificial causes or from causes partly natural and **[373]** partly artificial, so long, at any rate, as the person causing them has merely exercised the lawful rights of property, and has not abused them with the sole or express view of encroachment—see per *Lord Chelmsford* in *Attorney-General* v. *Chambers* (3), *Doed. Seebkristo* v. *The East India Company* (4). Compare also *Foster* v. *Wright* (5).

Govinda Menon, for respondents Nos. 3 and 4.

Mr. *Powell* in reply.

JUDGMENT.

The question to be decided is whether the strip of land designated as item No. 1 in the plaint is the jenm property of the plaintiff or whether it belongs to the Government.

This question is raised in a written statement filed on behalf of the Government, in which it is alleged that this strip of land belongs to Government by reason of its having been artificially reclaimed from the bed of a navigable river, and that even if it were a natural accretion (which it is not) the property in it nevertheless vests by local usage in the State. The District Munsif without recording any opinion as to the character of the river, finds that the land was an accretion gradually formed from the river bed and brought about by artificial means which he explains. He rules, as a matter of law, that such accretions belong to the riparian owner, and not to Government, and he further holds that no local usage was proved whereby such accretions became vested in the State. The District Judge treats the claim of Government as one founded solely on custom, and agrees with the District Munsif in holding that the custom was not proved. He considers that the fact that Government has no claim to waste lands in Malabar renders the claim of Government most questionable. With regard to the character of the river, and the means by which and manner in which the accretion came to be made, he records no opinion. Before dealing with the facts of the case, as to which it was complained in the argument that there were no sufficient findings, it may be well to state the principles on which the rights to soil gained from a river by accretion are determined.

According to English law the general rule has always been that laid down by Justinian:—"That ground which a river has added to your "estate by alluvion becomes your own, by the law **[374]** of nations. "And that is said to be alluvion which is added so gradually that no one "can judge how much is added in each moment of time." Justinian's Institutes, lib. II, tit. I, 20. Speaking of "lands gained from the sea, "either by alluvion, by the washing up of sand and earth, so as in time to

(1) 4 B. & C. 598. (2) 15 W.R. 212. (3) 4 De. Gex. M. & G, 206.
(4) 6 M. I. A. 267. (5) L. R. 4 C. P. D. 438.

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"make *terra firma*; or by dereliction, as when the sea shrinks back below "the usual low water mark." Blackstone says, "in these cases the law is "held to be that if this gain be by little and little, by small and imper-"ceptible degrees, it shall go to the owner of the land adjoining. For *de* "*minimis non curat lex*: and, besides, these owners being often losers by "the breaking in of the sea, or at charges to keep it out, this possible gain "is therefore a reciprocal consideration for such possible charge or loss. "But if the alluvion or dereliction be sudden and considerable, in this "case it belongs to the King; for, as the King is lord of the sea, and so "owner of the soil while it is covered with water, it is but reasonable he "should have the soil, when the water has left it dry." (Blackstone's Commentaries, Volume II, p. 262; Stephen's Commentaries, Volume I, edition of 1863, p. 457). The principle on which this rule as to gradual accretion rests is founded as well "on the necessity which exists for some "such rule of law for the permanent protection and adjustment of property" as "on the impossibility of identifying from time to time small addition "to or subtraction from land caused by the constant action of running "water." *In re Hull and Selby Ry. Co.* (1), *Foster* v. *Wright* (2).

From the passage cited from Blackstone it further appears that the Crown is regarded as owner of the land covered by the sea, and that to the Crown therefore belongs land which is gained from the sea by sudden dereliction or alluvion. What is true with regard to the sea is equally true with regard to tidal navigable rivers. The ownership in the land between the ordinary high and low water marks is vested in the Crown and subject to the user of the public for purposes of navigation and otherwise. *Gann* v. *Free Fishers of Whitstable* (3).

The theory is that such lands are not capable of ordinary cultivation and occupation, and so in the nature of unappropriated soil; whereas lands that are only covered by extraordinary tides **[375]** being for the most part dry are or may be capable of cultivation. See *Attorney-General* v. *Chambers* (4). The rule laid down in that case was that the extent of the Crown's right to the sea-shore landward is *prima facie* in the absence of particular usage limited by the line of the medium high tide between the springs and the neaps. The rule referred to by the District Munsif according to which the riparian proprietors are entitled to the bed of the river, *ad medium filum*, is not applicable in the case of navigable rivers in which the tide flows and re-flows. It is a question of fact whether any particular river is a tidal navigable river. A river may be tidal and yet not navigable, but the fact that it is tidal has been said to be *prima facie* evidence that it is navigable. Regard must, however, be had also to the nature and situation of the channel, its depth at different periods of the tide and the use that has been actually made of it in order to determine whether it is a navigable river. See *The King* v. *Montague* (5).

There seems no reason to doubt that the principles above indicated are the principles according to which the law must be administered in British India in the absence of local usage or statutory enactment to the contrary. The rule that the Government is the owner of the soil in the bed of a navigable river up to high water mark is recognized in the Regulation XI of 1825, see *Felix Lopez* v. *Maddan Thakoor* (6), and it was further recognized by the Judicial Committee in the case of *Doe d. Seebkrishto* v. *The East India Company*(7). Nor is there

(1) 5 M. & W. 327. (2) L.R. 4 C. P D. 438. (3) 11 H.L.C. 192.
(4) 4 De Gex. M. & G. 206 (218). (5) 4 B. & C. 598.
(6) 5 B.L.R. 521 (527). (7) 6 M.I.A. 267.

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any ground for the contention that this rule is inconsistent with the law prevailing in Malabar with regard to ownership in land. It is true that there is no presumption in Malabar that waste lands are the property of Government: but land covered by the water of the sea or of a tidal river is not within the category of waste land, for as land it is incapable of occupation and, whoever may be the owner, it is subject to rights of user by the public. If this is so, and if the neighbouring jenmi is not the owner of the land as long as it remains covered with water, on what principle should it be held to belong to him when by some sudden recession of the water it becomes dry land? Any principle on which the jenmi's title to such land so gained from a river can be supported would be equally applicable to land similarly gained from the sea and even [376] to an island formed in the sea. It is difficult to believe that any private rights to such land can have grown up among a people like the inhabitants of Malabar given to agricultural habits and possessed of a strong feeling of horror and aversion towards the sea and the navigation of it. Otherwise it might be conceivable that such new and unoccupied land should belong to the first occupant or to the sovereign by a title similar to title by escheat—*Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1); but on what principle the neighbouring owner should be entitled to it has not been explained. In our opinion there is nothing in the system of property as recognized in Malabar to displace the rights of the Crown as they are ordinarily understood. On the contrary the evidence indicates a recognition of those rights in recent times; and in the grant traditionally recorded to have been made by the Brahmans to Keralan are enumerated among other sovereign rights "the regulation of the beds of streams and accretions from the seas," Malabar Manual, Volume I, p. 226.

On the assumption then that we have to apply the principles which we find in the English books there are two matters to which regard has to be had in order to ascertain whether in the case of a given accretion from a river the property in it vests in the Crown. There is the character of the river to be considered, and the manner in which the accretion is occasioned. On the former of these matters we have already made some observations, and concerning the latter we have noted the distinction between an accretion which is gradually and imperceptibly produced, and one which is sudden and considerable. The right of the owner, and therefore, in the case of a tidal navigable river, of the Crown is not lost where the alluvion or dereliction is of the last-mentioned character. It was argued on the respondent's behalf that provided the accretion in this case was gradually made, as appears to have been the opinion of the District Munsif, it was immaterial whether it was produced or accelerated by artificial means adopted by or on behalf of the respondent. Subject to a proviso which will be hereafter mentioned this position is correct and is well supported by authority. So long as the accretion has been slow and imperceptible in its progress so that it could not be marked from day to day, but only at the end of some considerable period of time, the rule [377] in favour of the riparian owner is applicable notwithstanding that the accretion may have been brought about by operations conducted by him lawfully on his own lands or by neighbours on their lands—*Attorney-General* v. *Chambers* (2), *Doe d. Seebkristo* v. *The East India Company* (3). In the latter case the Judicial Committee observes "a question of law was "raised whether supposing the accretion (granting it to be gradual) was one

(1) 8 M.I.A. 525. (2) 4 De Gex. & J. 55, 69. (3) 6 M.I.A. 267.

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"which had been contributed or even purposely contributed to, by the act "of the defendants, that would not take the matter out of the ordinary "law with respect to the accretion. The Court below thought, and we "think rightly, that that made no diference. If there were a gradual accretion "which was not denied, it was one which would be dependent on ordinary "law." This passage might at first sight seem to justify the contention that a riparian proprietor was at liberty to employ any means to promote the formation of soil on his own bank and thus to transfer to himself part of the bed of the river. But an examination of the facts of the case will show that no such point was decided. It was found as a fact that the defendants in the case, the East India Company, were the owners of the land adjoining the high water mark, and that in constructing a road and works protecting it along the bank of the river the Company were acting within their rights. Being the owners of the land to which a gradual accretion was made, they were necessarily owners of that accretion, which moreover was gained from the bed of the river which itself was vested in the East India Company. This case therefore is no authority even for the proposition that a deliberate intention on the part of a riparian owner to produce an accretion and adoption of means to that end are immaterial in considering whether the accretion so gained belongs to him or not. In the later case of *Attorney-General* v. *Chambers* (1), the Lord Chancellor did not entertain that opinion, for after saying that the rule with regard to accretion is not affected by the nature and character of the operation employed to produce it, he observes that, "of course an exception must "always be made of cases where the operations upon the party's own land "are not only calculated, but can be shown to have been intended, to "produce this gradual acquisition of the sea-shore, however difficult such "proof of intention may be." If there is not only [378] proof of that intention but it also appears that the party has by unlawful acts done upon the land below the high water mark contrived to raise the bed of the river adjoining his own land, and thus endeavoured to appropriate to himself soil which is vested in the Crown, there can be no doubt that he cannot claim the benefit of the ordinary rule with regard to accretions. To allow him to do so would be to allow him to take advantage of his own wrong. The proposition therefore that the means whereby an accretion is occasioned are immaterial must be taken subject to the proviso expressed in the judgment of the Lord Chancellor, *viz.*, that it is by a lawful use of the party's own land that the accretion is caused. Acts not coming within that category done with the intention and result of annexing the soil of a public river are nothing else than acts of encroachment.

It is apparent from what has been already said with regard to the findings in this case that in neither of the Courts have the facts requisite for a determination of the rights of the parties been considered and adjudicated upon. There were no proper issues raised with regard to the matters upon which the claim made on behalf of Government would rest. We must therefore ask the District Judge having regard to the observations above made to record findings on the following issues :—

(1) Whether as far as the point near which the land No. 1 in the plaint lies the river Kottapuya is a tidal navigable river.

(2) Whether the variation if any in the natural line of high water has at the same point been slow, gradual and imperceptible or otherwise.

(1) 4 DeGex & J. 55, 69.

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(3) Whether such variation has been caused by acts unlawfully done by the plaintiffs and persons claiming under them or otherwise.

The parties are at liberty to adduce further evidence.

The findings will be returned within three months from the date of the receipt of this order, when seven days after the posting of the findings in this Court will be allowed for filing objections.

In compliance with the above order the District Judge submitted the following finding:—

"I find the first issue in the affirmative, and the second in the "negative, and on the third issue I find that the variation in the high "water line has been caused by acts unlawfully done [379] by persons "alleged by the contending respondents (plaintiffs) to be their lessees or "tenants under their lessees."

This second appeal coming on for final hearing upon receipt of the above finding the Court delivered judgment as follows:—

JUDGMENT.

The findings are against the plaintiffs. It is objected that the District Judge declined to issue a commission for the purpose of ascertaining whether there was any tree 50 years old on the spot in dispute. This application was not made until the re-hearing was closed, and the Judge observes that the Sheristadar and the Amshom Menon, who inspected the locality, denied the existence of such a tree, and that none of the respondents' witnesses, except one, who is discredited, referred to its existence.

We accept the finding, and must accordingly reverse the decrees of the Courts below and direct that the suit be dismissed. The plaintiffs (respondents Nos. 1 and 2) must pay the costs of appellant throughout. The other respondents, who need not have appeared but have benefited by the appeal, will bear their own costs.

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ORIGINAL CIVIL.

Before Mr. Justice Handley.

ADMINISTRATOR-GENERAL OF MADRAS (*Plaintiff*) *v.* WHITE AND OTHERS (*Defendants*).* [19th December, 1889.]

Will, construction of—Absolute gift—Repugnant gift over indefiniteness of gift—Reputed wife.

On the construction of a will which was as follows:—

"I hereby declare all former wills cancelled. I desire that my wife should "obtain possession of all my property and enjoy the benefit of all monies that "may accrue until her death, when I wish that whatever may remain shall be "used for the education of the children of the Eurasian and Anglo-Indian "community. I desire that this will be administered by the Official Trustee of "Madras:"

Held, (1) that the reputed wife should take under the will without strict proof of the marriage, no fraud being imputed to her in the matter of the marriage;

(2) that the gift to the wife was absolute and the gift over bad for repugnancy.

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* Civil Suit No. 268 of 1889.

[380] SUIT by the Administrator-General of Madras holding letters of administration (with the will annexed) to the estate of D. E. S. White, deceased, praying that the rights of the defendants under the will be declared and for directions.

The facts of this case and the arguments adduced at the hearing appear sufficiently for the purpose of this report from the judgment.

The *Advocate-General* (Hon. Mr. *Spring Branson*), for plaintiff.

Mr. *Johnstone*, for defendant No. 1.

Mr. *R. F. Grant*, for defendant No. 2.

Mr. *W. Grant*, for defendants Nos. 3 and 4.

Cur. ad. vult.

JUDGMENT.

David Emanuel Starkenburgh White, a Eurasian inhabitant of Madras, made his last will and testament, dated 18th December 1888, in the following words :—"I hereby declare all former wills cancelled. I desire that "my wife should obtain possession of all my property and enjoy the benefit "of all monies that may accrue until her death, when I wish that whatever "may remain shall be used for the education of the children of the Eurasian and Anglo-Indian community. I desire that this will be administered "by the Official Trustee of Madras."

The testator died on the 1st February 1889. The Official Trustee declined to take out probate, and letters of administration with the will annexed were granted to the Administrator-General, who brings this suit to have the rights of the parties interested declared. Defendant No. 1 is the widow and defendants Nos. 2, 3 and 4 some of the next-of-kin of the testator. The question to be determined is whether, upon the true construction of the will, the widow takes an absolute interest in the whole of the testator's property, or only a life interest followed by a gift over for the charitable purpose indicated in the will. If the latter be the true construction, the gift over fails, because the provisions of Section 105 of the Indian Succession Act as to charitable bequests were not complied with, and there is an intestacy as to the devolution of the property after the widow's death. For the widow it is argued that the words used amount to an absolute gift to her, and therefore the subsequent attempt to provide for the devolution of the property after her death is void as being repugnant to the absolute gift. For the next-of-kin the contention is that only a life interest is given to the widow coupled with a gift over to the charity, which [381] having failed by reason of non-compliance with the provisions of Section 105 of the Succession Act, the next-of-kin take on the death of the widow. I am referred to English decisions upon the subject, amongst others, for the widow to *Henderson* v. *Cross* (1), *Bowes* v. *Goslett* (2), and *Re Wilcocks' Settlement* (3), and for the next-of-kin to *Constable* v. *Bull* (4), *Bradly* v. *Westcott* (5), *Le Marchant* v. *Le Marchant* (6), *Bibbens* v. *Pottar* (7). Some of these cases are rather difficult to reconcile, but I think the general principle of construction to be deduced from these and other cases—a principle intelligible and reasonable and which this Court should follow—is that where there is a gift which upon the face of it appears to be absolute, but subsequent provisions, either of the same will or of a codicil, show an intention to cut down the interest to a

(1) 29 Beav. 216.
(2) 27 L.J. Ch. (N.S.) 249.
(3) L.R. 1 Ch. D. 229.
(4) 3 De. G. & Sm. 411.
(5) 13 Ves. 445.
(6) L.R. 18 Eq. 414.
(7) L.R. 10 Ch. D. 733.

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life interest, the Court reading the whole will or will and codicil together will allow the intention to prevail; but where there is an absolute gift in the first place and no subsequent words purporting to cut it down but provisions in favor of other objects purporting to limit or restrain the complete power of alienation or testamentary disposition of the first donee, or to compel the devolution of the property on the intestacy of the first donee otherwise than the law would prescribe, then such provisions are void as being inconsistent with and repugnant to the absolute gift to the first donee. Applying these principles to the present case, the first question to be determined is, do the words of the will purport to give an absolute interest in the property to the widow; for, if they do, there is certainly nothing in the subsequent words to cut that interest down to a life estate, and I think that they do. The wife is to obtain possession of all the testator's property and enjoy the benefit of all monies that may accrue. The property consists chiefly of money with the testator's bankers, shares in various loan societies and companies, and money on deposit with them. Possession and enjoyment of the benefit of shares and money are equivalent, I think, to absolute ownership with full power of disposal and that such was the testator's intention is further manifested by the words following "until her death when I wish that *whatever may remain*;" what can these latter words [382] refer to except to the contingency that the wife might dispose of the whole or part of the property in her lifetime. It is true that in *Constable* v. *Bull* quoted above similar words were held not to imply a power of disposal in the donee, but in that case the property consisted partly of household leases held for terms of years and the Vice-Chancellor holding that without these words the gift was only of a life interest, considered that there were several meanings capable of being rationally attributed to those words which would be inconsistent with the construction giving to the widow the power of disposing of the property.

Here I can see no other rational construction of the words, but that they refer to the widow's power of disposal in her lifetime. It was pressed upon me in argument that the words "until her death" show an intention to give only a life interest. If they stood by themselves they doubtless would do so, but they must be read with the words following "when I wish that whatever may remain," and the preceding words "my wife should obtain possession of all my property after my decease and enjoy the benefit of all monies that may accrue." That the possession which the wife was to have was not merely possession for the purpose of administration of the estate is evidenced by the fact that testator intended the estate to be administered by the Official Trustee. I come to the conclusion that testator's intention was to give his wife absolute power of disposal over his property during her lifetime, but to provide that whatever she should not dispose of in her lifetime should go for the education of the Eurasian and Anglo-Indian community. This provision being repugnant to the absolute interest in the wife previously given is void, and the wife takes an absolute interest unfettered by any limitation of her power of disposal.

The attempted disposition of "whatever may remain," would I think also be void for indefiniteness.

I find that first defendant takes under the will of the testator an absolute interest in all his property with full power of disposal and that there is no valid gift over or residuary bequest after the death of the

first defendant, and there will be a declaration to that effect. A question was raised as to the validity of the marriage of first defendant to testator as it appears she was married many years ago to a man named Jordian, who deserted her soon after the marriage and has not been heard of since. In the [383] view I take of the proper construction of the will it is necessary to consider this point. There can be no doubt that as testator's wife by repute first defendant is sufficiently indicated by the will, and the bequest to her is good in the absence of any suggestion that there was any fraud upon the testator in the matter of her former marriage. It is clear that he was fully cognizant of all the facts about it.

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The costs of all parties to be taxed as between attorney and client will come out of the estate.

Branson and *Branson*—Attorneys for plaintiff.

Carr—Attorney for defendant No. 1.

D. Grant—Attorney for defendant No. 2.

Wilson and *King*—Attorneys for defendants Nos. 3 and 4.

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ORIGINAL CIVIL.

Before Mr. Justice Shephard.

MADRAS BUILDING COMPANY (*Plaintiffs*) *v.* ROWLANDSON AND ANOTHER (*Defendants*).* [30th April, 1890.]

Transfer of Property Act.—Act IV of 1882, *Sections* 78, 101—*Priority of mortgages—Gross negligence —Extinguishment of charges—Registration Act—Act III of* 1877, *Sections* 17 (*d*), 48—*Notice by registration.*

In a suit for declaration of priorities of mortgages and for foreclosure, it appeared that the mortgage premises were mortgaged to defendant No. 2 in 1879 and to the plaintiff in 1883, and again in 1884 and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff and defendant No. 2 had no actual notice at the date of their mortgage and conveyance, respectively, of the previous incumbrances. The plaintiff received the title-deeds to the estate from the mortgagor on the execution of the mortgage of 1883; defendant No. 2 alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that previous to the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody:

Held (apart from the question whether the mortgage of 1879 had been extinguished by the conveyance of 1886), that the conduct of defendant No. 2 in [384] permitting the title-deeds to remain in the possession of the mortgagor amounted to gross negligence within the meaning of Transfer of Property Act, Section 78, and that the registration of the mortgage to defendant No. 2 did not affect the plaintiff with constructive notice of its existence, and that accordingly the subsequent mortgages to the plaintiff were entitled to priority.

[**Appr.**, 7 C.W.N. 11 (17); **R.**, 31 M. 7=17 M.L.J. 499 (500)=3 M.L.T. 87; **Cons.**, 3 Bur. L.T. 103=8 Ind. Cas. 1199.]

SUIT by the plaintiff company for a declaration of the priority of their two mortgages over a mortgage of December 1879, under which defendant

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* Civil Suit No. 8 of 1889.

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No. 2 claimed to be interested in the same premises, and for foreclosure. The mortgagor, Mrs. Anne Smith, was an insolvent, and defendant No. 1 was the Official Assignee of Madras, and, as such, assignee of her estate.

The further facts of the case appear sufficiently for the purposes of this report from the judgment.

The first five issues originally framed in this suit were as follows :—

(1) Did Mrs. Anne Smith execute to the plaintiff mortgage, and, further charge, and what is due?

(2) Had plaintiff notice of alleged mortgage of 5th December 1879 at date of execution of their mortgages?

(3) Was second defendant guilty of fraud or gross neglect in allowing Mrs. Smith to remain in possession of the title-deeds?

(4) If so, did defendant No. 2 lose his priority?

(5) Did Mrs. Smith execute in favor of second defendant mortgage of 5th December 1879?

An additional issue was framed at the hearing as to the question whether the alleged mortgage of 5th September 1879 was merged in, or extinguished by, the subsequent conveyance by the mortgagor to defendant No. 2.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and Mr. *K. Brown*, for plaintiffs.

Mr. *Norton* and Mr. *R. F. Grant*, for defendant No. 2.

Cur. ad. vult.

JUDGMENT.

This is a suit upon a mortgage, in which the defendant No. 1 is the Official Assignee, representing the estate of the mortgagor, and defendant No. 2, another mortgagee of the same property, and the question arises between the plaintiff and the defendant No. 2 which of the two mortgages is to have priority. A further question is raised by the fact that defendant No. 2, subsequently to the date of the plaintiff's mortgage, purchased the [385] property already mortgaged with him. The facts of the case, for the most part undisputed, are these. It appears that the property subject to these mortgages before 1878 belonged to a Muhammadan family. There is a Court certificate filed, in favor of two Muhammadans, dated 14th April 1874. The representatives of one of these two Muhammadans appear to have mortgaged the property on the 5th August 1876 to Agarchund, defendant No. 2. The same persons on the 16th January 1878, with the concurrence of the mortgagee, Agarchund, conveyed the property to the insolvent Anne Smith by name. The consideration for that conveyance being the amount due on the mortgage to Agarchund, and a further sum of Rs. 3,500 payable to the vendors. These three documents, the Court certificate, the mortgage to Agarchund and the conveyance to Anne Smith, together with the Collector's certificate of 1877, constituted the title-deeds at that time, and they all appear to have been handed over to Mrs. Smith in 1878. Defendant No. 2 says that Mrs. Smith executed two mortgages of the same property in his favor, one in February and the other in October. These mortgages are not proved, except by the word of defendant No. 2 and his gumastah. The documents themselves are not forthcoming. In May 1878, Mrs. Smith obtained a new certificate from the Collector; on the 5th of December 1879 she mortgaged the same property to Agarchund. That mortgage is said to have been in consolidation of the two prior mortgages of

1878; but it is noticeable that there is no recital of these prior mortgages. On the 10th of October 1883, Mrs. Smith applied to the plaintiff for a loan, and her request was complied with, and money was advanced to her in or about the month of October or later to the extent of Rs. 10,000 upon the security of a mortgage of the property. In that mortgage she purports to deal with the property as unincumbered, and she does not disclose Agarchund's mortgage of 1879. The same day the plaintiffs took a rent agreement from her. In August 1884, the plaintiff advanced a further sum of money, and a further charge was effected to secure it, and again a rent agreement was taken from the insolvent. When advancing the money on the mortgage of 1883, the plaintiffs' officers obtained from the insolvent the three title-deeds which I have already mentioned, namely, the Court certificate, the mortgage to Agarchund and the conveyance to the insolvent. No Collector's certificate was handed over to the [386] plaintiffs, and no search was made by the Company's officers in the Registration Office. In 1886 a suit was brought by Agarchund against the insolvent upon his mortgage. The suit was withdrawn on Mrs. Smith consenting to sell her property, which she did by a conveyance of the 19th August 1886. Apart from the question whether the plaintiffs had notice of Agarchund's mortgage by reason of its registration, it admitted that the plaintiff had no actual notice of Agarchund's mortgage, and it is equally admitted that Agarchund when he took this conveyance in 1886 had no notice of the plaintiffs' mortgage. These are the admitted facts of the case. It is clear from the recital that the title-deeds of the property were not in October 1883 with the person with whom they should naturally have been, namely, with Agarchund, the mortgagee, either he never obtained them when the mortgage was executed in his favor or he gave them up. The question then arises whether his conduct with reference to the title-deeds can be said to amount to fraud or gross negligence within the meaning of Section 78 of the Transfer of Property Act. If there was such fraud or gross negligence, there can be no doubt that it was in consequence of that fraud or gross negligence that the plaintiffs were induced to advance money on the security of their mortgage. Now, several cases have been cited with regard to the question of what constitutes evidence of such fraud or negligence as to deprive a first mortgagee of the priority which he ordinarily enjoys. In *Northern Counties of England Fire Insurance Company* v. *Whipp* (1), is given a summary of the law on the subject at page 494 of the report. It is there said that the authorities justify the following conclusion "that the Court will postpone the prior legal estate to a "subsequent equitable estate; whether the owner of the legal estate "has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal "estate, of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title-deeds may be, and in "some cases has been, held to be sufficient evidence, where such "conduct cannot otherwise be explained." One of the cases which that passage referred to is the case of *Hewit* and *Loosemore* (2). There the law is laid down in these terms:—"That the legal mortgage is [387] "not to be postponed to a prior equitable one upon the ground of "his not having got in the title-deeds unless there is fraud or gross "or wilful negligence on his part, and the Court will not impute fraud

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ORIGINAL CIVIL.

13 M. 383.

(1) 26 Ch. D. 482. (2) 9 Hare 449.

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"or gross or wilful negligence to the legal mortgagee if he has *bona* "*fide* inquired for the title-deeds and a reasonable excuse is given for "the non-delivery of them to him. But the Court will impute fraud "or gross or wilful negligence to the mortgagee if he omits all inquiry "as to the deeds." Now the question then is whether there has been given by Agarchund a reasonable explanation for his not having these title-deeds with him. His explanation is that he did obtain the title-deeds when his first mortgage of January 1878 was effected in his favour, but that he gave them up a month or two afterwards, in order that Mrs. Smith might obtain a Collector's certificate. He says that she required them for that purpose, and for that purpose he gave them to her. She did obtain the Collector's certificate in the month of May, and, on his asking her to give up the title-deeds which she had taken, he was told that the Collector had retained them. He got the new certificate, but he never got the title-deeds which he had given up in the early part of the year. All this happened in 1878, some months before the mortgage, now in question of 1879. As far as the mortgage of 1879 is concerned, it is admitted by Agarchund that he never had the title-deeds at all. Assuming that it is true that there were these two mortgages, of which, as I have said, there is no evidence except his own statement and that of his gumasta, and assuming that on the first mortgage being executed he obtained these title-deeds, there is no evidence whatever that he ever had the title-deeds in connection with the mortgage of 1879. It appears to me to make very little difference whether the case is one of a man who never had the title-deeds or a man who had them and subsequently gave them up. In either case he has to show some reasonable excuse for his conduct. I must find that the explanation given is not a reasonable one and that the defendant No. 2 has failed to show them that he *bona fide* made inquiries for the title-deeds and that a reasonable excuse for not delivering these to him was given to him. It appears to me absurd to suppose that defendant No. 2, an experienced sowcar, can really have believed Mrs. Smith when she told him, if she ever did tell him, that the Collector was in the habit of retaining the title-deeds which had been lodged with him for the purpose of issuing a new certificate. [388] I am, therefore, of opinion that Agarchund has failed to explain satisfactorily his conduct with reference to these title-deeds, and on the authority of the cases I have cited, I must find that he has been guilty of such fraud or gross negligence as to entitle the plaintiffs to the benefit of Section 78 of the Transfer of Property Act.

But another question has been raised by the defendant. It is said that the plaintiffs had notice of the prior mortgage of Agarchund. If that notice was proved as a matter of fact, I apprehend there can be no doubt that Section 78 would have no application. It is not proved as a matter of fact, but it is argued that notice is to be assumed because the prior mortgage to Agarchund was registered and might have been discovered by the plaintiff's officers had they taken the trouble to make a search. It is contended as a matter of law that the registration of a document conveys a notice to all subsequent purchasers and reliance is placed on the authority of some Bombay cases, and also on some observations made in the case of *Kettlewell* v. *Watson*(1). Now as regards the Bombay cases, I am of opinion that they do not justify me in holding that such effect ought to be given to registration. Professedly the opinion of the Bombay High Court in *Lakshmandas Sarupchand* v. *Dasrat* (2) is

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(1) 21 Ch. D. 685. (2) 6 B. 168.

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founded on its own judgments and on the doctrine obtaining in America only. It is admitted that neither in England nor in Ireland is it held that mere registration can amount to notice to subsequent purchasers. Besides the authority of these and other cases referred to in the judgment, there is, as far as I have learnt, no authority in this country to the effect that registration operates to give notice to subsequent purchasers. This absence of authority appears to me a strong indication that the doctrine does not obtain here, and there is further a negative authority on the point in the case referred to in the arguments of *Madras Hindu Union Bank* v. *Venkatrangiah* (1), in which the prior document was registered, and yet no point with regard to notice was taken. The case of *Kettlewell* v. *Watson* (2)—I am also of opinion has no application to the present facts. That is a case in which the contest was not between the legal mortgagee and a later mortgagee, but between two persons having merely equitable titles. In that state of things mere negligence on the **[389]** part of one or the other would have the effect of turning the scale against him. It may well be that here in a like case, for instance, supposing the contest to be between one claiming a lien for unpaid purchase money and an equitable mortgagee, omission to search the register would be imputed as negligence with the consequence of postponing the claim of the party guilty of it, but it does not follow that the party guilty of such omission can be treated as having had notice and therefore precluded from asserting the priority to which he is otherwise entitled. For these reasons I must decline to hold that in point of law the plaintiff had notice of Agarchund's mortgage of 1879.

It is unnecessary to express any opinion on the additional issue with regard to which the contention on the part of the plaintiffs was that inasmuch as Agarchund when taking the conveyance was unaware of the plaintiff's mortgage and hopeless of realizing his money by his own mortgage, no other intention could be attributed to him than that of extinguishing his mortgage. The question must be taken on the construction of the last words of Section 101 of the Transfer of Property Act, and I would only observe that if those words demand the adoption of the plaintiff's contention, it would seem to follow that a purchaser without notice is now in the position occupied by a purchaser with notice under the rule in *Toulmin* v. *Steere* (3), or in a less favorable position than such purchaser. In my opinion the plaintiffs are entitled to a finding in their favor on the 1st, 2nd, 3rd and 4th issues and consequently to a decree in the terms of the plaint. Defendant No. 2 must pay the plaintiffs' costs.

Branson & Branson, Attorneys for plaintiffs.

Champion & Short, Attorneys for defendant No. 2.

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(1) 12 M, 424, (428). (2) 21 Ch. D. 685. (3) 3 Mer. 210.

1890
APRIL 24.

PRIVY COUNCIL.

13 M. 390 (P.C.) = 5 Sar. P.C.J. 584.

13 M. 390 (P.C.) = 5 Sar. P.C.J. 584.

[390] PRIVY COUNCIL.

PRESENT :

Lord Macnaghten, Sir Barnes Peacock, and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

Ex parte, RANI MATHUSRI JIJAI AMBA AND OTHERS, *Petitioners.* [24th April, 1890.]

Discretionary refusal to remove a Receiver and Manager of the Estate of Hindu widows.

Rights and proceedings rendering a Court's order, refusing to remove an appointed Receiver and Manager of the estate, of which the widowed Ranis of the late Maharaja of Tanjore had become possessed by grant from the Government, entirely a matter for the discretion of the Court, which had exercised its discretion soundly.

APPEAL from an order (17th February 1888) of the High Court, affirming an order (13th September 1887) of the District Judge of Tanjore.

A Divisional Bench of the High Court (COLLINS, C.J., and PARKER, J.) made the above order on the petition filed in the Original Court on 24th August 1887, by the surviving widows of the last Maharaja of Tanjore, they having been parties to a decree in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (1). That decree (8th May 1868) declared "that the permanent appointment of a Receiver and Manager of the property was "necessary;" and directed "that the Collector, if possible, should be continued as Receiver and Manager"; that, if such was not practicable, the Civil Court of Tanjore should appoint a Receiver and Manager after taking proper security, and "from time to time make fresh appointments during the lives of the widows and the survivors or survivor of "them, or until it shall be considered by the Civil Court that a Receiver "and Manager is no longer necessary."

The reason given in the order from which this appeal was preferred was thus given :—"The decree clearly contemplates that the Receiver "shall be permanent during the lives of the widows, and the survivors, "or survivor, of them; and having regard to the history of the litigation, "the nature of the property, and the [391] circumstances of the family, "we are clearly of opinion that the District Judge exercised a right discretion in refusing this application."

All the parties having joined in applying for a certificate under Section 602, Civil Procedure, the same Judges recorded their reasons, more fully, as follows :—

"As the surviving Ranis are the only persons at present entitled to participative enjoyment of the estate, and as all have united in this application, we think that there is a substantial question of law which will admit of an appeal to the Privy Council within the meaning of Section 596 of the Civil Procedure Code, but we think it right to place on record our reasons for holding that the District Judge exercised a sound discretion in refusing to grant the prayer for the removal of the Receiver.

"The circumstances of the litigation which led to the appointment of a Receiver are fully reported in the third volume of the Madras High

(1) 3 M. H. C. R. 424. The estate of the last Maharaja of Tanjore came into the possession of the E.I. Company by an act of State in 1856. *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 7 M.I.A. 476.

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Court Reports, pp. 424-455. The property in question was seized by Government at the annexation of the Tanjore State, not under colour of any legal title, but by the forcible exercise of Sovereign power. It was afterwards transferred to the senior widow by order of Government, dated 21st August 1862, as a matter of grace and favour. The order after making over the management and control to Her Highness went on to state:—'It 'will be her duty to provide in a suitable manner for the participative 'enjoyment of the estate in question by the other widows, her co-heirs. 'On the death of the last surviving widow, the daughter of the late Raja 'or, failing her, the next heirs of the late Raja, if any, will inherit the 'property.'

"Within four years of the transfer of this estate to the senior widow this suit was brought by two of the junior Ranis. They complained of various acts done by the senior widow in detriment of their rights, and more especially that she had, without their consent, adopted a boy as the son of the late Raja, to whose possession she had transferred or was about to transfer the whole property. That son was included as the fourteenth defendant, and the first defendant alleged that she herself and all the other Ranis were entitled only to receive maintenance from him.

"The Court held that the evidence as to the senior widow's management of the estate since it had been under her charge showed 'reckless dealing with the property and the lavish **[392]** expenditure of 'large sums for purposes of which the accounts afford no satisfactory ex'planation. Not only has the large sum of ready money received from the 'Government and the whole proceeds of the immoveable property been 'dissipated, but a considerable portion of the moveable property itself has 'been got rid of and debts to a considerable amount been left unpaid. We 'are at the same time of opinion that it would be most imprudent to 'entrust the management of the property to the second defendant or to 'either of the other junior widows. Little, if anything, we are sure, would 'be gained as respects the care and preservation of the property, and there 'would very soon be violent disputes and further litigation. It appears to 'us to be absolutely necessary that the estate should remain in the custody 'and under the control and direction of a competent Receiver and Mana'ger appointed from time to time by the Civil Court and invested with 'general powers for the management and regulation of the property and 'its enjoyment, and the application of the rents and profits. The Collector 'is at present the appointed Receiver, and there is no doubt that it is of 'the very greatest advantage to the estate and the parties interested that 'he should continue to act as Receiver and Manager, as we trust he will 'be able to do. The continuance of his appointment will therefore be 'decreed; but should it be necessary, the Civil Judge must appoint a fit 'and proper person in the Collector's place, taking sufficient security for 'the discharge of his duties and fixing a fair and reasonable remuneration 'for his services.'

"The High Court in the view that it took of the case found it unnecessary to raise an issue as to the validity of the alleged adoption of the fourteenth defendant, observing that 'if found to be valid (a result at 'present very problematic), his present claim by right of adoption being 'as lineal heir of the Raja in preference to the widows would not be 'maintainable. To that claim the absolute ownership of the Government 'in the interval between the death of the Raja until the act of State by 'which the transfer was made to the widows and daughter is, we think, 'fatal,' see 5 Mad. H.C. Rep., p. 455.

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"More than twenty years have passed since that decree, and we are of opinion that the same reasons which in 1868 made the appointment of a Receiver imperatively necessary still exist in all [393] their force. Old age and twenty years more of that seclusion which is the lot of ladies of exalted rank in this country can hardly have made their Highnesses better fitted for the management of an estate whose annual income is more than $1\frac{1}{2}$ lakhs of rupees and which was valued in 1868 as worth about 68 lakhs of rupees (the moveable property in jewels and cash alone being worth nearly 20 lakhs). If given back at all, the chief management would, under the terms of the Government order, vest in the senior widow,—a lady now over 70 years of age and who twenty-four years ago, on 5th January 1864, intimated to the then Civil Judge of Tanjore that she had formed the resolution of withdrawing from all worldly transactions and transient pleasures and resolved from that moment to lead a life of seclusion, &c.,' see 3 Mad. H.C Rep., p. 437.

"For more than twenty years this decree has secured the estate and these ladies immunity from litigation,—but, at the death of the last surviving widow, the Government order vests the estate in the daughter of the late Raja, or failing her, in the next heirs of the late Raja, if any."

The Judges concluded by adverting to the probability of future litigation if the management of the property should be restored to the widows.

On this appeal,

Mr. *J. D. Mayne* appeared for the appellants.

His argument was that under the Proceedings of the Madras Government of 21st August 1862, printed in the report of *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (1), and the construction put upon it in the judgment in the latter suit, the property vested in the Ranis for the estates of Hindu widows. They, thereby, became full owners, and represented the estate, subject to the legal restrictions upon their disposing of the property. One of the incidents of a widow's estate was a right to management. Of this she could only be deprived on the objection of some one interested in the good management of the property; but no such objection was made here. The present application was supported by all who had a vested interest in the estate. The Receiver had been appointed in consequence of the proceedings in a suit which had come to an end.

[394] Their Lordships' judgment was delivered by SIR BARNES PEACOCK.

JUDGMENT.

Their Lordships are of opinion that it was entirely a matter of discretion with the Court as to the removal of the Receiver, and, looking to the case, their Lordships think that the Court have exercised a very sound discretion in not removing him. They will therefore humbly advise Her Majesty to dismiss this appeal.

Solicitors for the appellants: Messrs. *Lawford*, *Waterhouse*, and *Lawford*.

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(1) 3 M H.C.R. 424 (428).

13 M. 394.

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APPELLATE CIVIL.

13 M. 394.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

HALL AND OTHERS (*Defendants*), *Appellants v.* VENKATAKRISHNA (*Plaintiff*), *Respondent.**
[13th February and 3rd April, 1889, and 17th March, 1890.]

Malicious prosecution—Matters in issue—Burden of proof.

In a suit for damages for malicious prosecution it was found that the charge brought by the defendant against the plaintiff was unfounded, and that it was brought without probable cause:

Held, that the absence of probable cause did not imply malice in law, and that on the failure of the plaintiff to prove that the defendant did not honestly believe in the charge brought by him, the suit should have been dismissed.

[F., 24 M. 549 (552); Appr., 19 B. 717 (721); R., 28 B. 226 (229); 26 M. 506 (507); 6 Bom. L.R. 131 (157), 6 Bom. L.R. 704 (717); 12 C.P L.R. 24; 112 P.R. 1901=176 P L.R. 1901; U.B.R. (1897—1901) 484.]

SECOND appeal against the decree of V. Srinivasacharlu, Subordinate Judge of Cocanada, in appeal suit No. 452 of 1887, confirming the decree of L. Narayana Row, District Munsif of Rajahmundry, in original suit No. 67 of 1887.

The District Munsif passed a decree for the plaintiff, which was confirmed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. *Michell*, for appellants.

Mahadeva Ayyar, for respondent.

The facts of this case appear sufficiently for the purposes of this report from the

JUDGMENT.

The appellants are merchants carrying on business at Cocanada on their own account and as agents of Messrs. **[395]** Arbuthnot and Company of Madras. In payment of a debt due to them by one Butchi Ramesam they took over the unexpired portion of a lease which he had in regard to certain lankas or islands in the Godavari, and the respondent was a tanadar on the establishment entertained by them for the purpose of collecting rents due to them under the lease. Mr. Macnab, a member of the appellants' firm, charged the respondent and two others before the Joint Magistrate of the Godavari district with having misappropriated Rs. 309-4-3 out of the collections made for them in fasli 1294. After hearing the complainant and his witnesses, the Joint Magistrate discharged the accused, as he was of opinion that there were no grounds for putting them on their defence. The complaint not being since revived, the respondent sued the appellants for damages and claimed Rs. 200 as compensation due for the false and malicious prosecution which he said they had instituted against him. They contended that they acted *bona fide*, and also pleaded to the jurisdiction of the District Munsif at Rajahmundry, and that the claim was barred by limitation. Both the Courts below decreed the claim and disallowed the appellants' pleas. Hence this second appeal.

The preliminary objections taken in the Courts below are again urged before us, and we shall deal with them first. The respondent brought

* Second Appeal No. 1300 of 1888.

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this suit first in the Subordinate Court at Cocanada on the Small Cause Side, and it is conceded that it was brought in time. But the Subordinate Court held that it had no jurisdiction and returned the plaint for presentation to the Court of competent jurisdiction. The suit was then filed in the Court of the District Munsif of Rajahmundry, and it is not shown that the suit would be barred by limitation if the time during which it was pending in the Subordinate Court were deducted. We see no reason to doubt that the suit was first brought in the Subordinate Court under a *bona fide* mistake as to the Court of competent jurisdiction, and that the respondent was entitled to rely on Section 14 of the Act of Limitations. We are also of opinion that the conclusion arrived at by the Lower Court on the question of jurisdiction is correct. The appellants' counsel urged that there was no evidence that any member of the appellants' firm other than Mr. Macnab was responsible for the respondent's prosecution; but this contention, which is at variance with the admission made in their written statement, cannot be supported. The substantial question, however, **[396]** for decision is whether the Courts below have rightly apprehended what the respondent is bound to show in support of his claim, and tried it in accordance with law. The Subordinate Judge observes: "There "was thus no reasonable and probable cause for making this prosecution, "and especially so against the plaintiff, and this clearly imports malice in "law even if there was no proof of actual malice." Again, the District Munsif states the law in somewhat similar terms: "Want of probable "cause, therefore, implies malice, and the burden is shifted to the "defendants to prove that there was probable cause for the prosecu-"tion." After referring to certain dissensions in order to account for the prosecution, the District Munsif observes: "Mr. Macnab believed all "that was reported to him and hurried the proceedings without proper "inquiry. Not a single witness in this case would say that Mr. Macnab "inquired of him about the truth of the charges. He made no inquiry "whatever, and is much to blame for his hastiness." In advertence to the same point, the Subordinate Judge remarks that: "Ramesam Surai-"ya and Viraragavulu bore personal ill-will to Bhashiyacharlu, that "they were the trusted agents of Mr. Macnab, and employed by him to "fish out information against Bhashiyacharlu when he went to inquire "about his conduct in consequence of some anonymous petition received "by him. No case could be concocted against Bhashiyacharlu alone, "and some one else needed to be connected with him, and as the plaint-"iff would not agree to give any evidence against Bhashiyacharlu, he "(plaintiff) was associated with him as a delinquent." The facts found "by the Courts below are that the charge brought against the respondent was not true, that he showed that there was no probable cause for it, that it was not necessary for him to prove more, that two persons who bore personal ill-will to Bhashiyacharlu gave false information to Mr. Macnab, that he hastily accepted it as correct without proper inquiry, that the respondent was charged because he gave no information against Bhashiyacharlu, and that, as the absence of probable cause implied malice in law, the respondent was entitled to a decree. We are unable to say that the law applicable to the case has been correctly understood. In *Abrath* v. *North Eastern Railway Company* (1), the legal import of reasonable and probable **[397]** cause and the law as to burden of proof in suits of the kind now before us were explained by Cave, J., in his

(1) L.R. 11 App. Cas. 247.

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lucid charge to the Jury. That learned Judge said: "It was for the plaintiff "to establish a want of reasonable and probable cause and malice," and then proceeded as follows: "I think the material thing for you to "examine about is, whether the defendants in this particular case took "reasonable care to inform themselves of the true facts of the case. "That, I think, will be the first question you will have to ask yourselves— "did they take reasonable care to inform themselves of the true facts "of the case? Because, if people take reasonable care to inform them-"selves, and notwithstanding all they do they are misled, because people "are wicked enough to give false evidence, nevertheless they cannot be "said to have acted without reasonable and probable cause; with "regard to this question, you must bear in mind that it lies on the "plaintiff to prove that the Railway Company did not take reasonable "care to inform themselves. The meaning of that is, if you are not satis-"fied whether they did or not, inasmuch as the plaintiff is bound to satisfy "you that they did not, the Railway Company would be entitled to your "verdict on that point. Then there is another point, and that is, when "they went before the Magistrates, did they honestly believe in the case "which they laid before the Magistrates? If I go before Magistrates "with a case which appears to be good on the face of it, and satisfy the "Magistrates that there ought to be a further investigation, while all "the time I know that the charge is groundless, then I should not have "reasonable and probable cause for the prosecution. Therefore, I shall "have to ask you that question along with the others, and according as "you find one way or the other, then I shall tell you presently, or I shall "direct you, whether there was or was not reasonable and probable cause "for this prosecution. If you come to the conclusion that there was "reasonable and probable cause, or rather that those two questions should "be answered in the affirmative, that is, that the defendants did take care "to inform themselves of the facts of the case, and they did honestly "believe in the case which they laid before the Justices, then I shall tell "you, in point of law, that this amounts to reasonable and probable cause, "and in that case the defendants will be entitled to your verdict; if, on the "other hand, you come to the negative conclusion, if you think that the "defendants [398] did not take reasonable care to inform themselves of the "facts of the case, or that they did not honestly believe the case which "they laid before the Magistrates, then in either of those cases you will "have to ask yourselves this further question, were they in what they did "actuated by malice, that is to say, were they actuated by some motive "other than an honest desire to bring a man whom they believed to have "offended against the criminal law to justice? If you come to the conclu-"sion that they did honestly believe that, then they are entitled again to "your verdict; but if you come to the conclusion that they did not honestly "believe that, but that they were actuated by some indirect motive other "than a sincere wish to bring a supposed guilty man to justice, then the "plaintiff is entitled to your verdict, and then it will become necessary to "consider the question of damages."

As pointed out by Lord Justice Bowen, "the plaintiff in an action "for malicious prosecution has to prove, first, that he was innocent, and "that his innocence was pronounced by the tribunal before which the "accusation was made; secondly, that there was want of reasonable and "probable cause for the prosecution, or, as may be otherwise stated, that "the circumstances of the case were such as to be in the eyes of the Judge "inconsistent with the existence of reasonable and probable cause; and,

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"lastly, that the proceedings of which he complains were initiated in a "malicious spirit, that is, from an indirect and improper motive, and not "in furtherance of justice. All those three propositions, the plaintiff has "to make out, and if any step is necessary to make out any one of those "three propositions, the burden of making good that step rests upon the "plaintiff. I think that the whole of the fallacy of the argument address-"ed to us, lies in a misconception of what the learned Judge really did "say at the trial, and in a misconception of the sense in which the term "'burden of proof' was used by him. Whenever litigation exists, some-"body must go on with it; the plaintiff is the first to begin; if he does "nothing, he fails; if he makes a *prima facie* case and nothing is done to "answer it, the defendant fails. The test, therefore, as to the burden of "proof or onus of proof, whichever term is used, is simply this, to ask "oneself which party will be successful if no evidence is given, or if no "more evidence is given than has been given at a particular point of the "case, for it is obvious that as the con-[399]troversy involved in the "litigation travels on, the parties from moment to moment may reach "points at which the onus of proof shifts, and at which the tribunal will "have to say that if the case stops there, it must be decided in a "particular manner. The test being such as I have stated it is not a "burden that goes on for ever resting on the shoulders of the person "upon whom it is first cast. As soon as he brings evidence which, until "it is answered, rebuts the evidence against which he is contending, "then the balance descends on the other side, and the burden rolls "over until again there is evidence which once more turns the scale. "That being so, the question of onus of proof is only a rule for deciding "on whom the obligation of going further, if he wishes to win, rests. "It is not a rule to enable the Jury to decide on the value of conflicting "evidence. So soon as a conflict of evidence arises, it ceases to be a "question of onus of proof. There is another point which must be cleared "in order to make plain what I am about to say. As causes are tried, the "term 'onus of proof' may be used in more ways than one. Sometimes "when a cause is tried the Jury is left to find generally for either the "plaintiff or the defendant, and it is in such a case essential that the "Judge should tell the Jury on whom the burden of making out the case "rests, and when and at what period it shifts. Issues again may be left "to the Jury upon which they are to find generally for the plaintiff or the "defendant, and they ought to be told on whom the burden of proof rests; "and indeed it is to be observed that very often the burden of proof will be "shifted within the scope of a particular issue by presumptions of law "which have to be explained to the Jury. But there is another "way of conducting a trial at Nisi Prius, which is by asking certain "definite questions of the Jury. If there is a conflict of evidence as to "these questions, it is unnecessary, except for the purpose of making plain "what the Judge is doing, to explain to the Jury about onus of proof, unless "there are presumptions of law, such as, for instance, the presumption of "consideration for a bill of exchange, or a presumption of consideration for "a deed. And if the Jury is asked by the Judge a plain question, as, for "instance, whether they believe or disbelieve the principal witness called "for the plaintiff, it is unnecessary to explain to them about the onus of "proof, because the only answer which they have to give is Yes or No, or "else they cannot tell what to say. If the [400] Jury cannot make up "their minds upon a question of that kind, it is for the Judge to say "which party is entitled to the verdict. I do not forget that there are

"canons which are useful to a Judge in commenting upon evidence and "rules for determining the weight of conflicting evidence; but they are "not the same as onus of proof. Now in an action for malicious "prosecution the plaintiff has the burden throughout of establishing that "the circumstances of the prosecution were such that a Judge can "see no reasonable or probable cause for instituting it. In one sense "that is the assertion of a negative, and we have been pressed with the "proposition that when a negative is to be made out the onus of proof "shifts. That is not so. If the assertion of a negative is an essential "part of the plaintiff's case, the proof of the assertion still rests upon the "plaintiff. The terms 'negative' and 'affirmative' are after all relative "and not absolute. In dealing with a question of negligence that term "may be considered either as negative or affirmative according to the "definition adopted in measuring the duty which is neglected. Wherever "a person asserts affirmatively as part of his case that a certain state of "facts is present or is absent or that a particular thing is insufficient for "a particular purpose, that is an averment which he is bound to prove "positively. It has been said that an exception exists in those cases "where the facts lie peculiarly within the knowledge of the opposite party. "The counsel for the plaintiff have not gone the length of contending "that in all those cases the onus shifts, and that the person within whose "knowledge the truth peculiarly lies is bound to prove or disprove the "matter in dispute. I think a proposition of that kind cannot be main-"tained, and the exceptions supposed to be found amongst cases relating "to the game laws may be explained on special grounds."

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On appeal to the House of Lords the direction of the Judge to the Jury was held to be right. Lord Bramwell said: "To maintain an "action for a malicious prosecution, it must be shown that there was an "absence of reasonable and probable cause and that there was malice or "some indirect and illegitimate motive for the prosecution"—*Abrath* v. *North Eastern Railway Company* (1).

The Subordinate Judge was in error in holding that it was sufficient for the plaintiff to prove absence of probable cause, for **[401]** the essence of the wrong consists in putting the criminal law into motion without reasonable cause against an innocent person from malice or some indirect and illegitimate motive. The question for decision was not simply whether Mr. Macnab used proper care to inform himself of the facts, but also whether he honestly believed the case which he laid before the Magistrate. Again, it is not correct to say that the burden of proof lies only in part on the plaintiff, for, as already explained, the burden of proving both the propositions rests on him. Moreover the Subordinate Judge observes that the agents employed by Mr. Macnab included the plaintiff among the accused, not because he was considered to be guilty, but because he was reluctant to give information against Bhashiyacharlu and that Mr. Macnab was responsible for it. There is no distinct finding that Mr. Macnab was aware that his informants gave information from such motive, or that he was influenced by such motive in instituting the prosecution against the accused. Though there is a finding that Mr. Macnab did not use proper care to inform himself of the facts, there is no finding as to whether he honestly believed the case which he laid before the Magistrate. We shall therefore direct the Subordinate Judge to return a finding on that question after considering the evidence on record

(1) L.R. 11 App. Cas. 247 (251).

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with reference to the foregoing observations. The finding will be returned within six weeks after the re-opening of the Court, and seven days after the posting of the finding in this Court will be allowed for filing objections.

[The finding recorded in compliance with the above order was to the effect that Mr. Macnab did honestly believe the case which he laid before the Magistrate.

The second appeal having come on for final hearing their Lordships reversed the decrees of the Lower Courts and dismissed the suits with costs throughout.]

Barclay & Morgan, appellants' attorneys.

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13 M. 402.

[402] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Handley.

VEDAPURATTI (*Defendant No.* 1), *Appellant v.* VALLABHA (*Plaintiff*), *Respondent.** [24th March and 1st April, 1890.]

Limitation—Adverse possession—Suit by a trustee of a devasom disaffirming the act of his predecessor.

The trustee of a Malabar devasom, who had succeeded to his office in June 1883, sued in 1887 to recover for the devasom possession of land which had been demised on kanom by his predecessor in February 1881, on the ground that the demise was invalid as against the devasom. The defendant had been in possession of the land for more than twelve years, falsely asserting the title of kanomdar with the permission of the plaintiff's predecessor in office:

Held, (1) the suit was not barred by limitation;

(2) the plaintiff was entitled to maintain the suit for the purpose of recovering for the trusts of the devasom property improperly alienated by his predecessor. *Suppammal* v. *The Collector of Tanjore* (I.L.R., 12 Mad., 387) distinguished.

[R., 16 C.L.J. 349 = 17 C.W.N. 873 (875) = 16 Ind. Cas. 927; 6 M.L.J. 270 (271); 9 M.L.J. 93 (97).]

SECOND appeal against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 723 of 1888, confirming the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 11 of 1887.

Suit in 1887 by the *udama* of a devasom to recover possession of certain land with mesne profits.

The plaintiff's case was that the land in question was the jenm property of the devasom, which was attached to his stanom; that he succeeded to the stanom on 24th June 1883; that in December 1884 he first came to know of a demise on kanom of the land in question by his predecessor in office to defendant No. 1 and another dated 25th February 1881; that the demise was invalid as against the devasom; and that he had demanded possession of the land, but it had been refused.

The case for defendant No. 1 was that the demise of February 1881 was valid, being a consolidation of various other kanoms under which she had been in possession for more than twelve years: limitation was also pleaded.

[403] The District Munsif passed a decree for the plaintiff, which was confirmed on appeal by the District Judge.

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* Second Appeal No. 1043 of 1889.

Defendant No. 1 preferred this second appeal.
Subramanya Ayyar and *Sundara Ayyar*, for appellant.
Sankaran Nayar, for respondent.

JUDGMENT.

The contention first raised on behalf of the defendant (appellant) was that the suit, being a suit in ejectment, was barred by limitation, inasmuch as it was shown that for many years previously to the kanom of 1881, from the date of which only the plaint avers that the defendant was in possession, she was in possession asserting a kanom title to the same land.

The defendant's case was that the kanom of 1881 was given by the plaintiff's predecessor in the stanom by way of consolidation of previously existing kanoms, and it appears to have been found that for some years the defendant had been in possession by means of tenants to whom she had represented herself as kanomdar. Both Courts, however, find that there were no such prior kanoms and that the kanom of 1881 was therefore a mere fraud on the stanom. On this state of facts it is argued that the defendant is entitled to assert that her possession, based on an asserted, though groundless, title, was adverse to the plaintiff and his predecessor, and that the suit ought therefore to have been dismissed as barred by limitation, and we are referred to *Madhava* v. *Narayana* (1), to which also the District Judge refers. In our opinion that case is entirely distinguishable from the present. In that case there was an actual kanom granted by the plaintiff's father, which, however, was invalid against the plaintiff. It was held that the kanomdar's possession having remained unquestioned for more than twelve years was adverse, and that a suit for ejectment therefore would not lie. In the present case there was the mere assertion of a kanom which is found to have had no existence, and it does not appear that the defendant's possession as against the plaintiff's predecessor was referable to the alleged kanom. On the contrary, the finding is that the defendant, being a member of the kovilagom to which the stanis, with one exception, for a considerable time back have belonged, were allowed to occupy the land belonging to the stanom. Under these circumstances, the fact that in dealing with their tenants the defendants **[404]** made a pretence of holding kanoms cannot alter the character of their possession. We see nothing inconsistent in the findings, and, on the other hand, it is consistent with probability that the plaintiff's predecessor should, after allowing the defendants to occupy the lands, have endeavoured to secure them in their possession by a kanom.

In this view of the facts it becomes unnecessary to consider the applicability of Section 10 of the Indian Limitation Act, for which Mr. Sankaran Nayar argued on the strength of the decision of this Court in *Mundakkel Govinda Paniker* v. *Zamorin of Calicut* (2).

A further contention raised on behalf of the appellant was that the plaintiff, being the trustee of a devasom, was bound by the act of his predecessor, and therefore could not maintain the suit, and reliance was placed on a case decided in this Court, *Suppammal* v. *The Collector of Tanjore* (3). According to this contention, while it was conceded that the suit, if brought to recover stanom property, would be maintainable, it was urged that the plaintiff, being a mere trustee, could have no other or greater right than his predecessor in the trust, and that, if any action was

(1) 9 M, 244. (2) S.A. No. 332 of 1881, unreported. (3) 12 M. 387.

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maintainable, it should be at the suit of a beneficiary and not of the present plaintiff. There can be no doubt that the holder of a stanom has a life-interest only in the property attached to it, and that any alienation by him of that property, if not made under justifying necessity, may be set aside at the suit of his successor, subject, of course, to the rules of limitation, see *Mana Vikraman* v. *Sundaram Pattar* (1).

In our opinion it is equally clear that the present suit is maintainable if the property sought to be recovered is property dedicated to religious purposes. Such property is, as a general rule, inalienable, and although, for some purposes, the manager or trustee for the time being represents the estate, it has never been doubted that his successor in office may recover for the trust property improperly alienated by him. He may insist on the restoration of the property to its intended uses. The judgment in *Mundakkel Govinda Paniker* v. *Zamorin of Calicut* (2) is sufficient authority for this proposition.

[405] In our opinion the decision in *Suppammal* v. *Collector of Tanjore*, (3) does not trench upon this principle. In that case the plaintiff, widow of one Ponnusami, sought to recover certain property alleged to be dedicated to charitable purposes, representing herself to be the person entitled to maintain the charities. The property was in the hands of purchasers who had acquired it on sales in execution of decrees obtained against the late Ponnusami and his brother. All that was decided was that the plaintiff, as heir of Ponnusami, was bound by those sales and could not be permitted to say that her interest in the property had not passed. There was no question in that case of recovering the property for the charity, for the defendants were holding it subject to the charges imposed upon it by Ponnusami. It was the right of management and the incidental right of enjoying the surplus profits, which, by the grant, had been reserved to Ponnusami and his heirs, that the plaintiff sought to recover, and it was never suggested on the plaintiff's behalf that the property had, by virtue of the declaration of trust, become inalienable as a religious endowment in the hands of Ponnusami. In our opinion the decision has no bearing on a case like the present, in which it is assumed, for the purpose of the defendant's case, that the property forms part of a religious endowment, and is, as such, sought to be recovered by the new trustee or manager.

Whether the property is of that charactar, or whether it is simply property of the stanom, we think the plaintiff can maintain the suit, and we therefore dismiss this second appeal with costs.

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(1) 4 M. 148. (2) S.A. No. 332 of 1881, unreported. (3) 12 M. 387.

13 M. 406 (P.C.) = 17 I.A. 134 = 5 Sar. P.C.J. 547.

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[406] PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Sir Barnes Peacock, and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

SRIMANTU RAJA YARLAGADDU MALLIKARJANA (*Defendant*) v. SRIMANTA RAJA YARLAGADDA DURGA (*Plaintiff*) AND ANOTHER (*Co-Defendant*). [5th, 6th, 7th, 8th March and 1st May, 1890.]

Impartibility of zemindari shown by evidence—Grant by sanad in 1802 *of zemindari without change of rule of succession by primogeniture—Madras Regulation XXV of* 1802.

The question whether an estate is impartible and descends by the law of primogeniture, or is subject to the ordinary Hindu law of inheritance, must be decided in each case according to the evidence given in it. The result of the evidence in this suit was to show that before, and in, the year 1802, the zemindar was in possession of the Devarakota zemindari, by right of primogeniture, as an impartible estate; and that he was so regarded by the Government.

On the passing of Madras Regulation XXV of 1802, and the issue to him of a sanad-i-milkiyat-i-istimrari, in accordance with it, he acquired a permanent property in the zemindari lands at a fixed assessment, but they remained heritable as before; the estate remained entire; and there was no evidence of any intention on the part of the Government to alter the nature of the tenure. What was said in the judgment in the *Hansapur case* (1) was applicable here. The estate continued to be impartible, and the rule of succession to it was not altered. It descended by the rule of primogeniture.

[F., 28 M. 508 (515) (P.C.) = 2 A.L.J. 845 = 7 Bom. L.R. 907 = 2 C.L.J. 231 = 10 C.W.N. 95 = 32 I.A. 261 = 15 M.L.J. 312 = 8 Sar. P.C.J. 855 = 1 M.L.T. 12; 29 M. 437 (442) = 16 M.L.J. 178; R., 16 M. 54; 24 M. 562 (604) = 11 M.L.J. 191; 27 M. 153.]

APPEAL from a decree (18th August 1885) of the High Court at Madras, reversing a decree (30th September 1882) of the District Judge of Kistna.

The parties to this appeal were the three sons of Raja Ankinidu Garu, the last Zemindar of Devarakota in the Kistna district, who died on the 6th April 1875. The appellant, his eldest son, Mallikarjuna, was the first and principal defendant in the suit, which was brought by his younger brother, Yarlagadda Durga Prasada, claiming that he and another brother, Venkataramalinga, who was joined as a defendant, were each entitled to a one-third share. [407] And the question was whether the zemindari was partible or impartible, the lower Courts having differed on the point.

Devarakota was one of the zemindaries making up the district of Condapillee, one of the Northern Circars. The history of the latter is given in Grant's Political Survey, which forms one of the appendices to the fifth report of the Select Committee (1812) on the affairs of the East India Company. The Circars originally were part of the dominions of the Hindu Rajas in Southern India. Afterwards they were acquired by the Muhammadans of the dynasty founded by Sultan Kuli Kutub Shah in 1571, called the Kutubshahi. In 1687, when the last of this race was subdued by Aurangzeb, also named Alam Gir, the Northern Circars were

(1) *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M.I.A. 1.

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taken by him. In 1724 the Nizam-ul-Mulk became the ruler of this district, nominally on account of the Delhi Emperor, but in reality as an independent ruler. His Amildar, Rustum Khan, administered the government of these districts for about seven years from 1732, breaking up the zemindari system which he found established, and bringing in another of his own. After his time the descendants of the former zemindars regained their proprietary rights.

In 1753 the French under Bussy obtained an assignment of the Northern Circars from the Nizam. They suspended the zemindars from their functions as representatives of the sovereign, but left them in the enjoyment of savarams and such other privileges as they possessed in connection with their zemindari estates. Their military duties were also enforced as before. In 1759 the conquest of Masulipatam by the English put an end to the French administration, and for a period of seven years, any authority which existed was exercised in the name of the Nizam, and especially by his Amildar, Hussein Ali Khan. Under his administration the zemindars appear to have resumed their former authority. This state of things was terminated in 1766, when the Nizam, by treaty with Lord Clive, confirmed the grant of these Circars to the East India Company, which had been made by the Mogul Emperor in the previous year. The British continued the zemindari system, which they found in existence, making settlements of the revenue with the zemindars, first from year to year, afterwards for longer periods, until at length the permanent settlement was introduced in 1802 under the Madras Regulation XXV of that year.

[408] In 1766 Clive who had procured a sanad from the Court of Delhi transferring in perpetuity to the Company the sovereignty of the Circars compelled the Nizam to confirm it by treaty. At first the Company was not in a position to undertake the direct collection of the revenue; and a farm of the Circar comprising the Devarakota lands, was granted to Hussein Ali Khan, under the name of the Mustaphanagar Circar. The commercial factory established by the East India Company at Masulipatam was replaced by a chief in Council, by whom the administration was directed until 1794, when Collectors of Revenue were appointed.

The history of the Devarakota zemindari in given as follows by Mr. Grant: "Devarakota 15 miles south of Masulipatam on the north bank "of the Kistna, adjoining to Divi on the west, fertile in rice and joary and "well managed, Parganna zemindari of Yarlagadda Kodandaram of the "Kommawar caste; the family first settled here as combies or husbandmen, in the year 1580, are supposed to have got their first sanads for "desmukhi jurisdiction from Abdullah Kuttub Shah in 1640, though not "constantly confirmed in the possession of it, by future rulers. In 1726 "one of the family obtained the zemindari of Guntur and Auchilminar, "but in 1732, being involved in the general proscription of Rustom Khan, "lost all territorial jurisdiction, rights and privileges. In the confusion of "future revolutions, they have by some means or other regained possession "and were numbered in the Convention of 1766, paid formerly Rs. 2,19,455, "are supposed actually to collect pagodas 70,000 exclusive of savarams, &c., "but by the Dowle bandobust only 60,000.

"At that time (about 1761) Hussein Ali Khan acted in the capacity "of Amildar in the Circars. This man had in vain instigated the English "Government to assert its rights; at the same time he found his authority "curtailed in the exercise of his office by the protection given to the "zemindars. Among numberless instances of this kind one Kodandaram,

"of Devarakota a small but compact, fruitful and highly cultivated "pargana, lying 15 miles south of Masulipatam on the banks of the "Kistna, had been invariably assessed in the books of the Circar of "Condapillee for a revenue of rupees two lacs, nineteen thousand four "hundred and fifty seven and six annnas (2,19,457-6-0); the gross "mofussil receipts exceeded this amount in the sum of sixty thousand "rupees which defrayed the expense [409] of internal management, "such as sibundy, with the rusums and savarams of the zemindar and "other lesser officers of Government. Kodandaram, a sensible, intelligent "man, and at this day, without exception, the most skilful farmer in any "of the provinces according to popular estimation, availed himself of the "prevailing distraction on re-instatement in the zemindari management "from which he had been suspended by the French, to obtain an annual "diminution of his usual rent on the plea of predatory and other losses "sustained by the inhabitants of the district, in the period of his suspen-"sion."

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A description of the position of Devarakota was given by Mr. Roberts, Collector of Masulipatam, in a letter to the Revenue Board, dated 30th October 1824. In 1860 the Madras Government recorded the following:

"Devarakota was not a newly-created zemindari, but one of the most "ancient in the Masulipatam district, having been held by the family "under Padshahi grants for upwards of a century before the permanent "settlement." "Whatever may have been the origin or position of the "zemindars, they were most probably the men of chief local influence in "their districts when they were selected for the service of Government; "and in many instances, no doubt among which it is likely the Devara-"kota family may safely be included, they really possessed old feudal "rights, of origin long anterior to that of the Mussulman Government whom "they served."

The order of succession of the Devarakota zemindars was given in a pedigree table, furnished in 1792 by Venkataramanna, then in possession, to the Chief in Council at Masulipatam, in obedience to orders received from the Board of Revenue. Ankinidu was by this shown to be ninth in descent from Gurva Naidu, the first holder of the zemindari, who possessed it from 1576 to 1607. Kodandaram (1746 to 1791) appeared in the fifth pusht, or generation, from the founder. With one intermediate holder, Naganna, who held for a short time, the succeeding Zemindar Yarlagadda Ankinidu was the one who received the sanad in 1802. Two successive adoptions followed, and in 1835 Ankinidu, the father of the now contending parties, held the zemindari, and continued down to 1875. The sanad which was dated 8th December 1892, and was in the same terms as other sanads issued at that time in conformity with Madras Regulation [410] XXV of 1802, was granted to Yarlagadda Ankinidu. Upon this the plaint, filed 18th April 1880, relied, it having been granted to him, and to his heirs, successors and assigns, without any condition of descent, impartibility, or by primogeniture. And the plaintiff alleged that for some time under British rule, his ancestors "used to rent, temporarily, "Devarakota and other estates, on frequently varying terms and for vary-"ing amount of rent," and were frequently divested of those rights.

The appellant, by his written statement, averred that for at least 600 years his ancestors had been in uninterrupted enjoyment of the Devarakota Zemindari, and that it was impartible, and had always descended by the rule of primogeniture, and been enjoyed by only one member of the

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family; the other male members of it being entitled to nothing but maintenance.

Of the issues only one was now material, *viz.*, whether the zemindari was impartible and descended to the eldest son, or was partible among all the sons.

The District Judge was of opinion that regard being had to the judgments of the Committee in *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, the *Hansapur case* (1), in *Rajah Venkata Narasimha Appa Row* v. *The Court of Wards*, the *Nuzvid case* (2), and in *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar*, the *Shivagunga case* (3), the effect of the sanad of 1802 was not to alter the previous law of succession, and that the zemindari, if impartible before that grant, continued to be so after it.

He added that the only effectual mode of dealing with the question of impartibility was to see whether, according to the custom of the family, impartibility had come to be recognized as its usual incident, and whether there was any well-authenticated instance of a partition of it amongst more than one member. Upon this he said: "In reviewing the history of "the zemindari it will be observed that on three occasions the Government "recognized the custom of descent by primogeniture. The first was on the "death of Kodandaram in 1791, when his second son, Nageswara Naidu, "having attempted to usurp the zemindari, the Government officers inter-"vened and bestowed it on his elder brother, Venkatramanna, alone, "although he had at that time two brothers living. Secondly, in 1792, "Nageswara Naidu [411] succeeded alone on the death of his elder brother, "though his other brother, Venkatadri, was then alive. Thirdly, in 1798, "Ankinidu was alone appointed in place of his father, who had been sus-"pended, although he had a brother named Gangadhara Naidu, and an "uncle, Venkatadri, living at the time. Ankinidu, after his accession to the "zemindari, had to pay a certain amount for maintenance to his brother "and uncle, and this fact, which is fully proved by documentary evidence, "is strong evidence of the prevalence of such a rule of descent amongst "the members of the family.

"There is certainly no well-authenticated instance of a partition "amongst the members of the family, or of the estate having descended "to more than one person at a time."

The Judge accordingly dismissed the suit, except as to a small parcel of inam lands, and mesne profits in respect thereof, and a sum of Rs. 1,806-15-0, which he considered the plaintiff entitled to in respect of certain personal property.

The plaintiff appealed to the High Court; and the present appellant preferred a cross appeal as to the personal property and certain debts due by his father's estate, which he alleged he had discharged, and was entitled to credit for in the accounts.

The High Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.), held the zemindari partible. They went through the documentary evidence and traced the connection of this family from the earliest time with Devarakota. considering that time to be about A.D. 1640, when desmukh jurisdiction was alleged to have been conferred on the family, under a sanad issued by Abdul Kutub Shah, who was at that time, and before its conquest in 1687 by the Emperor Aurangzeb, the ruler of the district. That sanad was not produced.

(1) 12 M.I.A. 1. (2) 7 I. 38. (3) 8 I.A. 99.

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The Judges then traced the history of this family, so far as it was possible, under the rule of Aurangzeb and subsequent conquerors, and found them, with interruptions, styled always desmukhs, or, by similar appellations, "all titles of the same office," down to 1732, when they were deprived of "all territorial jurisdiction, rights and privileges," by Rustum Khan, acting on behalf of the First Nizam, who had "proclaimed his independence of the Court of Delhi." Then followed the cession, in 1753, of the country to the French East India Company, who were ousted in [412] 1765-66 by the English East India Company, who obtained, in 1766, a sanad for the district from the Court at Delhi.

The High Court was of opinion, in effect, that when this family is referred to in the documents produced of a date prior to the establishment of British rule it is as revenue officers, or renters of a few villages, and that for some years they "had ceased to have any official connection "with the parganna," and that "prior to the establishment of British rule "we have no evidence of the existence of any Zemindari of Devarakota." That in 1765 "the fortunes of the family were restored and augmented" by Kodandaram, who, in a letter of Mr. Pybus, "Chief at Masulipatam," dated the 25th June 1763, to the Governor of Madras in Council, was for the first time styled "Zemindar of Sallapalli" (which seems to have been the name of the fort or principal place of Devarakota); and afterwards, in a letter, dated the 4th April 1765, was styled Zemindar of Devarakota. That in 1769 a cowle or engagement was taken from Kodanda, described in it as Zemindar of Devarakota, for one year, and was followed by other similar engagements for short periods up to 1778.

In reference to the rule of primogeniture the Judges said :

"If the rule attached to no estate except a zemindari and could not "attach to an estate which had in comparatively recent times been erected "into a zemindari, we should have little difficulty in disposing of the "claim ; for there is no trace of the existence of any estate known as the "Zemindari of Devarakota prior to the exclusion of the French from the "Northern Circars. Nor have we evidence that before that period any "member of the Yarlagadda family laid claim to or was addressed as "Zemindar of Devarakota, or Challapalli, where the family resided.

"The evidence taken in this suit confirms the information collected "by Mr. Grant in his Political Survey of the Northern Circars, and "again by Mr. Roberts in 1824, that about the year 1640 the Yarlagadda "family obtained the office and jurisdiction of desmukh in the parganna.

"A full account of the office of desmukh and its origin is to be found "in the Political Survey II, Fifth Report, Madrās Edition, 155.

"From about 1640 until the expedition of Rustum Khan in 1732 we "find members of the family addressed severally or jointly as desmukhs "and with some interruptions they enjoyed [413] the office. Similarly we "find members of Yaddanapudi family addressed sometimes severally and "sometimes jointly as despandyas or stalakarnams. The Yarlagadda "family as desmukhs were collectors of revenue. They themselves rented "at some times a few villages, at others the whole parganna. So far as "there is evidence before us they did not always rent the same villages "and on one occasion we find the village from which they took their "name rented by a stranger. They had doubtless private property "in the parganna, but no evidence has been given to show of what it "consisted prior to 1732. There were savaram lands and rusums attach- "ed to the office, but whether these were held jointly or severally

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"prior to the time of Kodandaram we have no sufficient evidence to "show."

Another extract from the judgment is as follows:

"In 1732 the family was deprived of its desmukh jurisdiction, "although it may have still held property out of which it may have made "inam grants. We may observe that such grants were at times made by "renters or even by claimants to revenue officers who had no property "in the soil. However this may be, we find no evidence of a recognition "of their enjoyment of territorial rights over the parganna until after "1759.

"When Hussein Ali endeavoured to collect revenue on behalf of "Nizam Ali, he issued sanads to Kodandaram who was then in possession "of the fort of Challapalli and had troops in his pay. What may have "been the nature of these sanads we know not. We do know that "he rented the parganna, for, payments to which he was liable were "assigned for maintenance of the Company's troops which were assisting "Hussein Ali to maintain order. Kodandaram appears to have again "assumed the office of desmukh and possession of rusums and savarams "attached to it.

"These savarams and rusums were resumed in 1789, the sanads he "had produced in support of his title to those being declared invalid. "Nevertheless the title of desmukh continued to be borne by Kodandaram "and his successors up to the date of the permanent settlement.

"That he was addressed as zemindar as well as desmukh in the "earlier cowles issued by the British and that the payments he was bound "to make were styled tribute, may be accounted for by the loose way in "which the term was then employed in the case of mere renters who had "some local importance. We find then **[414]** that prior to the issue of these "cowles there is no proof that a zemindari existed; nor is there any suffi- "cient proof that by a custom of the family the rule of *primogeniture* attach- "ed to any estate possessed by the family and invested it with the incident "of impartibility. Kodandaram, under the style of zemindar, held the "parganna as rented on cowles for short terms. His eldest son was "accepted as renter on his undertaking to fulfil the engagements made "by his father, the terms of whose cowle had not expired on his death. "The family had so long held the position of rent collectors or renters that "they no doubt considered they had a claim to be recognized as zemindars, "though it was a claim which was dependent on the pleasure of the "Government."

And the High Court, after examining into what occurred during Kodanda's lifetime, and at his death in 1791, when the Government appointed as his successor, in the first instance, his second son Naganna, and then, on Naganna proving unfit, resumed the estate in November 1796, and kept it under their own management until April 1798, when the Government appointed Ankanna, son of Naganna, and great-grandfather of these parties in his place, with whom the perpetual settlement was made by the grant of a sanad in 1802, expressed their conclusion thus:

"It appears to us that whatever estate the family had in the des- "mukhi emoluments came to an end in 1789, when the Government "indicated, as its reason for resuming those emoluments, that the "services attached to the office had long been discontinued and were no "longer required; that Kodanda obtained the zemindari in virtue of the "possession he held as renter and that this right which was regarded "terminable at the pleasure of the Government was eventually confirmed

"to his grandson in perpetuity; that the changes of possession which "followed Kodandaram's death until the first succession after the permanent settlement were not regarded as successions governed by any "law or custom of inheritance, but as acts of the administration which "the other members of the family could not question, or at any rate "that they cannot be regarded as instances of a family custom, to which "the other members submitted with a consciousness that they were bound "to do so.

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"In the view we take, the estate cannot be said to be the self-"acquisition of Ankinidu, though it may have been so regarded [415] by "the members of the family who were alive in 1832, and might have con-"tested the brief possession of the widow.

"We must then hold that the first respondent failed to prove the "existence of a usage over-riding the ordinary law, and that the zemindari "is partible."

The decree reversed so much of that of the First Court as disallowed the plaintiff's claim to a share in 67 villages of which the zemindari consisted, and the kamatam lands and certain houses and buildings lying within the ambit of the zemindari; and directed that partition into three equal shares should be made; and that the plaintiff and second defendant should each recover from the present appellant a one-third share with mesne profits; and that as to the devasthanam, or temples, and the property appertaining thereto, the parties should be entitled to the management in yearly turns; and that a receiver should be appointed to collect the outstandings, which the plaintiff had agreed to take, as amounting to Rs. 31,609-10-1.

The first defendant, Mallikarjuna, preferred this appeal, in which the plaintiff and the second defendant were respondents.

Mr. *J. D. Mayne*, for the appellant, argued that the High Court should have found upon the evidence that the zemindari was ancient, impartible and passed by primogeniture. He referred to Grant's Political Survey (1812), Appendix to Fifth Report, pp. 18 and 155; Gleig's Life of Sir T. Munro, vol. 3, 1831, p. 425; Mill's British India, vol. 7 (Wilson, H.H.), pp. 437, 442; Fifth Report, p. 203, Shore's opinion; Collector of Masulipatam to Board of Revenue, 30th October 1824; Manual of the Kistna District by Nelson, 1883, p. 325; Fifth Report, p. 22, as showing the state of things at an early date in the Circars.

Although early sanads were absent, grants from 1738 onwards were in evidence; and Kodandaram, who was shown to have been zemindar at the commencement of British rule, was recognized as such; and Devarakota was his zemindari. With him a series of revenue settlements between 1769 and 1783 were made, and he was referred to in documentary evidence as Zemindar of Devarakota, or Sallipalli, the central fort, as well as desmukh of the Mustaphanagar Circar. The cowles were the same in form as those granted to the Zemindar of Nuzvid, to the Rajas of Vizianagram, and others, whose estates were well known to descend by primogeniture; the language of these cowles differing from those [416] granted to mere renters. As with the desmukh, so with the zemindar, the revenue was settled from time to time, that involving no change of the tenure; and down to Kodanda's death in 1791, and during the disputes as to the succession after his death, there was no suggestion that the zemindari could be held by more than one person at a time. It was assumed that primogeniture prevailed. Also, in 1794, when the Government changed the Provincial

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Chief and Council for Collectors, a proclamation was issued to the zemindars, including the one of Devarakota, stating that their rights and privileges were to be preserved. Previously, in 1791, when Kodanda died, the Chief of Masulipatam had summoned his sons, Venkatramanna and Naganna, to meet him that the orders of Government might be taken regarding the succession. It was upon this occasion that the pedigree table was produced, and in the subsequent dispute as to the succession, seniority prevailed, the eldest son becoming zemindar. This pedigree was most important. The weight given to such evidence was apparent in *Naragunty Lutchmee Davamah* v. *Vengama Naidoo* (1), and in *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (2).

The sanad was granted to Ankinidu in 1802 in the same form that sanads were granted to other zemindars, some of whom held impartible estates, for instance, the Ramnad Zemindar; *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(3). The present appellant's position was exactly parallel to that of the plaintiff in the last Shivagunga case, *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar*(4). One of the principal precedents as to the result of the issue of a sanad in 1802 under the Regulation was *Collector of Trichinopoly* v. *Lekkamani* (5) which maintained the judgment of the High Court delivered by Scotland, C.J., reported in *Lekkamani* v. *Srimat Ranga Kristna Muttu Vira Puchaya Naikar*(6). Neither the sanad, nor the Madras Regulation XXV of 1802 gave new rights to the owners of lands, except in respect of the permanency of the assessment, nor did either of them take any rights away, merely vesting in all zemindars the right to have the amount of revenue payable permanently fixed. There was no [417] evidence here that when the Government was granting the sanad of 1802 there was any intention on its part to alter the rule of succession or the impartibility of the zemindari. The Regulation which in Bengal might be said to have indicated such an intention was not applied to Madras where Regulation XX of 1802 could not bear any such construction. The *Shivagunga Case* (4), which this closely resembled, established that where an estate was impartible previously to 1802 it was not altered by the grant of a sanad. The pedigree table showed single ownership. The tenure, originating in an office which must have been impartible, the holder having exercised civil, criminal, and revenue powers, was also impartible. The whole nature of such estates was properly decribed by Sir T. Munro as that of "petty principalities" in the Northern Circars.

Mr. *T. H. Cowie, Q. C.*, and Mr. *R. V. Doyne*, for the respondents, supported the judgment of the High Court. It had not been shown that, at the end of the last century, and at the time of the passing of Madras Regulation XXV of 1802, there was an impartible zemindari in the possession of the plaintiff's ancestors. A distinction prevailed between an estate, hereditary and impartible, in proprietary possession, and an hereditary office. It was to the latter that the pedigree related; and it was not disputed that neither under the Mahommedan rule, nor under the French, nor after the cession of the Diwani to the British, was there any alteration in the position of this family as regards the office of desmukh. But what the appellant had to establish was the impartibility of the Devarakota zemindari, the presumption being that

(1) 9 M.I.A. 66 (88). (2) 13 M.I.A. 333 (339). (3) 12 M.I.A. 397.
(4) 8 I.A. 99 = 3 M. 290. (5) 1 I.A. 282. (6) 6 M.H.C.R. 208.

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it was partible. Kodandaram, it was true, obtained cowles for short periods, by which he became responsible for varying amounts of the revenue. But these were no more than temporary settlements for so much revenue to be received from such and such person. There was nothing in them to show an hereditary right in any one member of this family to Devarakota as impartible estate. No such pretension was put forward in 1802, nor was any ancient sanad produced. The High Court had, therefore, rightly inferred that when the family was referred to in documents prior to British rule, it was as Revenue Collectors, or assignees of the revenue of a few villages. Impartibility must **[418]** rest upon tenure, not upon settlement. In the years 1738, 1753, 1760 and 1788 members of the family were desmukhs, but there was no evidence, documentary or other, to show that they had a zemindari title to Devarakota. The title to the zemindari must, then, rest upon the sanad of 1802—as it would according to the principle on which the *Hansapur Case* (1) was decided—the title from those who had the power to grant, or to withhold; and a sanad was granted in accordance with the Regulation XXV of 1802; but in the sanad there was no reference to impartibility, or to any rule of descent by primogeniture. The grant was of the zemindari to Ankinidu, his heirs, successors, and assigns. And this must be according to the ordinary law. Even if the first Court had been right in holding that the office of desmukh was hereditary, and held by one person only, and that person the eldest son, the appellant's contention that the zemindari was to descend, subject to the like conditions, was not maintainable. Such a custom would not govern the descent of the zemindari after December 1802, and certainly could not be assumed to have done so; it being a point on which evidence was required. Since the grant to Ankinidu, in 1802, down to the death of his grandson, Ankinidu, father of these parties, on the 6th April 1875, no previous descent occurred on which the present question could have arisen. Ankinidu, the first grantee, died in 1819, without a son of his body; and was succeeded by an adopted son, Durga Prasada, who died in 1834; and was succeeded at first by his widow, and then by a son, whom she adopted under a power to her from her husband. This son was Ankinidu, the father of these parties. On his death, in April 1875, the disputes arose leading to the present litigation.

In all the decided cases the question of impartibility was held dependent on continuity from an estate impartible before the Regulation and sanads of 1802. The Regulation did not affect to alter the character of the estate. For these reasons the plaintiff's evidence had failed to establish his claim.

Mr. *J. D. Mayne* replied, relying on the evidence as to the character of the zemindari at the time when the istimrar sanad was granted in 1802, and the absence of any intention shown on the part of the Government to alter its impartible character at the **[419]** time of such grant; the Regulations, also, not authorizing any alteration.

The following cases were referred to on both sides during the argument:

Rawut Urjun Singh v. *Rawut Ghunsiam Singh* (2), *Baboo Gunesh Dutt Singh* v. *Maharaja Moheshur Singh* (3), *Naraguntу Lutchmeedavamah* v. *Vengama Naidoo* (4), *Katama Natchiar* v. *The Rajah of Shivagunga* (5),

(1) 12 M.I.A. 1. (2) 5 M.I.A. 169. (3) 6 M.I.A. 164.
(4) 9 M.I.A. 66. (5) 9 M.I.A. 539.

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Collector of Madura v. *Moottoo Ramalinga Sathupathy* (1), *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (2), *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (3), *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (4), *Collector of Trichinopoly* v. *Lekkamani* (5), *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari* (6), *Rajah Venkata Narasimha Appa Row* v. *The Court of Wards* (7), *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (8), *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (9).

Afterwards, on 1st May 1890, their Lordships' judgment was delivered by SIR R. COUCH.

JUDGMENT.

The question in this appeal is whether a large estate called Devarakota, in the Northern Circars in the Presidency of Madras, is impartible, and descends to the eldest son of the last owner. The parties to the suit are the three sons of Ankinidu, who died possessed of the estate on the 6th April 1875. The appellant is the eldest son, and shortly after his father's death he took possession of the estate, and had remained in possession of it till the bringing of the suit. The respondent, Durga Prasada, is the second son, and on the 16th April 1880 he brought the suit in the District Court of Kistna against his brothers, praying that he and the two defendants might be declared each entitled to a one-third share in the property. Issues were framed, of which only the second is now material. That is, whether the estate called in the issues the Zemindari of Devarakota is an impartible zemindari, and descendible to the eldest as against other sons, or partible. The District Judge held that the estate [420] was impartible, and disallowed that part of the plaintiff's claim. In respect of other matters, which need not now be noticed, his claim was allowed. The High Court of Madras, on appeal, held that the estate was partible, and reversed that part of the decree.

In Mr. Grant's Political Survey of the Northern Circars, submitted to the Governor-General in Council at Calcutta on the 20th December 1784, and inserted in the Appendix to the Fifth Report from the Select Committee of the House of Commons on the affairs of the East India Company, there is a notice of the family in which it is stated that they first settled at Devarakota as combies or husbandmen in 1580, and were supposed to have got their first sanads for desmukhi jurisdiction from Abdullah Kootub Shah in 1640, though not constantly confirmed in the possession of it by future rulers. In 1732, being involved in the general proscription of Rustum Khan, they lost all territorial jurisdiction, rights and privileges, but in the confusion of subsequent revolutions they regained possession, and were numbered in the Convention of 1766, by which the Northern Circars were transferred to the East India Company. Devarakota is stated by Mr. Grant to be in the Circar of Condapillee, and appears from the rental concluded with the ryots to have been one of the largest estates there.

Their Lordships think that, in considering the evidence upon the question of impartibility, it is not necessary to go further back than 1766. At that time one Kodandaram was in possession of the estate. He died on the 20th November 1791, leaving three sons, Venkatramanna, Naganna, and Venkatadri. Venkatramanna succeeded to the whole estate,

(1) 12 M.I.A. 397. (2) 12 M.I.A. 1. (3) 13 M.I.A. 333.
(4) 14 M.I.A. 570. (5) 1 I.A. 282. (6) 2 I.A. 263=1 C. 153.
(7) 7 I.A. 38. (8) 8 I.A. 99=3 M. 290. (9) 15 I.A. 51=10 A. 272.

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and died after a few months in 1792. On his death the zemindari was claimed by Naganna, and a claim was set up on behalf of his son Ankanna, then a boy of 13 or 14 years old, on the ground of his having been adopted by Venkatramanna. The adoption was denied by Naganna. The Government, which appears at that time to have been the only authority which had power to decide the question, there being no Civil Court competent to do so, resolved that the right of succession was in Naganna, and ordered him to be put in possession. In November 1796 Naganna was dispossessed of the estate by the Collector of Masulipatam, who, in his letter to the Board of Revenue assigning his reasons for doing so, said, "It "appears that the zemindar has failed in the payment of the customary "tribute due by him to [421] the Company on account of that zemindari." And in a letter from the Board of Revenue to the Governor in Council, dated the 22nd March 1798, they say, "The conduct of Nageswaram "Naidu (another name for Naganna), although it ought to disqualify "him from being longer entrusted with the care of a zemindari, certainly "has not been such as to set aside for ever the rights of his son, who, it "appears by the report of the Chief and Council of the 12th March 1792, "contested the succession with his father, under the plea of having been "adopted by his uncle Venkataramayya, the late Kodandaram's eldest "son, who died without issue soon after his father. We, therefore, in "consideration of this right, not as giving a preference to zemindari management, concur in Mr. Oakes' (the Collector) recommendation in his "favour."

The Governor in Council, in a letter to the Board of Revenue of the 4th April 1798, said as to this recommendation, "We owe it to the "rights of the young Zemindar Ankanna, as well as to considerations "which arise from the late Collector's administration, to concur in the "recommendation of Mr. Oakes and your Board for the restoration of "this zemindari to Ankanna." The words "rights of the young zemindar" are opposed to the view of the High Court that the changes of possession were simply acts of administration. At this time Ankanna had a younger brother named Gungadhara, and there is evidence of allowances for maintenance being made to him and to Venkatadri, the youngest son of Kodandaram. In a letter from the Secretary of the Board of Revenue to the Collector in February 1800 the Board approves of his making an allowance out of the revenue of Devarakota to Ankanna (there called Ankinidu) of 100 pagodas per month during the period his zemindari is under assumption, and directs him to continue the allowances granted to Nagesha Naidoo (Naganna) and the uncle of Ankanna (Venkatadri).

On the 28th February 1801 the Collector wrote to Ankanna by the name of Ankinidu as follows: "It is surprising that you have "written to say that you will pay 10 pagodas per mensem to your "younger brother, Gungadhara Naidu, though the responsibility of maintaining him rests to a great extent with you. I think that at least 15 "pagodas per mensem should be given him. If you do not do so how "will you acquire our good-will?" [422] It is apparent from this that Ankanna had before this time been restored to the zemindari, though it does not appear in the proceedings when this took place.

Their Lordships think that the result of the evidence in the suit is that at this time Ankanna was in possession of the estate by right of primogeniture as an impartible estate, and was so regarded by the Government.

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Regulation XXV of 1802 (Madras) was passed on the 13th July. It recites that the public assessment of the land revenue had never been fixed, and that the Government had resolved to grant to zemindars and other landholders, their heirs and successors, a permanent property in their land in all time to come, and to fix for ever a moderate assessment of public revenue on such land, the amount of which should never be liable to be increased under any circumstances. On the 8th December 1802 an istimrar sanad was granted by Lord Clive, then Governor in Council of Fort St. George, to Ankinidu, otherwise Ankanna, fixing the assessment of the zemindari at the annual sum of 29,340 star pagodas, and declaring it to be permanent. Ankinidu thus acquired a permanent property in the land at a fixed assessment, but there was no grant of the land, and the rule of succession to it was not altered. The estate remained entire, and there is no evidence of any intention of the Government to alter the nature of the tenure. What is said by this Board in the judgment in the *Hansapur Case* (1) is applicable to the present case. The estate continued to be impartible, and the rule of succession to it was not altered.

There is evidence of a later date which is some proof in support of this. Ankanna adopted Durga Prasada, the son of Gungadhara, and after his death in 1833 his widow adopted Ankinidu, the father of the appellant and respondents Venkatadri left a son, Karkotaka, and in 1866 his mother and guardian brought a suit on his behalf against Ankinidu for a monthly maintenance of Rs. 161-11-2, which had been paid to her late husband Venkatadri from the estate of Devarakota zemindari, and for arrears from the 1st May 1856 to the 1st August 1866. The defendant pleaded that the maintenance was for Venkatadri's life only, and did not descend to his son. In the judgment of the **[423]** Principal Sadr Amin it is said, "The parties have agreed that the zemindari "descended to the eldest son," and the decision "that the defendant be "held liable to the payment of Rs. 50 per mensem to the plaintiff's "minor son during the period of his minority" is founded upon the assumption that Venkatadri was by usage excluded from inheritance. No objection appears to have been made to this judgment being admitted in evidence, if it could have been made successfully.

The question whether an estate is subject to the ordinary Hindu law of succession, or descends according to the rule of primogeniture, must be decided in each case according to the evidence given in it. In this it appears that the claim of the plaintiff under the ordinary Hindu law has been answered, and that the decree of the District Court disallowing the claim ought not to have been reversed. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, and to affirm the decree of the District Court, with the addition of the costs of the appeal to the High Court.

The respondents will pay the costs of this appeal.

Solicitor for the appellant:—Mr. *R. T. Tasker*.

Solicitors for the respondents:—Messrs. *Lawford*, *Waterhouse*, and *Lawford*.

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(1) 12 M.I.A. 35.

13 M. 423 = 2 Weir 147.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

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QUEEN-EMPRESS v. KATHAPERUMAL.* [11th and 15th October, 1889.]

Criminal Procedure Code, Section 188—Offence committed in foreign territory—Trial without certificate of the Political Agent.

A District Magistrate instituted criminal proceedings in British India against a native Indian subject of the Queen, in respect of offences under Sections 419, 467 and 114 of the Indian Penal Code, said to have been committed by him in French territory, without a certificate under Section 188 of Criminal Procedure Code. The accused was committed to the Sessions Court:

[424] *Held*, although the District Magistrate was the Political Agent who might have certified under Criminal Procedure Code, Section 188, that the proceedings were void for want of the certificate, and the commitment should be quashed.

[R., 24 B. 287 (290); 1 Bom. L.R. 678; 4 P.R. 1902 Cr. = 21 P L.R. 1902 (F.B.); 2 Weir 148 (149).]

CASE referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure, by J. A. Davies, Sessions Judge of Tanjore.

The facts of the case were stated by the Sessions Judge as follows:

"A preliminary objection is taken by the prisoner's pleader to the "commitment to the effect that the offence having been committed in "Karikal, French territory, no inquiry could be made in to it without a "certificate of the Political Agent for Karikal that the charge is in his "opinion one that ought to be inquired into in British India, as provided "in Section 188 of the Code of Criminal Procedure.

"The following being undisputed facts in the case, (1) that the "prisoner is a native Indian subject of Her Majesty, (2) that the offence "of which he is accused, knowingly abetting the payment of a money "order for Rs. 99 to a wrong person, was committed beyond the limits of "British India, that is, in the French settlement of Karikal, (3) that there "is a Political Agent for that territory, namely, Mr. Edward Gibson of "the Madras Civil Service (*vide* page 218 of the Madras Quarterly Civil "List, corrected up to 1st July 1889), and (4) that the certificate required "under Section 188, Code of Criminal Procedure, has not been issued by "him—it seems to me the objection raised is fatal to the commitment, "and I must, therefore, refer the case to the High Court, under Section 215 "of the Code of Criminal Procedure, for the quashing of the commitment "on the grounds stated above.

"It happens that Mr. Edward Gibson, the Political Agent for "Karikal, is also the District Magistrate of Tanjore, and, in this latter "capacity, it appears that he initiated the case and transferred it from "his own file to that of the Sub-divisional Magistrate of Negapatam; "but these acts of his, as District Magistrate, cannot be taken as having "been done in his other capacity as Political Agent. Further, it is "contended by the public prosecutor that if the required certificate were "now given by Mr. Gibson in his capacity as Political Agent, it would "fulfil the requirements of the law, but I hold that the certificate was

* Criminal Revision Case No. 422 of 1889.

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"[425] a preliminary requisite to the institution of proceedings, which "cannot now be validated by an *ex post facto* authorization. However, "this is a point I submit and leave for the High Court's decision.

"If the offences charged were offences falling under the Post Office "Act (XIV of 1886), then under the terms of Section 59 of that Act, the "prisoner could have been tried here without a certificate from the Politi-"cal Agent, but the particular offences on which the prisoner is com-"mitted to this Court are not offences under that Act, but only under "the Penal Code.

"Pending the orders of the High Court, the prisoner will be "released on bail, on his own recognizance for Rs. 200, with two sureties "for Rs. 200 each."

The Government Pleader and Public Prosecutor (Mr. *Powell*), for the Crown.

The accused was not represented.

JUDGMENT.

The accused in this case is a native Indian subject of Her Majesty, and the offence with which he is charged was committed in the French settlement of Karikal. The District Magistrate of Tanjore initiated criminal proceedings against him as regards the offence, and transferred the case from his own file to that of the Sub-divisional Magistrate of Negapatam. The District Magistrate, Mr. Edward Gibson, is also the Political Agent for Karikal; but he omitted to certify in his capacity as such, that in his opinion, the charge ought to be inquired into in British India. The inquiry held by the Sub-divisional Magistrate was therefore not in conformity to the provisions of Section 188 of the Code of Criminal Procedure, and on this ground, the Sessions Judge objected to accept the commitment when the Magistrate committed the accused for trial. The Public Prosecutor offered to produce a certificate to remedy the defect in the commitment; but the Judge, considering that it could not be validated by *ex post facto* authorization, has referred it to this Court for orders.

Having regard to the language of the proviso to Section 188, we agree with the Sessions Judge that the certificate mentioned therein is a preliminary requisite as well to an inquiry before the Magistrate as to the trial before him. The offence being committed in foreign territory, it is not capable of being inquired into under the Code of Criminal Procedure which is applicable only to British India, until it is certified by the Political Agent to be one [426] which ought to be inquired into in British India. The inquiry held by the Sub-divisional Magistrate was *ultra vires*, and the commitment wholly void. Section 188 corresponds to Section 9 of Act XXI of 1879, and before it was introduced into the Code of Criminal Procedure, this Court quashed a trial held by the Sessions Judge of Mangalore without the prescribed certificate in *Bapu Daldi* v. *The Queen* (1). The defect cannot, in our judgment, be cured under Section 532 of the Code of Criminal Procedure, for, it is not a case of mere irregular commitment under the Code of Criminal Procedure, but it is a case which cannot be dealt with at all under the Code until a certificate has been produced. If that section applied, it would not be necessary to produce a certificate even at the trial, and such a construction would tend to take away from the accused the protection to which he is entitled under Section 188. Though the District Magistrate happens, by accident,

(1) 5 M. 23.

also to be Political Agent in this case, that circumstance cannot alter the construction which we have to place on the last-mentioned section. The commitment is illegal, and must be quashed as such. It will be open to the District Magistrate to institute criminal proceedings *de novo*, in accordance with law.

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13 M. 426 = 1 Weir 290.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

QUEEN-EMPRESS *v.* SAMI AND ANOTHER.* [3rd and 6th February, 1890.]

Evidence—Trial for robbery and murder—Offences constituting parts of the same transaction—Evidence of robbery considered in trial for murder.

Persons convicted of robbery by a Sessions Judge and a Jury, and of murder by the Sessions Judge with Assessors appealed to the High Court against the conviction on the charge of murder:

Held, that in coming to a conclusion as to whether the evidence justified the conviction appealed against, the verdict of the Jury should not be taken into consideration.

But on its appearing that the two offences constituted parts of the same transaction:

[427] *Held*, that recent and unexplained possession of the stolen property which would be presumptive evidence against the prisoners on the charge of robbery was similarly evidence against them on the charge of murder.

[**F.**, 12 Cr.L.J. 564 (565) = 12 Ind. Cas. 652 = 21 M.L.J. 1071 = (1911) 2 M.W.N. 478; 4 Ind. Cas. 1051 (1052) = 6 M.L.T. 123; **R.**, 6 Ind. Cas. 51 = 11 Cr.L.J. 222 = 20 M.L.J. 657 (681) = 7 M.L.T. 314 = (1910) M.W.N. 77; **D.**, 13 Cr. L.J. 249 = 14 Ind. Cas. 601.]

APPEAL against the conviction of the appellants on the charge of murder by W. Dumergue, Sessions Judge of Salem.

Mr. *Gantz*, for appellant No. 1.

Mahadeva Ayyar, for appellant No. 2.

The Government Pleader and Public Prosecutor (Mr. *Powell*), for the Crown.

The facts of this case appear sufficiently for the purposes of this report from the following

JUDGMENT.

The appellants who were charged on three counts, *viz.*, of kidnapping, of robbery and of murder, were tried on the second count by the Sessions Judge and a Jury and on the first and third counts by the Sessions Judge and Assessors. The charges had reference to a boy named Thevoo who is alleged to have been enticed away, robbed and murdered by the appellants on the evening of the 31st August last. The Assessors were of opinion that the appellants were guilty on the charge of kidnapping, and as a Jury found them also guilty on the charge of robbery, but returned a verdict of not guilty on the charge of murder.

The Sessions Judge agreed with the opinion of the Assessors as to the first count and with the verdict as to the second count, but dissented from the verdict of not guilty on the charge of murder. He passed a sentence of death subject to the confirmation of this Court on the latter

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* Referred Trial No. 58 of 1889.

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charge, but also in deference to the verdict of the Jury, as he observed, sentenced the appellants to a term of ten years' rigorous imprisonment on the charge of robbery. It was argued before us by the vakil for the second appellant that the Sessions Judge ought not, having regard to the proceedings of this Court, dated 11th February 1889, No. 336, to have tried the three charges together in one trial and that the conviction was therefore bad. The Sessions Judge has, under Section 239 of the Criminal Procedure Code, a discretion to try prisoners separately or together as he thinks fit, accused of several offences committed in the same transaction, and the circular order referred to was merely intended to suggest the procedure which in such cases it would be most convenient to adopt. It is not alleged that the appellants have been prejudiced by the course adopted by the Sessions Judge.

[428] We think there is no ground for setting aside the conviction as illegal. The sentence passed by the Sessions Judge appears to us however anomalous. Having sentenced the appellants to death it was obviously unnecessary to pass any further sentence on the other counts, and he ought to have refrained from doing so, though he might have not improperly mentioned the sentence which might, in his opinion, be appropriately passed if the conviction on the charge of murder were set aside. Neither of the appellants has questioned the conviction on the charges of kidnapping and robbery. What we have to consider is whether the evidence justifies the conviction of both or either of the appellants on the charge of murder. In coming to a conclusion on this question, we dismiss from our minds the verdict of the Jury.

There is no doubt that the boy Thevoo was enticed away from the temple in the agraharam, robbed of two gold bangles he had been wearing and murdered on the evening of the 31st August last. As to these facts the evidence of his father (the first witness) and the Hospital Assistant is conclusive.

The material question is whether the offences are sufficiently brought home to the appellants or either of them. Against appellant No. 1 the principal evidence is that contained in a confessional statement made by him before the Second-class Magistrate of Salem on the 27th September 1889, two days after he was arrested in the Madras Roads by the Chief Inspector Eaton. In this statement he says that the boy was brought by appellant No. 2 and another to the entrance of the Eswaran temple in the garden where the body was found and he admits that he and the other appellant removed the bangles from the boy's wrists and that he went to his house to secure them in an almirah. On his return after doing this, he says that he found his companion in a room near the temple, and, hearing a gurgling noise, was told by them in answer to his question that they had killed the boy. He reproached them, as he says, and went off to his own house, but in a short time appellant No. 2 came to him, told him the body of the boy had been disposed in the well of Gopalasami Mudaliyar and asked him to come away with him to Kumbakonam. They thereupon the same night went to the railway station and took the train to Kumbakonam. He then describes how he and appellant No. 2 remained together for two days, and afterwards the appellant No. 2 on his brother-in-law appearing went away, taking one of the bangles and leaving the [429] other with appellant No. 1. This bangle, he says, he sold at Tiruvadamarudur for Rs. 75. He then went to Negapatam and embarked in a steamer for Rangoon, but on the way he was arrested at Madras by the

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Inspector Eaton. He further related how, while he and appellant No. 2 were at Kumbakonam, a bond was executed by him in favour of a relative, and how that bond was ante-dated, the date of Saturday, the day on which the murder was committed being inserted instead of Monday, the day on which it was really executed. Before appellant No. 1 made this confessional statement he had been duly warned by the Magistrate that his statement would be used against him and the Magistrate certified his belief that the statement was made voluntarily and not under any threat or inducement. On the 31st October appellant No. 1, when his statement was read out to him, declared that it was not made voluntarily and he made another statement to the effect that he was not in Salem on Saturday the 31st August. The next day when he was about to be committed for trial, he told the Magistrate that he had retracted his confession, because the other accused were with him and he feared their speaking against him. As the Magistrate, although he made a note of the statement and appended it to the answers given by the appellant to questions put to him, had not recorded the statement itself in the appellant's words, we thought it desirable to have the Magistrate's evidence on this matter taken. In his evidence the Magistrate repeats what he had recorded in his note and he says that the appellant asking at the same time that he might be admitted to bail and permitted to change his dress, volunteered the statement. Before the Sessions Court appellant No. 1 left his defence to his counsel and no further questions were put to him.

There is a considerable body of evidence which goes to corroborate material parts of the confessional statement made on the 27th September. Several witnesses referred to by the Sessions Judge prove that the two prisoners were seen together near the Perumal kovil on the evening of the 31st August. They also say appellant No. 2, who is proved to have been on friendly terms with the boy Thevoo, was seen speaking to him at the same time and place. The fact that the body of the murdered boy was hidden in a pit in Gopalasami's garden is established by the evidence of the first witness and others who were present at the discovery of the body on Monday the 2nd September. The fact that the two [430] appellants went to the Suramangalam station the same night and took the train is proved by the seventeenth witness who, being a relation of Thevoo, had gone to the station in search of him. This witness says that he found appellant No. 1 sitting there with his companion lying down and having his face covered, and in answer to his inquiries he was told by appellant No. 1 that the man lying down was a stranger to him, though in fact he was known to him. The witness afterwards saw the man standing up and recognized him. That the two appellants did take the early morning train for the south as this witness deposes is further proved by the evidence of the twenty-sixth witness, the first appellant's brother-in-law, who says that he and appellant No. 2 came to his house at Bhagavatapuram on the Sunday evening. According to this witness the two stayed at his house over the Monday night, and meanwhile on the Monday the bond mentioned in the confessional statement was executed in favour of Krishnasami, the eighteenth witness. The execution of this document, dated the 31st August, on the 2nd September, is spoken to by this witness and by the twenty-third, twenty-fourth and twenty-fifth witnesses, who with appellant No. 2 attested the execution. At the trial the evidence of the stamp-vendor, whose endorsement bearing date 31st August appears on the document, was not taken, and we thought it desirable that he and his son, who, according to the witnesses, was said to have brought the paper to the house

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of the first witness, should be examined. Their evidence has now been taken and it appears that the endorsement was written entirely by the son, a boy of ten years old. His account of what took place with regard to the stamped paper and his father's, though the two do not altogether agree, is to the effect that in the absence of the latter the paper was given out as endorsed by the son on the 31st August, and an entry made accordingly in the diary. Having regard to the strong evidence proving the presence of the prisoners in Salem on the evening of Saturday and to the twenty-third and other Tanjore witnesses, some of whom are related to the appellant, we are unable to accept the testimony of the stamp-vendor and his son as true with regard to the date on which the stamped paper was sold. The next fact mentioned in the confessional statement is the parting of the two appellants, and this is proved by the twenty-sixth witness who did not see appellant No. 2 in his house on the Tuesday and the ninth witness, who says he saw him at Srirangam on [431] that day. This witness also says that this appellant and his brother-in-law Ratnasabapathi came to her house, and stopped the night, and that the latter and her husband went out to the bazaar, saying they had a bangle to sell. There is further evidence with regard to the sale of this bangle which will be mentioned hereafter in dealing with the second appellant's case.

In the present connection it is important to mention that these facts—the execution of the bond at Tiruvadamarudur and the sale of a bangle at Srirangam—were brought to light in consequence of a communication made by appellant No 1 to Inspector Jay Singh when the two were travelling from Madras to Salem. This statement, in so far as it led to the discovery of the matters mentioned in it, is evidence against the appellant. From the time when appellant No. 1 parted from the twenty-sixth witness on Tuesday, the 30th September, at Kumbakonam, there is no direct evidence as to his movements until he is found at Madras on the 24th or 25th September consulting Mr. Michell's gumasta.

On the 25th September he was arrested on board the S.S. *Sirsa* by Inspector Eaton. He had on his person a ticket for Rangoon. When at first accosted by the Inspector as Sambia, he said he was not Sambia and was not a Brahman, but that his name was Narainasami Pillai, but in the boat on the way to the pier he admitted that he was the man whom the Inspector wanted. He was dressed as he was when he appeared before the Sessions Court, that is to say, in a manner which is proved to be unusual among Brahmans and he was not wearing the Brahmanical thread. It is suggested by the learned Counsel who appeared to support the appeal that this intended journey to Rangoon was undertaken in search of work and that was the explanation offered by the appellant himself in his statement of the 31st October. In our opinion, however, the explanation is entitled to no weight. The whole conduct of the appellant, as exhibited in his dress and in his conversation with the Inspector, points irresistibly to the conclusion that he was acting under a strong impulse to conceal his identity and escape from the country.

All the circumstances which have thus been detailed tend to corroborate the confessional statement made by appellant No. 1. In that statement he admits that he took part in the robbery and that one of the bangles was disposed of by him, the other being left with the other appellant. The evidence of the first and other [432] witnesses with regard to the sale of a single bangle at Srirangam on the return of appellant No. 2 from Kumbakonam about the same time renders it probable that this part

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of the story is true. His attempt to make evidence for himself by antedating the bond, his projected flight by sea, his endeavour to conceal his identity are strong evidence to show that he was conscious of some great danger impending and that he was actuated by a strong desire to escape; and this conduct is the more important, because, so far at least as the execution of the bond is concerned, it was the conduct of a man who was not at the time pursued or even suspected. With all these facts proved we are of opinion that there is a strong case to justify the conviction on the charge of robbery. This being so, it must follow that the appellant was one of the persons who was last with the murdered boy before his death, because there is nothing to suggest the supposition that the robbery and the murder were separate transactions, committed at different times, and on the contrary, according to the confessional statement, the two crimes formed parts of one transaction. Moreover it is extremely unlikely that the deceased boy would not have returned to his house if he had been left free after he had been robbed. The appellant lived in the same agraharam with the boy, and the strong probability is that the motive for the murder was the desire to escape detection which, had the boy escaped alive after being robbed of his bangles, must almost inevitably have ensued. Under these circumstances, and in the absence of any explanation, the presumption arises that any one who took part in the robbery also took part in the murder. In cases in which murder and robbery have been shown to form parts of one transaction, it has been held that recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder. All the facts which tell against the appellant, especially his conduct indicating a consciousness of guilt, point equally to the conclusion that he was guilty as well of the murder as of the robbery committed on the evening of the 31st August. His own account of what took place on that evening in so far as it exonerates himself from any part in the act of killing the boy is extremely improbable. It is very improbable that he being older in years than appellant No. 2, the latter would have acted, as he says, without his knowledge or privity. Still less is [433] it probable that if, as he says, the boy was being murdered when he returned to the temple and without his connivance, he would afterwards have left Salem with appellant No. 2 and associated himself with him in efforts to create evidence in his favour. In addition there is the evidence of the third witness, which, if believed, makes it clearer that the appellant was not, as he says, a mere spectator when the murder was committed. This witness's story to the effect that, on the evening of the 31st August, he saw some men carrying a corpse near the temple and that he recognized the first prisoner as one of the party, was first communicated to the Police on the 13th October. On the previous day only he had been found and brought before the Head Constable at Tiruvadamarudur. The Inspector who, on the 13th October, wrote down the substance of the man's statement and the Head Constable both say that he and his wife were not in police custody. Observations were made with regard to the language said to have been used to the witness by the Head Constable when the witness was brought before him, but it is now explained that the words used were not intended to have any threatening significance, and then the Head Constable was in fact ignorant as to the position which the witness occupied, whether he was an accused person or a witness. The fact that the witness when first brought into communication with the police gave the same account of what he saw on

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the evening of the 31st August as he gave before the Sessions Court, and there is no evidence to show that any improper influence was brought to bear upon him, is strongly corroborative of the truth of his evidence. Moreover, except for the explanation which he himself gives for his hurried departure from Salem, there is nothing to account for that fact. It may be added in favour of the acceptance of his testimony that he incriminates only one of the persons whom he says he saw and does not attempt to name the others. Taking into account these circumstances, as well as what may be said on the other side with reference to the status of the witness and the fact of his having been under police surveillance, we agree with the Sessions Judge in thinking that the evidence of the third witness, corroborated by that of his wife, may be accepted as true. The importance of the evidence is great; for while it corroborates the other evidence connecting the appellant with the robbery of the boy, it directly contradicts the appellant's own story of the part he took after [434] the robbery and the murder had taken place and shows that he was actively engaged with the others in carrying away the corpse from the scene of the crime. To sum up the evidence which has now been dealt with as against the first prisoner we may state the matter as follows:—that it has been admitted by him that he was a party to the robbery, that his account of the transaction exculpating himself from all other part as being contradicted by other evidence and the probabilities of the case cannot be accepted as true, that he assisted in carrying away the corpse of the boy after murder, that he afterwards acted in concert with appellant No. 2 until they parted on the Monday night, and finally that in his flight, his abandonment of caste and other concealment of his identity he acted in a manner evincing an extreme desire to escape from an impending danger of a serious character. We are unable to reconcile these facts with any reasonable hypothesis of innocence on the part of appellant No. 1; on the contrary we see no reason to doubt that he was concerned in the murder. We must therefore uphold the conviction. The double crime of robbery and murder was an atrocious one and cannot be adequately expiated by any other punishment than that of death. We confirm the conviction and sentence against this appellant.

Against the second prisoner the evidence is not altogether the same. From his first arrest he made no statement, except that he was absent from Salem for some days before the 31st August and with the first prisoner at Tiruvadamarudur on the Sunday.

There is the evidence of several witnesses that he and the murdered boy were on friendly terms, and it is mentioned that the prisoner, who was a compositor, had given the boy some types on the previous day and those types were found by the boy's father in his jacket pocket. The witnesses say they saw the prisoner and the boy talking together on the Saturday afternoon about 3 o'clock, and that both prisoners were together near the temple in the evening about the time when the boy disappeared. Inasmuch as the boy was at that time in the agraharam in the neighbourhood of his father's house, and could not have been carried away from the street by force, it is clear that the persons who robbed him must have been assisted by some friend of the boy's who was able to persuade the boy to accompany them away from the street. So far as the events which occurred in Salem are concerned, the evidence carries the case no further. But from the moment of leaving [435] Salem, as has been already shown, the two prisoners acted in concert. Both leave Salem

suddenly and for no explained reason and are seen at the railway station in the early morning of Sunday taking the train for the south. They go together to the house of the twenty-sixth witness, arriving there on the Sunday without baggage or clothes. The second prisoner remains there on the Monday, but is not seen by the witness on Tuesday morning. Meanwhile on Monday the bond was executed by the first prisoner in the way already described and the second prisoner attested it appending to his name a description of himself which is noteworthy—he calls himself "son of Virasami Pillai who is come to Truvadamarudur on this current date from Salem." It is clear that he and the first prisoner were equally anxious to create clear written evidence to prove their absence from Salem on that day, the 31st August. The second prisoner is next found on the Tuesday at Srirangam in company with his brother-in law Ratnasabapathi. They go to the house of the ninth and tenth witness, himself a brother of Ratnasabapathi, and stay there over the next day; while there they went out into the bazaar saying they had a jewel to sell, and taking a bangle with them. The sale of a child's bangle by Ratnasabapathi to the thirty-first witness is proved by him and the twenty-ninth witness. The purchaser says that in buying it he had it cut up and sold the pieces. The bangle is described as weighing $15\frac{1}{16}$ pagodas and the price paid was Rs. 94. The pair of bangles worn by the murdered boy are described by his father as worth from Rs. 200 to Rs. 250. Although the bangle then sold to the thirteenth witness could not be produced for identification by the father, there is strong reason to think that this bangle is one of the pair taken from the boy. In addition to the facts already stated, namely, the presence of the prisoner with the boy and with the other prisoner at Salem on the afternoon of the 31st, the departure from Salem with the other prisoner, his co-operation with that prisoner in antedating the bond and his being in company with his brother-in-law, and that a single bangle was sold only four days after the murder, we are at liberty to take into account against the second prisoner the statement of the first prisoner in so far as it is a confessional statement. According to this statement the two prisoners took an equal part in robbing the boy. It is probable that the robbery was, as the first prisoner thus admits, committed by more than one person, and for reasons already given, it is [436] almost inevitable that one of those persons should have been well acquainted with the murdered boy.

As already observed, there is considerable evidence to show that appellant No. 2 was regarded by the deceased boy as his friend, and the fact that the boy would not have gone to the scene of the offence unless he had been enticed, corroborates the confession of the first prisoner that it was the second prisoner who in company with another brought the boy to the temple. This being so it is reasonable to infer in the absence of any satisfactory explanation that the second prisoner was equally implicated in the crime of murder. His motive for committing the murder in order to save himself from detection was even stronger than that of the first prisoner, for he was well known to the boy. His subsequent conduct from the time he left Salem, acting in concert with the other prisoner, in making evidence to prove an alibi and in securing the sale of the bangle—as it is presumptive evidence against him that he was a party to the robbery—is equally evidence against him on the other charge. There seems to be no reasonable ground for saying that while both of the prisoners assisted in the robbery, the first only took part in the murder.

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We are therefore of opinion that we must come to the conclusion that this appellant also was concerned in the murder.

Seeing however that the evidence against him is almost wholly circumstantial and that he is only eighteen years of age, we consider it safer to commute the sentence into one of transportation for life. The sentences of ten years' rigorous imprisonment are set aside and the sentence of death passed upon Sami Iyer is confirmed. The sentence of death passed upon Narayanasami is commuted into a sentence of transportation for life.

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[437] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

NARAYANA (*Defendant*), *Appellant v.* NARAYANA AND ANOTHER (*Plaintiffs Nos.* 3 *and* 4), *Respondents.**
[25th and 26th July and 27th November, 1889.]

Civil Procedure Code, Section 244—*Execution proceedings—Limitation Act—Act XV of* 1877, *Schedule II, Articles* 29, 61, 62, 97, 120.

In a suit of 1867 the present defendant obtained a decree for possession of a certain village and mesne profits for one year. Pending an appeal against that decree execution was stayed on the present plaintiff depositing a note for Rs. 15,000 as security. The decree was affirmed on appeal, and the present defendant had the note sold in execution and drew out of the proceeds a sum for mesne profits for snbsequent years; but an appeal was preferred in the execution proceedings to the High Court which set aside the execution so far as concerned the mesne profits for the years subsequent to that to which the original decree related. The present plaintiff thereupon attached and sold the village to recover the balance: before that amount was paid to the present plaintiff the present defendant brought a suit against him in the District Court and there obtained a decree for mesne profits for the subsequent years and in execution drew the amount of the decree out of Court. In second appeal however the High Court on 26th September 1881 reversed the decree of the District Court, whereupon the present plaintiff applied for restitution under Civil Procedure Code, Section 583, which application was ultimately disallowed. The present suit was brought to recover the amount to which that application related:

Held, (1) that the suit was not barred by the provisions of Civil Procedure Code, Section 244.

(2) that Limitation Act, Schedule II, Article 120, was applicable to the suit, which having been filed on 9th August 1887, was accordingly not barred by limitation.

[F., 10 Ind. Cas. 658 (659) = 21 M.L.J. 705 (706) = 9 M.L.T. 465 = (1911) M.W.N. 220; R., 24 M. 341 (344); 17 Ind. Cas. 311 = 36 P.R. 1913 = 16 P.L.R. 1913.]

APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in original suit No. 26 of 1887.

Suit to recover a sum of money alleged to be due by the defendant under the following circumstances:—

In a suit of 1867 the zemindar of Kurupam, who was the defendant in the present suit, sued Kannam Dora and Appanna Dora to recover from them the village of Arnada with mesne profits for *fasli* 1276. He was declared entitled to the village and to Rs. 600 in respect of mesne profits for *fasli* 1276. No provision [438] was made in the decree with

* Appeal No. 113 of 1888.

regard to mesne profits for subsequent years. The decree was confirmed on appeal by the District Court and on second appeal by the High Court. Pending these appeals execution was stayed, one Sadasiva Parabrahmam depositing a Government promissory note for Rs. 15,000 as security for the due fulfilment of the decree to be passed.

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On the decree of the High Court being known the zemindar had the note sold and received from the proceeds Rs. 11,175 which he represented as due to him under the decree for mesne profits of *fasli* 1276 and subsequent years. On appeal to the High Court these proceedings were set aside, on the ground that the decree was silent as to subsequent mesne profits and execution should not be in excess of the decree.

Thereupon Parabrahmam attached the village of Arnada, representing that Rs. 8,728 had been collected in excess from him and recovered that amount by sale. The Kurupam zemindar then filed original suit No. 11 of 1878 in the District Court of Vizagapatam against him to recover this amount, the decree in that Court was in favour of the zemindar, but it was on appeal to the High Court reversed on the ground that Parabrahmam had undertaken no liability for rents subsequent to fasli 1276. The sum of Rs. 8,728 realized by the sale of the Arnada village had, pending these proceedings, remained in deposit in the District Court. As soon as the decree of the District Court in original suit No. 11 of 1878 was given in his favour, the Kurupam zemindar drew Rs. 7,887 of it, the balance having apparently been taken by Parabrahmam, at whose instance the property had been sold.

On the passing of decree of the High Court reversing the decree in original suit 11 of 1878 was received Parabrahmam applied under Section 583 of the Code of Civil Procedure to recover from the zemindar Rs. 12,294, the above sum with interest and costs. This was allowed by the District Court, but disallowed on appeal on the ground that the application was barred by the limitation (*Kurupam Zemindar* v. *Sadasiva* (1).

Parabrahmam now sued to recover from the zemindar, with interest, the sum of Rs. 7,100 improperly drawn out of Court by him.

[439] Among other pleas the defendants raised the plea of limitation. On this the District Judge said—

"Plaintiff's vakil contends that the suit falls under Articles 61, 62, "or 97 of the Limitation Act and refers to *Bhawani Kuar* v. *Kikhi* "*Ram* (2); these articles cannot apply. In *Jogesh Chunder Dutt* v. *Kali* "*Churn Dutt* (3) it was held that a suit of this nature must be brought "within six years under Act IX of 1871, Schedule II, Article 118, which "is the same as Article 120 of the present Act. I hold Article 120 to "apply.

"The defendant drew the Rs. 7,100 on 28th January 1881; the High "Court by reversing the District Court's decree decided on 26th September "1881 that he had no right to do so. The present suit to recover the "money so improperly drawn was filed in July 1887. It was therefore "within six years."

The District Judge found the other issues also in favour of the plaintiff and he passed a decree as prayed.

The defendant preferred this appeal.

Subba Row, for appellant.

Subramanya Ayyar, for respondents who were the representatives of Parabrahmam, deceased.

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(1) 10 M. 66. (2) 2 A. 354. (3) 3 C. 30.

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JUDGMENT.

The appellant is the zemindar of Kurupam, and in original suit No. 10 of 1867 he obtained a decree against two persons—Kannam Dora and Appanna Dora. The decree awarded to him possession of a village, called Arnada, and mesne profits for one year, *viz.*, fasli 1276. It was confirmed by the District Court on appeal and by the High Court on second appeal. Pending the appeals, execution of the original decree was stayed on the first plaintiff in the present suit, Sadasiva Parabrahmam depositing a Government promissory note for Rs. 15,000 as security for the satisfaction of the decree that might ultimately be passed. After the High Court confirmed the original decree, the appellant had the Government promissory note sold in execution, and drew Rs. 11,175 as due to him under the decree for mesne profits for fasli 1276 and *for subsequent years.* On appeal the High Court set aside this execution so far as it related to mesne profits subsequently to fasli 1276, on the ground that they had not been awarded by the decree. Thereupon Sadasiva Parabrahmam attached the village of Arnada and brought it to sale in **[440]** order to recover back by way of restitution the amount collected by the appellant in excess of the amount decreed in his favour. Before the sum of Rs. 8,728 realized by the sale was paid out to the surety, the appellant brought original suit No, 11 of 1878 to recover subsequent mesne profits from the former and obtained an order for the amount being held by the Court in deposit pending the disposal of his suit. Subsequently the District Court decreed his claim and he drew out of the amount in deposit Rs. 7,887 in execution of that decree on 20th January 1881. On appeal, however, the decree was reversed by the High Court and original suit No. 11 of 1878 was dismissed, the surety being considered not liable for mesne profits subsequent to fasli 1276. The High Court passed its decree on the 26th September 1881, and the surety applied to enforce his claim to restitution under Section 583, Civil Procedure Code. His application was allowed by the District Court, but disallowed by the High Court as barred by Article 178 of the Act of Limitations. Thereupon the surety, Sadasiva Parabrahman, brought the present suit on the 9th August 1887, and claimed Rs. 7,100 as repayable by the appellant and Rs. 5,563 as interest due thereon at 12 *per cent. per annum* from 20th January 1881 to 31st July 1887.

It was contended for the appellant, first, that the claim was *res judicata*; secondly, that it was barred by limitation; thirdly, that the right to sue was personal to the surety, and, as he died after suit, it did not survive to his legal representatives, the respondents before us. He filed his written statement on the 13th October 1887, and his pleader argued at the final hearing on the 23rd January 1888, four days before the date of the original judgment, that the suit was also barred by Section 244 of the Code of Civil Procedure. The Judge observed that the question did not arise upon the written statement, but referring to the Full Bench Ruling of the Calcutta High Court (*Jogesh Chunder Dutt* v. *Kali Churn Dutt* (1) considered that Section 244 did not bar the suit. As regards limitation he held that Article 120 of the Act of Limitations applied, and that Articles 61, 62, or 97 did not apply and relied on the decision of the High Court at Calcutta already mentioned. He disallowed the plea of *res judicata* and decreed the principal sued for with interest thereon at 6 *per cent. per annum* **[441]** from the 28th January 1881 to date of payment. The defendant

(1) 3 C. 30.

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appeals, and it is contended for him (i) that the suit cannot be maintained under Section 244, (ii) that it is barred by limitation, and (iii) that no interest was claimed in the plaint subsequent to 31st July 1887. The objection regarding interest is not pressed at the hearing. Though no subsequent interest was in terms claimed in the plaint, yet it prayed for such further and other relief as the Court might deem just and equitable, and the Judge, whilst reducing the past interest claimed by the plaintiff from 12 *per cent.* to 6 *per cent.*, considered it fair to award future interest also at the reduced rate. Neither is Section 244 a bar to this suit. The Privy Council said in *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery*(1)—" There is no doubt that according to the Law of " England (and their Lordships see no reason for holding that it is otherwise " in India) money recovered under a decree or judgment cannot be recovered " back in a fresh suit or action whilst the decree or judgment under which " it was recovered remains in force ; but this rule of law rests, as their Lordships apprehend, upon this ground, *viz.*, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or " superseded, by some ulterior proceeding. If it has been so reversed or " superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary " process or by a new suit or action. The true question, therefore, in " such cases is whether the decree or judgment under which the money " was originally recovered has been reversed or superseded." In the case before us the decree in original suit No. 11 of 1878 under which the money in deposit was drawn was reversed by the High Court on appeal. Reading Section 244 in the light thrown by the principle laid down by the Privy Council it must be taken to relate to decrees which are still subsisting and in force and which have not been superseded in appeal and to be no bar to the institution of a suit for restitution after the decree has been reversed. The only question then which remains for us to consider is that of limitation. In its nature the suit is one for restitution or to be restored to the status quo ante. Under color of a decree since superseded, the appellant intercepted the money which the surety [442] had realized by summary process instituted under Section 583, Civil Procedure Code. There is no article in the schedule attached to the Act of Limitations which expressly prescribes a period of limitation for such suits. We consider that the Judge was right in holding that Article 120 applied. The surety was not in a position to claim a refund until the decree was superseded and neither Article 61 or 62 applies as time runs under it from the date on which the money was paid or received. There was a subsisting decree when the money was paid to the appellant, and its receipt cannot be regarded as a wrongful seizure of moveable property as mentioned in Article 29. Article 97 refers to contracts in which the consideration has failed. None of the specific provisions suggested by the appellant's pleader appear to us to contemplate a suit like the one before us.

We are therefore of opinion that this appeal cannot be supported, and we dismiss it.

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(1) 10 M.I.A. 203.

1890 MARCH 24. — APPELLATE CIVIL. — 13 M. 442.

13 M. 442.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Handley.

ANNAJI (*Plaintiff*), *Appellant v.* SUBRAMANYA AND ANOTHER (*Defendants*), *Respondents.** [24th March, 1890.]

Local Boards Act—Act V of 1884 (*Madras*), *Sections* 128, 156—*Suit for malicious prosecution against officers of panchayat union—Notice of suit.*

A suit was brought against the chairman and accountant of a panchayat union for damages for malicious prosecution more then six months after the close of the criminal proceedings :

Held, (1) that the defendants were liable for torts committed by them, and that notwithstanding Local Boards Act, Section 128, the plaintiff was not confined to his remedy against the Taluk Board;

(2) that Local Boards Act, Section 156, was not applicable unless it were proved that the act complained of was done by servants of the Taluk Board within the scope of their authority as such, acting or purporting to act under the Act.

[R., 28 M. 551 (552).]

SECOND appeal against the decree of C. W. W. Martin, District Judge of Salem, in appeal suit No. 144 of 1888, confirming the [443] decree of T. T. Rangachariar, District Munsif of Tripatore, in original suit No. 97 of 1888.

Suit for damages for malicious prosecution against the *ex-officio* chairman and the accountant of the union panchayat of Dharampuri. The criminal proceedings had terminated more than six months before suit. The defendants pleaded, *inter alia*, that the suit was precluded by Local Boards Act, Section 128, and also by want of notice to the President of the Taluk Board under Section 156 of the same Act.

The District Munsif held that both these pleas were well founded and dismissed the suit; his decree was affirmed on appeal by the District Judge who held that the want of notice pleaded was a bar to the suit.

The provisions of the Sections 128 and 156 above referred to are as follows:

Section 128.—(1) "Every panchayat shall, subject to the provisions "of this Act, be the agent and under the control of the Taluk Board;

(2) "and the Taluk Board, and not the panchayat, may "sue and be sued in respect of any act or omission of the panchayat giving "rise to a cause of action.

Section 156.—"No action shall be brought against any Local Board, "or any of their officers, or any person acting under their direction, for "anything done or purporting to be done under this Act until the expira-"tion of one month next after notice in writing shall have been delivered "or left at the office of the Local Board, or at the place of abode of such "person, explicitly stating the cause of action and the name and place of "abode of the intended plaintiff; and unless such notice be proved, the "Court shall find for the defendant; and every such action shall be "commenced within six months next after the accrual of the cause of "action, and not afterwards: and if any person to whom any such notice "of action is given shall, before action brought, tender sufficient amends "to the plaintiff, such plaintiff shall not recover more than the amount "so tendered, and shall pay all costs incurred by the defendant after such "tender."

* Second Appeal No. 1024 of 1889.

The plaintiff preferred this second appeal. 1890 MARCH 24.

Seshagiri Ayyar, for appellant contended that two months' notice of the institution of the suit which was given under Section 424 of the Civil Procedure Code was sufficient notice, that the suit [444] was not one brought under the Local Boards Act, that the suit was for a tort committed by the defendants, and that accordingly compliance with the preliminaries prescribed by the Local Boards Act was not necessary. APPELLATE CIVIL.

Pattabhirama Ayyar, for respondents. Under Section 128 of the Local Boards Act the Taluk Board and not the panchayat must be sued. No notice was given under Section 156 of the Local Boards Act. 13 M. 442.

JUDGMENT.

The plaintiff's suit has been dismissed on the ground that it should have been instituted against the Taluk Board and not against the defendants, and on the ground that notice ought to have been given under the provisions of Section 156 of Act V of 1884. It is also urged in this Court that the suit was not brought within six months of the date of accrual of the cause of action as required in the same section.

It is stated that two months' notice was given with reference to Section 424 of the Code of Civil Procedure, and unless this is incorrect, the objection founded on the want of notice which is apparently the ground of the District Judge's judgment fails. The other and more important contention is that by force of Section 128, the defendants who are the chairman and the gumasta or accountant of the panchayat are not personally liable for any act done by them as members of the panchayat. The object of Section 128 seems to have been to make it clear that the relation of the panchayat to the Taluk Board was to be that of agent and principal. The Taluk Board is incorporated, whereas the panchayat is not, and it would have been unreasonable that members of the latter should be personally liable on their contracts or otherwise whereas the Taluk Board could only be liable in its corporate capacity. The special provision contained in Section 128 must be construed with reference to the general principle of law and cannot be extended in the manner contended for by the respondents. It would be absurd to hold that the Taluk Board could be sued for the tortious acts of the panchayat which the Board had never authorized and may even have prohibited. Either this must be so according to the respondents' contention, or a person aggrieved in such cases has no remedy. We cannot construe the section in such a manner as to bring about such unreasonable results.

[445] It remains to mention the argument that the latter part of Section 156 applies and that the suit is brought too late, being instituted more than six months after the date of the accrual of the cause of action. In order to make that provision apply it would be necessary to show that the act complained of was done within the scope of their authority as servants of the Board and also that the act was done or purported to be done under the Act. We cannot at present deal decisively with these questions, the facts not being fully before us, but we may observe that it appears to us extremely doubtful whether such a prosecution as that which is the subject of the suit can be said to be an act done under the Act.

We must reverse the decrees of both Courts and remand the suit to the Court of First Instance.

The appellant is entitled to costs of this appeal : costs in the Courts below to be provided for in the revised decree.

1890
JULY 21.

APPELLATE CIVIL.

13 M. 445.

13 M. 445.

APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

KANAKASABAI AND ANOTHER (*Plaintiffs Nos.* 1 and 2), *Appellants v.* MUTTU AND ANOTHER (*Defendants*), *Respondents.** [21st July, 1890.]

Limitation Act—Act XV of 1877, *Schedule II, Article* 120—*Suit for perpetual injunction—Claim of possession.*

In a suit for a perpetual injunction to restrain the defendant from preventing the plaintiff from entering a certain house it was alleged that the defendant had been in exclusive possession for more than six years before suit:

Held, that Limitation Act, Schedule II, Article 120, applied to the suit which was therefore barred by limitation.

Per cur: It was open to the plaintiff to sue for such possession other than exclusive possession (the right to which had already been negatived by suit) as he might be entitled to.

[F., 26 A. 391 (393) = A.W.N. (1904) 69; 13 Ind. Cas. 661 = 151 P.L.R. 1912 = 77 P. W.R. 1912; R., 2 L.B.R. 113 (115); 14 M.L.J. 290 (293).]

SECOND appeal against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in appeal suit No. 769 of 1888, reversing the decree of A. Kuppusami Ayyangar, District Munsif of Kumbakonam, in original suit No. 100 of 1888.

[446] Suit filed on 6th March 1888 for a perpetual injunction restraining defendant No. 1 from preventing the plaintiffs from entering a house attached to a certain temple. It was alleged that defendant No. 1 had been in exclusive possession of the house since 2nd March 1888 and it appeared that the father of the plaintiff had brought a suit for the declaration of his right over the house now in question in 1885 and had failed to establish his right to exclusive possession.

The further facts of the case appear sufficiently for the purposes of this report from the judgment.

Ramachandra Rau Saheb, for appellants.

Pattabhirama Ayyar, for respondent No. 1.

JUDGMENT.

A preliminary objection is urged on behalf of the first respondent, *viz.*, that on the statement of the plaintiffs in the plaint to the effect that the first defendant has been wrongfully enjoying the property exclusively since 2nd March 1882 the suit is barred, inasmuch as the suit, not being otherwise provided for, must be taken to be governed by Article 120 of the Limitation Act and more than six years had passed since the right to sue accrued the plaint not having been filed until the 6th March 1888.

The suit is one of a special character, *viz.*, a suit for a perpetual injunction and no specific provision is made for such suits in the schedule to the Limitation Act.

For the appellants, it is argued that Article 127 of the schedule applies, and if not Article 144 of the schedule. It appears to us, however, that neither of these last-mentioned articles applies to a suit such as the

* Second Appeal No. 969 of 1889.

present which, as already observed, is a suit of a special character specially defined by statute, *i.e.*, Section 54, Specific Relief Act; the Limitation Act and the Specific Relief Act are both enactments of the year 1877, and if the Legislature had intended to provide any special period of limitation for suits under Section 54 of the latter Act, it may be presumed they would have done so.

We think, therefore, Article 120 of the schedule applies and we hold accordingly that the suit as brought is barred, and on this ground, we must support the decision arrived at by the Lower Court.

Adverting to the question, which has been raised in connection with the frame of the suit, we think it right, although it is not necessary to our decision, to state our opinion that as the plaintiff **[447]** was out of possession, it was open to him to sue for such possession (other than *exclusive* possession the right to which had already been negatived by suit) as he might be entitled to. And this being so, we are of opinion that the Subordinate Court rightly decided that the exceptional form of relief by way of perpetual injunction was not open to the plaintiffs and that such relief was rightly refused to them.

For the reasons already stated, however, we dismiss the appeal with costs.

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13 M. 447.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

PARVATHEESAM (*Plaintiff*), *Appellant v.* BAPANNA AND OTHERS (*Defendants*), *Respondents.** [27th and 31st March, 1890.]

Civil Procedure Code, Section 266—Unascertained interest in a partnership.

The plaintiff having purchased at an execution sale the interest of the judgment-debtor in a partnership, of which the undivided father (deceased) of the judgment-debtor had been a member, now sued the other partners praying that an account be taken and that the share of the judgment-debtor be paid to him:

Held, that the execution sale was not bad in law and that the present suit was accordingly maintainable. *Dwarika Mohun Das* v. *Luckhimoni Dasi* (14 C., 384) dissented from.

[R., 20 C. 693 (695); 24 M.L.J. 313 (317) = 13 M.L.T. 257; U.B.R. (1897-1901) 431.]

APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in original suit No. 15 of 1888.

One Ramamurti, who died on 23rd April 1885, and the first three defendants, carried on business in partnership. In February 1887, in execution of the decree passed in original suit No. 386 of 1885 against an undivided son of Ramamurti, the present plaintiff became the purchaser of Ramamurti's interest in the partnership. The plaintiff in this suit prayed that an account of the late partnership be taken and that he be declared entitled to receive such sum as may be found due by the other partners to Ramamurti.

The District Judge held that "an uncertain sum of money which "may or may not be payable by one member of a partner-**[448]** ship to "another, cannot be attached and sold," and accordingly dismissed the suit.

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* Appeal No. 41 of 1889.

1890 MARCH 31. — APPELLATE CIVIL. — 13 M. 447.

The plaintiff preferred this appeal.

Bhashyam Ayyangar and *Krishnasami Rau*, for appellant.

Subramanya Ayyar, for respondents.

JUDGMENT.

MUTTUSAMI AYYAR, J.—It is contended for the appellant that Ramamurti's interest as a partner in the business which he had carried on in partnership with defendants Nos. 1, 2 and 3 was liable to be attached and sold in execution, and that the Judge was in error in holding that the court-sale was bad in law and that Ramamurti's right to an account did not pass by it to the appellant. I am of opinion that this contention must prevail.

Prior to 1885 Ramamurti and defendants Nos. 1—3 traded in jaggery in partnership at Chodavaram, and the former died on 23rd April 1885. The partnership was therefore dissolved on that date by his death, and his son became entitled to sue for an account and to recover what might be found to be due to him. In February 1887 the appellant attached that interest and bought it at the court-sale held in execution of the decree which he had obtained against Ramamurti's son in original suit No. 386 of 1885. Thereupon he brought the present suit as purchaser against Ramamurti's partners to ascertain and recover the balance which might be found due to him upon the partnership account. The Judge considered that the balance which was unliquidated at the time of attachment and sale, and which might possibly turn out to be nothing, was not saleable property within the meaning of Section 266 of the Civil Procedure Code. That the right to an account is a vested and heritable interest, there can be no doubt. Section 265 of Act IX of 1872 recognizes the right of a deceased partner's representative to apply for winding up the partnership business, for an account being taken, and for the distribution of the surplus according to the shares of the several partners. Nor is there any reason to doubt that, although a partner is not at liberty to introduce a new partner into the firm without the consent of all the partners, and thereby give him the *status* of a partner, his interest in the partnership may be legally transferred. The effect of such transfer is that it is operative for all purposes but that of forcing him as a partner on the other partners without their consent, the relation of partners being one of mutual confidence and fiduciary in its character. This is clear from Sec- [449] tion 254, Clause 3, and Section 262 of the Indian Contract Act. This being so, it is not correct in principle to say that a partner's unascertained interest in partnership business is not his saleable property, or that a Court is not entitled to sell it, though he himself can do so during his life. It is argued for the respondents that the sale of an unascertained interest may not fetch an adequate price at a public auction, and that it is the practice of the Courts of Chancery to ascertain first the *quantum* of interest which is to be put up to sale with precision, and then to proceed to sell it. But it is to be observed that the interest of an undivided co-parcener, though equally uncertain, is liable to be sold in execution. So also the right of redemption may be an uncertain interest when there are several incumbrances, and yet it is sold in execution. Again, the right, title, and interest of a judgment-debtor may be uncertain in some cases, but it has not been considered to bar its sale in execution. I think, therefore, that the contention that a vested interest is not saleable whenever its *quantum* is uncertain and until it is made certain cannot be upheld with reference to the provisions of the Code of

1890 MARCH 31. — APPELLATE CIVIL. — 13 M. 447.

Civil Procedure. There is a distinction between such interest and a mere expectancy or contingent or possible right or interest which is not liable to be attached in execution (see Section 266, Clause K). In that case, there is no vested right of property upon which the attachment can operate when it is made, and no future right nor mere possibility can be attached by anticipation. But the interest of a partner is one growing out of a pre-existing contractual relation, and though, under certain circumstances, it may turn out infructuous in common with several other recognized forms of saleable property, it does not on that ground cease to be saleable property. That this is the proper construction to be put upon Section 266 is clear from the observations of the Privy Council in *Deendyal Lal* v. *Jugdeep Narain Singh* (1). The question in that case was as to the rights of an execution creditor and of a purchaser at an execution sale in regard to the interest of an undivided co-parcener in a Hindu family and it was held that such interest was liable to be attached and sold. In stating the ground of decision, their Lordships of the Privy Council observed as follows :—" It is sufficient to instance the seizure and sale of a " **[450]** share in a trading partnership at the suit of a separate creditor of " one of the partners. The partner could not have himself sold his share " so as to introduce a stranger into the firm without the consent of his " co-partners, but the purchaser at the execution sale acquires the interest " sold, with the right to have the partnership accounts taken in order to " ascertain and realize its value. The same principle may and ought to be " applied to shares in a joint and undivided Hindu estate." In this connection, the pleader for the respondents draws our attention to the decision of the Judicial Committee in *Syed Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (2). The particular interest attached in that case was, as observed by the Privy Council, not an unliquidated demand *ex contractu* nor an antecedent share of the existing assets, but an uncertain future right which was to come into existence under a future award, the terms of which depended on the extensive discretionary powers conferred upon certain arbitrators. Far from this decision being an authority in support of the respondent's contention, it appears to me to illustrate the distinction between a possible future interest and a vested interest.

As to the case of *Karimbhai* v. *The Conservator of Forests* (3), it is not in point, and, so far as it goes, it recognizes the right of the purchaser to the partner's share in the assets.

As to the decision in *Abbott* v. *Abbott and Crump* (4), which seems to support the respondents' contention, it is to be observed that it is the decision of a single Judge and cannot prevail against the authority of the Privy Council. As to the decision of the Divisional Bench in *Dwarika Mohun Das* v. *Luckhimoni Dasi* (5), it purports to proceed on the decision of the Privy Council in *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (2), but it appears to me not sufficiently to recognize the distinction between a saleable interest which might turn out to be infructuous under certain circumstances and a mere expectancy or possibility. The reasoning of the Privy Council in *Deendyal Lal* v. *Jugdeep Narain Singh* (1), was not considered in that decision. The contention for the appellant is, in my judgment, sound in principle and supported by authority.

[451] The next objection argued before us is as to limitation. Ramamurti died on 23rd April 1885, and the plaint was presented on 26th

(1) 4 I.A. 247. (2) 14 M.I.A. 40. (3) 4 B. 222.
(4) 5 B.L.R. 382. (5) 14 C. 384.

1890 MARCH 31. — APPELLATE CIVIL. — 13 M. 447.

April 1888. It appears that the Court was closed for the annual recess from 23rd April, but that arrangements were made and duly notified for the reception of plaints on every Monday and Thursday during the recess. There is an endorsement on the plaint apparently by the Sheristadar of the Court that Monday the 23rd April was a local holiday and that the plaint was presented on the 26th *idem*. It is conceded that, if the 23rd April were a local holiday, the suit would be brought in time, but it is contended that the endorsement is not sufficient legal evidence. I consider it desirable to ask the Judge to ascertain whether the 23rd April 1888 was a local holiday and the Court was closed on that day.

I would set aside the decree of the Judge and remand the case with the direction that the Judge do re-try the issue as to limitation with reference to the foregoing remarks, and that if he comes to the conclusion that the suit is not barred, he do proceed to dispose of it on the merits.

Costs hitherto incurred will be provided for in the revised decree.

BEST, J.—I concur.

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13 M. 451.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NARASIMMA AND OTHERS (*Defendants*), *Appellants v.* MUTTAYAN AND OTHERS (*Plaintiffs*), *Respondents*.* [1st May, 1890.]

Limitation Act—Act XV of 1877. *Section* 14—*Exclusion of time of proceeding with suit* bona fide—*Cause of like nature.*

Of six persons in whom was vested the obligee's interest under a hypothecation bond, three brought a suit upon it in a District Court and the other three brought a similar suit in a District Munsif's Court to recover, with interest, their respective shares of the sum secured. The former suit was dismissed as not being maintainable and the latter was withdrawn. The present suit was brought by all six :

[452] *Held*, that in computing the time within which the plaintiffs had to sue, the time occupied by them in prosecuting the former suits should be deducted. *Deo Prosad Sing* v. *Pertab Kairee* (10 C. 86) followed.

[R., 22 A. 248 (256) ; 23 C. 821 (825).]

APPEAL against the decree of W. Austin, District Judge of Trichinopoly, in original suit No. 20 of 1887.

Suit by six persons in whom was vested the obligee's interest in a hypothecation bond to recover the principal and interest due thereon.

It appeared that the plaintiffs did not at first agree in bringing one suit for the whole amount due under the bond, and the plaintiffs Nos. 1—3 brought original suit No. 28 of 1886 in the District Court for recovery of their three-fourth share of the whole amount, while plaintiffs Nos. 4—6 brought original suit No. 359 of 1886 in the Court of the Kulitalai District Munsif to recover their one-fourth share.

Original suit No. 28 of 1886 was dismissed on the ground that the plaintiffs were not entitled to bring a suit for a portion of the mortgage amount. The suit in the District Munsif's Court was withdrawn as soon as the dismissal of original suit No. 28 of 1886 became known with permission of that Court to bring a fresh suit.

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* Appeal No. 71 of 1889.

1890 MAY 1. — APPELLATE CIVIL. — 13 M. 451.

Upon these facts the defendants raised a plea under Section 43 of the Civil Procedure Code and also pleaded limitation as to which the District Judge delivered judgment as follows :—

" As to the first issue, the defendants contend that this suit is barred "by suits 28 and 359 of 1886 above alluded to, because in those suits "plaintiffs intentionally omitted to sue for the whole amount due under "Exhibit A, and further that in any case they cannot now ask for more "than three-fourths of the whole amount. In reply, it is said that the "two suits taken together comprised the whole claim and therefore nothing "has been omitted.

"This issue I find for plaintiffs, for it is clear that no portion of the "claim was intentionally omitted, but that the claim was merely split "into two portions.

"The second issue I find also for plaintiffs. I think they are clearly "entitled to exclude, as far as bar by limitation is concerned, the time "occupied by them in prosecuting suits 28 and 359 of 1886. The deci-"sions in *Deo Prosad Sing* v. *Pertab Kairee* (1), *Putali Meheti* v. "*Tulja* (2), *Obhoy Churn Nundi* v. **[453]** *Kritarthamoyi Dossee* (3) and "*Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha* (4) seem to me to "settle the point, and I hold that the words in Section 14 of the Limita-"tion Act ' or other cause of a like nature' would certainly apply to the "suit now brought with reference to suits 28 and 359 of 1886 above "referred to."

The District Judge recorded findings in favour of the plaintiff on the other issues raised in the suit and accordingly passed a decree as prayed.

The defendants preferred this appeal upon the ground among others that the suit was barred by limitation.

Parthasaradhi Ayyangar (*Kristnasami Rau* with him) for appellants.

Mere withdrawal of the suit does not prevent time from running under Section 374 of the Code of Civil Procedure, as to which see *Pirjade* v. *Pirjade* (5), *Kifayat Ali* v. *Ram Singh* (6), *Krishnaji Lakshman* v. *Vithal Ravji Renge* (7) and *Bai Jamna* v. *Bai Ichha* (8). Limitation Act, Section 14, does not help the defendant. See *Chunder Madhub Chuckerbutty* v. *Ram Coomar Chowdry* (9), *Ram Subhag Das* v. *Gobind Parsad* (10), questioned in *Deo Prosad Sing* v. *Pertab Kairee* (1).

(*Best*, *J.*, referred to *Jag Lal* v. *Har Narain Singh* (11).

Krishnasami Ayyar, for respondent.

Permission under Section 374 alone is not enough to save limitation. See *Deo Prosad Sing* v. *Pertab Kairee* (1), *Rajendro Kishore Singh* v. *Bulaky Mahton* (12) and *Putali Meheti* v. *Tulja* (2).

Upon the question of limitation the Court delivered judgment as follows :—

JUDGMENT.

The only point argued before us is as to limitation. We agree with the Judge that the plaintiffs in original suit No. 28 of 1886 are entitled to the benefit of Section 14 of the Limitation Act, and that the case of *Deo Prosad Sing* v. *Pertab Kairee* (1) was rightly decided.

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(1) 10 C. 86. (2) 3 B. 223. (3) 7 C. 284. (4) 10 C. 265.
(5) 6 B. 681. (6) 7 A. 359. (7) 12 B. 625. (8) 10 B. 604.
(9) B L.R. Sup. Vol. 553. (10) 2 A. 622.
(11) 10 A. 524. (12) 7 C. 367.

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[454] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

[In S.A. No. 1321 of 1888.]

VALIA TAMBURATTI (*Plaintiff*), *Appellant v.* PARVATI AND OTHERS (*Defendants, Nos.* 1—3), *Respondents.**

[In S.A. No. 1367 of 1888.]

PARVATI AND OTHERS (*Defendants*), *Appellants v.* VALIA TAMBURATTI AND ANOTHER (*Plaintiffs*), *Respondents.**

[8, and 12th February 8th July and 13th August, 1889.]

Malabar compensation for Tenants' Improvements Act—Act I of 1887 (*Madras*). *Sections* 1, 2, 4, 6—*Mode of assessing compensation for improvements.*

The sum to be allowed for compensation for a tenant's improvements under Act I of 1887 (Madras) is not to be determined by capitalizing either the annual rent or the annual increment due to the improvement, but a reasonable sum should be awarded, assessed with reference to the amount by which the market value or the letting value or both has been increased thereby; and the Court should take into consideration the actual condition of the improvement at the time of the eviction, its probable duration, the labour and capital which the tenant has expended in effecting it and any reduction or remission of rent or other advantage which the landlord has given to the tenant in consideration of the improvement. In the absence of evidence as to the actual market value in the place where the land is situated, the reasonable mode of estimating the compensation consists in taking the cost of the improvement and interest thereon and in adjusting the compensation to be awarded with reference to the matters specified in Section 6.

[R., 18 M. 407 (409); 19 M. 384 (387); 24 M. 47 (57).]

SECOND APPEALS against the decree of V. P. deRozario, Subordinate Judge at Palghat, in original suit No. 1012 of 1887, modifying the decree of S. Subramanya Ayyar, District Munsif of Temelprom, in original suit No. 362 of 1886.

The predecessor in title of plaintiff No. 1 had demised certain land, now in question, on kanom to the tarwad of defendants Nos. 1—3 in July 1874. Plaintiff No. 2 claimed, under a second mortgage, from plaintiff No. 1 and defendants Nos. 4—12 were sub-mortgagees under defendants Nos. 1—3.

[455] The plaintiffs brought this suit to redeem the above kanom and recover the land with arrears of rent. The defendants pleaded that they had made improvements on the land.

The District Munsif passed a decree for the plaintiff, allowing to the defendants Rs. 85-10-8 for their improvements. On appeal, the Subordinate Judge modified this decree by allowing Rs. 837-4-0 for the improvements.

Plaintiff No. 1 and defendants Nos. 1—3 preferred these cross-appeals against this decree of the Subordinate Judge.

Subramanya Ayyar and *Sundara Ayyar* in support of the plaintiff's appeal.

Bhashyam Ayyangar and *Govinda Menon* in support of the defendants' appeal.

JUDGMENT (PRELIMINARY.)

This is a suit for the redemption of land demised on kanom upon payment of the value of improvements.

* Second Appeals Nos. 1321 and 1367 of 1888.

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Compensation is claimed for the following improvements:—

(1) the conversion of one-crop into two-crop land, (2) the conversion of paramba into one-crop land (3) the conversion of paramba into seed-bed, (4) trees. The District Munsif awarded Rs. 85-10-8 as the value of improvements. The defendants appealed and the Subordinate Judge ordered the plaintiff to pay Rs. 837-4-0 as compensation.

Both plaintiff and defendants have appealed, the former on the ground that the Subordinate Judge has not arrived at a correct estimate of the value of the improvements effected by conversion and that he has allowed compensation for trees of spontaneous growth; the latter on the ground that the principle adopted by the Subordinate Judge was unsound and injurious to their interests. It is not clear on what principle the Subordinate Judge has proceeded. He states that the increased value of a holding is determined by the higher rent which the landlord will be able to obtain by reason of the improvement, and appears to think that the only way to arrive at the amount due to the evicted tenant is to capitalize the enhanced produce of the land at so many years' purchase. He finds that, in consequence of the improvements effected by the tenant, the holding yields 423 paras of paddy in excess of what it yielded when demised. Taking into consideration the fact that the tenant has by long enjoyment more than recouped the actual costs of the reclamation, Rs. 338 and the interest thereon, and that the improvement is a permanent one, [456] he awarded Rs. 600, the value of six years' increased profits, as compensation. On what ground he selected the number six is not apparent. In another portion of the judgment he suggested ten times the annual produce as the proper compensation.

We are unable to accept this method of ascertaining the value of improvements.

The word improvement is defined in Madras Act I of 1887 as meaning "any work which adds to the value of the holding, provided (1) that "the work is suitable to the holding and (2) that it is consistent with the "purpose for which it is let." By Section 4 it is provided that, on eviction, every tenant shall, any custom to the contrary notwithstanding, be entitled to compensation for all improvements effected by him or his predecessor, provided they have not been already paid for. Section 6 of the Act then lays down the principles on which compensation is to be awarded. It provides that the compensation to be paid shall be the amount by which (1) the value of the holding or (2) the produce of the holding or (3) the value of that produce is increased. The wording of the section is not felicitous, but we take it that the object which the legislature had in view was to secure to the tenant the full value of his improvements and that it recognized, what is an undoubted fact, that in the different taluks of Malabar such value had been habitually ascertained in various and arbitrary ways. In order to secure uniformity in the assessment of compensation, the legislature would appear to have intended that the Court should, in arriving at a conclusion as to the amount due, look at the matter from every point of view. To take the present case as an example, the market value of the holding may be materially increased (in other words, the holding may, in consequence of the improvement effected, fetch a higher price in the market than before), or the letting value of the holding may have been enhanced, and the landlord may be enabled to demand and obtain from the in-coming tenant a higher rent either in money or kind. The Court is bound to ascertain the amount by which the market value or the letting value or both has been increased by the improvement. But in

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arriving at a conclusion on these points, the Court must take certain other matters into consideration, *viz.*, the actual condition of the improvement at the time of the eviction, its probable duration, the labour and capital which the tenant has expended in effecting it, and any reduction or remission of rent [457] or other advantage which the landlord has given to the tenant in consideration of the improvement. The amount of compensation to be awarded will be the sum, which, after due consideration of all these matters, appears to the Court to be, in the circumstances of the case, reasonable. No hard-and-fast rule, such as that suggested by the Subordinate Judge, can be laid down. Each case must be decided on its own merits.

The pleader for the plaintiffs does not impeach the principle on which the Judge has awarded compensation for the trees on the holding, but objects to the inclusion of certain trees (iripa, puvam, bamboo and margosa), which were held by the District Munsif to be trees of spontaneous growth. The tenant would be entitled to compensation for such trees if it were found that he had protected or maintained them ; but the Subordinate Judge has recorded no finding on this point.

The Subordinate Judge will, therefore, be required to submit a revised finding (with reference to the above remarks) as to the compensation to be awarded to the defendant for conversion and improvement of the land and as to the amount of compensation, if any, to be awarded for trees of spontaneous growth. He will submit his finding within six weeks from the date of receipt of this order.

Fresh evidence may be adduced. Ten days will be allowed after posting of the finding in this Court for filing objections.

In accordance with the above order, the Subordinate Judge returned his finding as follows :—

" I am directed to submit a revised finding (with reference to the "remarks contained in the order of remand) as to the compensation to "be awarded to the defendant for conversion and improvement of the "land and as to the amount of compensation, if any, to be awarded for "trees of spontaneous growth.

" Neither party has adduced any fresh evidence.

" As regards the trees, it is observed in the order that iripa, puvam, "bamboo, and margosa were held by the Munsif to be trees of spon-"taneous growth. I beg respectfully to point out that the trees, which "the Munsif held to be of spontaneous growth, are teak and some "others referred to in the twenty-second paragraph of his judgment, "for which no compensation was allowed by him or by me. The trees "above described are those referred to in the twenty-first paragraph "of the Munsif's judgment, which were not asserted to be spontaneous, "which the evidence showed to be planted and for which [458] "compensation was allowed by him. No appeal was preferred by "plaintiff to this Court against the Munsif's decision, nor was any objec-"tion filed.

" As regards the conversion and improvement of the land, I have, "in the fourteenth paragraph of my judgment, stated my reasons for the "opinion that the annual produce, that is, net rent of the land "demised, was increased by 423 paras of paddy, the value of which is "about Rs. 100, by reason of the labour and capital valued at Rs. 338 "employed by the tenant in the conversion and improvement of the land. "No fresh evidence has been adduced by either party, nor any argument "advanced, to show my estimate to be incorrect.

"The amount to be awarded as compensation for an improvement "under the Improvements Act 'is the amount by which the value, or "the produce of the holding, or the value of that produce is increased by "the improvement.' In the present case the produce of the land has "been increased by 423 paras of paddy per annum, the price of the "increased produce at the current rate being about Rs. 100. By what "amount has the increased produce of Rs. 100 per annum increased "*the value of the holding*? The value contemplated by the Act is, as "the title of the Act indicates, the market value. The value to be ascer-"tained is the increassd market value of the 'holding' by reason of the "improvement.

"'Holding' means land forming the subject of tenancy, or as defined "in the Bengal Tenancy Act, from which many of the provisions of the "Improvements Act have been taken, it means 'a parcel or parcels of land "held by a rayat and forming the subject of a separate tenancy.' The "value of the holding is the value of the leasehold or the letting value, "and not the value of the freehold or the jenm value. The letting value "of a land is not always in a direct ratio to its proprietary value. The "proprietary value of a land may be increased without any influence on "the rent. There are lands which yield no rent and still have a proprie-"tary value.

"What I have to determine is the amount by which the market-value, "or the letting value of the holding, is increased by the improvement. "It is not easy to determine the market value, for the tenant's improve-"ment under 'the Malabar Compensation for Tenants' Improvement Act, "1886,' is a commodity which has never before been in the market. The "landlord's estimate of the value never accords with the tenant's and the "Court's estimate agrees with neither. While one Court estimates the "value of the tenant's improvement at the cost of production and one year's "produce, another Court estimates it at twelve times the annual produce. "The **[459]** market value (in the ordinary acceptation of the term) of the "present holding after the expiration of the lease may be said to be an "uncertain value, for, of the several elements which constitute it, only "some are constant, the cost of production and yearly produce, if this "latter which varies with the season may with propriety be termed cons-"tant. The *term* for which the produce can be enjoyed is uncertain, for "it would depend solely upon the pleasure of the landlord.

"The letting value alone can furnish some help in determining the "value of the improvement.

"The higher rent which the landlord may be enabled to demand and "obtain from the in-coming tenants is 423 paras of paddy or Rs. 100 per "annum. This is the profit which the landlord will derive annually from "the holding. The exchange value of the profit must be a certain number "of years' purchase of the rental. The number of years cannot exceed "twenty, for twenty times the yearly rent is the proprietary value of the "land. If the value of the jenm is only twenty times the produce, it is "clear that the letting value must be less. It appears to me that a sum "sufficient at the current rate of interest (5 per cent. when land is the "security) to replace the capital on the expiration of the usual term of a "lease of twelve years should be taken to be the letting value. In the "present case, the sum which, at the usual rate, would be replaced at "the end of twelve years is Rs. 900. This sum would be equivalent to "nine years' produce, and it is what the tenant would be entitled to, if, on "consideration of certain other matters, to which regard must be had in

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"fixing the amount of compensation, it is not to be increased or reduced. "These matters are—

"(a) The condition of the improvement and the probable duration "of its effects.

"(b) The labour and capital required for the making of the improve-"ment.

"(c) Any reduction or remission of rent, or any other advantage "given by the landlord to the tenant in consideration of the "improvement.

"With regard to clause (a), the improvement is of a permanent "nature. The landlord, after he has replaced the capital by the produce "of the land in twelve years, has the benefit of the improvement for an "indefinite period free from any burden. The present improvement is of "a different kind from planting of trees or plants, the effects of which are "of short duration. Would nine years' produce be a sufficient compensa-"tion? To determine this, we [460] have to look also to the amount of "labour and capital required for the improvement.

"(b) In the present case the amount of the capital and labour employed "in producing an improvement of a permanent nature is Rs. 300. The "effect produced is an income of Rs. 100 per annum. I think, therefore, "nine years' produce, Rs. 900, or three times the amount of the capi-"tal and labour expended by the tenant is not an inadequate compensa-"tion. The extra Rs. 600, if invested by the tenant in land, will yield "to him at the end of twelve years Rs. 900. So that, while the landlord "at the end of twelve years replaces the price paid, Rs. 900, and has "thenceforward the unrestricted use of the improvement, the tenant at "the end of the same term realizes a profit of about Rs. 900 by his "improvement.

"I have now to consider clause (c) whether any reduction should be "made in the amount of compensation found due upon consideration of "clauses (a) and (b) by reason of any reduction or remission of rent or "any other advantages given by the landlord to the tenant in considera-"tion of the improvement.

"In paragraph 11 of my judgment, I gave the following as my "reason for taking into consideration the length of time (30 years) during "which the tenant has had the benefit of the improvement at an un-"enhanced rent :—

"'It is contended that the profits realized by the tenant by the "improvement should not be taken into account unless there is a "special clause in the lease allowing the tenant any reduction or remis-"sion of rent or any other advantage. I do not think any special clause "necessary. If a tenant, who is expressly or impliedly allowed to make "improvements on a land let to him for a certain number of years at a "fixed rent, makes the improvement and enjoys the produce without "paying any increased rent, he enjoys an advantage impliedly allowed "to him by the landlord in consideration of the improvement. That "advantage should be taken into account in estimating the compensation "due to him.'

"Taking this advantage into account, I allowed the tenant six years' "produce.

"I have now, upon re-consideration, found reason to alter my "original opinion. The land was let for a certain rent, and that rent "was the consideration for the use of the land by the tenant. That "the legislature did not intend that the length of time during which

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"a tenant has had the benefit of the improvement at an unenhanced "rent should be taken into consideration is clear from the fact that "this clause, which appears in the Bengal Tenancy Act, Section 83, "Clause (*e*) in addition to Clause (*c*) of the Improvements Act is not "**[461]** incorporated in this latter Act. The former Act takes into "consideration both the 'reduction or remission of rent or any other "advantage given by the landlord to the raiyat in consideration of the "improvement' [clause *d* (1)] as well as 'the length of time during which "the raiyat has had the benefit of the improvement at an unenhanced rent' "[clause (*e*)]. The provisions in the Bengal Tenancy Act show that en-"joying the benefit of the improvement at an unenhanced rate is distinct "from, and is not comprehended in, the advantage contemplated in the "preceding clause. The legislature having had this Act before it when it "framed the Improvements Act, the omission of the last clause in the "latter Act seems intentional. The Legislature was probably apprehensive "that, if this clause were introduced in the Act, advantage would, in some "cases, be taken of it by the landlord to deprive the tenant of all compen-"sation and thus defeat the main object of the Act.

"I am of opinion, therefore, the fact 'that the tenant has enjoyed the "increased produce for about thirty years without paying any additional "rent' should not be taken into consideration in ascertaining the amount "of compensation.

"My finding on the second issue referred to me is that the amount "of compensation due to the tenant for the conversion and improvement "of the land is Rs. 900."

These second appeals having come on for final hearing, the Court delivered the following

JUDGMENT (FINAL).

The finding returned by the Subordinate Judge is that the amount of compensation due to the tenant for the conversion and improvement of land is Rs. 900. Both the appellants and respondents object to it, and the question is whether the compensation is fixed in accordance with the provisions of Act I of 1887. These are discussed in our former judgment and it only remains for us to consider whether they have been correctly applied to the facts of this case. The letting value of the holding, it is found, has been increased by 423 paras of paddy, of which the price at the current rate is Rs. 100. The capital and labour expended for effecting the improvement are estimated at Rs. 338 Neither party has attempted to show what is the market value of the holding, where it is situated, and what addition it has received by reason of the improvement. The improvement is found to be of a permanent character and the tenant has had the benefit of the enhanced rent for nearly thirty years, the porapad payable to the landlord being the same throughout, *viz.*, As. 13-9 **[462]** a year. The Subordinate Judge drew a distinction between the proprietary value and the letting value of the land and estimated the former at twenty times the rent and the latter at the sum sufficient at 5 per cent. per annum to replace the capital expended on the expiration of the usual kanom period of twelve years. He took this amount to be Rs. 900 and referring to Clauses (*d*) and (*e*), Section 83, of the Bengal Tenancy Act, held that the benefit of the improvement, which the tenant had had, was not a matter to be taken into consideration under Section 6, Explanation (*e*). There is no provision in the Act for capitalizing either the annual rent or the annual increment due to the improvement. The intention

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was to provide an adequate compensation for the out-going tenant in substitution for the arbitrary and varying rates at which compensation had been previously assessed.

The mode of capitalizing the additional rent, which the Subordinate Judge has adopted, tends also to introduce an arbitrary and a variable standard. There is no evidence to warrant the assumption that twenty or twelve years' purchase at 5 per cent. is a correct measure of the market value in every part of Malabar. In the absence of evidence as to the actual market value in the place where the land is situated, the reasonable mode of estimating the compensation consists in taking the cost of the improvement and the interest thereon at the local rate during the period that has elapsed subsequent to the improvement and in adjusting the compensation to be awarded with reference to the matters specified in Section 6. This would replace the capital laid out by the tenant and thereby provide an adequate compensation as far as it can be ascertained, in cases in which there is no evidence of the market value. We cannot accede to the suggestion made by the Subordinate Judge that the period for which the tenant has had the benefit of the enchanced rent is not intended to be taken into account. It may be that Clause (*e*), Section 83, of the Bengal Tenancy Act, was considered to be explanatory of Clause 2. As the kanom is ordinarily redeemable on the expiration of twelve years the landlord's forbearance after twelve years to raise the rent payable to him clearly implies an intention to confer an advantage on the tenant.

In cases like this, however, in which there is no evidence as to the actual market value, regard should be had in adjusting the compensation to the fact that, in the absence of a special agree- **[463]** ment, the tenant ordinarily expects to have the capital expended replaced, though the benefit of the enhanced rent, which he has had, may be set off against the interest which he lost on the capital. The tenant ordinarily spends his income received from the land and he is not expected, in the absence of express agreement, to replace his capital out of it. It would, we think, be reasonable to allow the tenant the actual cost of effecting the improvement, as he would otherwise lose both the holding and the money spent upon it, and would be placed, on eviction, in a position much worse than he would be in if he spent no money on improving the land. We would, therefore, fix the compensation due to the tenant for the conversion and improvement of the land at Rs. 338.

The objection in regard to trees of spontaneous growth is not pressed.

The decree of the Subordinate Judge will be modified accordingly. Each paty will bear his own costs in this Court.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

APPAYASAMI (*Defendant*), *Appellant v.* SUBBA (*Plaintiff*), *Respondent.** [14th February and 22nd July, 1890.]

Rent Recovery Act (*Madras*)—*Act VIII of* 1865, *Sections* 2, 7.

In a suit by a tenant against a zamindar to release an attachment made under Rent Recovery Act, Section 40, it appeared that, according to the kistbandi obtaining in the zamindari, rent was payable in monthly instalments, commencing with November in each Fasli:

Held, that the unit for the rule of limitation prescribed by Rent Recovery Act, Section 2, for proceedings by the landlord was the aggregate rent in arrear at the end of the Fasli.

[Diss., 27 M. 241 (F.B.) = 14 M.L.J. 67; D., 17 M. 225 (227).]

SECOND APPEAL against the decree of H. T. Ross, Acting District Judge of Madura, in Appeal Suit No. 396 of 1888, affirming the decision of C. H. Mounsey, Acting Sub-Collector of Madura, in Summary Suit No. 25 of 1888.

[464] Summary suit to set aside an attachment under Rent Recovery Act, Section 40, for arrears of rent due for Fasli 1296 (1886-87). The rent was payable by custom in monthly instalments, beginning in November. A patta for the fasli in question was tendered in June 1887; the attachment took place in April 1888. The plaintiff alleged, *inter alia*, that the attachment was bad, in that it had been made more than a year from November 1886. He also alleged that the patta tendered was not such as he was bound to accept and this was the subject of the second issue.

The Sub-Collector and on appeal the District Judge held that the attachment was bad for the first of the above reasons.

The landlord preferred this second appeal on the following grounds:—

"Under the provisions of Section 38 of Rent Recovery Act, the "rent becomes due for purposes of issuing process under the Act only "at the end of the fasli. According to the custom of the country instal-"ments are fixed only for the convenience of the tenant and no legal "process can be issued for the realization of the rent until the expiration "of the fasli."

Bhashyam Ayyangar, for appellant.

Mr. *Johnstone*, for respondent.

JUDGMENT.

The appellant is the zamindar of Kannivadi in the district of Madura and the respondent is his tenant. The former tendered a patta to the latter for fasli 1296 in June 1887, but the latter neither accepted it nor paid rent for that fasli which commenced with July 1886 and ended with June 1887. According to the kistbandi obtaining in the zamindari, rent was payable in monthly instalments, commencing with November in each fasli. In April 1888, the appellant attached the tenant's holding in order to bring it to sale under Section 38 of Act VIII of 1865 for arrears of rent due for fasli 1296. The respondent brought this suit to set aside the attachment under Section 40 of that enactment on the ground that the

* Second Appeal No. 667 of 1889.

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patta tendered was not such as he was bound to accept, and that the attachment was not made within one year, as prescribed by Section 2 of the Act, from November 1888. The Sub-Collector, who tried the suit in the first instance, and the Judge, on appeal, held that the attachment was *ultra vires* so far as it related to instalments which had accrued due between November 1886 and April 1887 and set it aside *in toto* as being *excessive*; hence this second appeal.

[465] It is provided by Section 2 that process against a tenant under the Act must be taken within one year from the time *when the rent became due*. It is settled law that a landlord is entitled to tender a proper patta at any time within the fasli and that he is not at liberty to enforce the terms of a tenancy until he has tendered a proper patta. It is also provided by Section 38 that it shall be lawful for a landholder to sell the tenant's interest in land when arrears of rent may not be liquidated within the current revenue year, that is to say, before the end of fasli. The question arising for decision upon these provisions of law and the kistbandi sanctioned by custom is whether the unit for the special limitation prescribed by Section 2 is the instalment in arrear according to the kistbandi or the aggregate rent in arrear at the end of the fasli. The Lower Courts considered that it was the former, but, in this opinion, we are unable to concur. In its ordinary sense, the expression in Section 2, "when rent became due," means when rent became recoverable by action or other legal proceeding, and as no suit or other proceeding can be instituted under Section 7 to enforce the terms of a tenancy unless and until a proper patta has been tendered, it is not right to say that rent accrued due to the appellants for fasli 1296 in November 1886, when patta was tendered only in June 1887. If the patta tendered was the one which the tenant was bound to accept, the rent, which the appellant sought to recover, became due in June 1887, that is to say, within one year prior to the date of the attachment in question. Again all rules of limitation, whether general or special, rest on the doctrine of *laches* and reading Section 2 in the light thrown by it, the proper construction is that the section pre-supposes that the process contemplated by it is available under the Act when rent becomes due and keeps the remedy alive for one year from the date when time begins to run. By Section 38, the tenant's saleable interest in his holding is not liable to be attached until after the expiration of the fasli, for which the rent claimed is due. The process of attachment becomes, therefore, available only at the end of the fasli, and, as one year is the special period prescribed by Section 2, the time from which it ought to be computed with reference to the process mentioned in Section 38 is from the commencement of the next fasli. The construction that the unit for limitation is the first instalment results in this anomaly, *viz.*, that, whilst Section 2 prescribes a special limitation [466] of one year, the period which would be allowed under this construction is about four months. The Judge is in error in holding that "kistbandi" creates an independent obligation to pay rent by instalments from November each year whether a proper patta has or has not been tendered, for, under Section 7, the landlord has no right to claim rent until he tenders a proper patta, and, in the absence of such right, the tenant can be under no obligation to pay rent at all. The suspension of the landlord's remedy, pending the issue of a proper patta, gives the tenant the corresponding right of withholding payment of customary instalments until a proper patta has been issued and modifies to that extent the contents of the customary obligation in the interest of the

tenant. The Judge observes that the landlord might have tendered a proper patta before November and has in that sense been guilty of *laches*, of which he ought not to be permitted to take advantage. This view is untenable. Admittedly it is law that a proper patta may be tendered at any time within the end of the fasli and there can be no *laches*, therefore, in not tendering the patta before November, as he has a right to tender it before the end of the fasli. The decision then that the attachment was excessive could not be supported.

No distinct finding has, however, been recorded with reference to the second issue, and the decrees of both the Lower Courts must be set aside, and the case remitted to the Court of First Instance for disposal after trial of the second issue. The costs of this appeal will be provided for in the revised judgment.

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13 M. 467.

[467] APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

SANKARAN (*Defendant No. 1*), *Appellant v.* PERIASAMI AND ANOTHER (*Plaintiffs*), *Respondents*.* [11th, 14th March and 14th April, 1890.]

Limitation—Regulation II of 1802 (*Madras*) *S.* 18—*Act IX of* 1871, *Sch. II. Art.* 142 —*Starting point of limitation—Acknowledgment of title—Adverse possession of partial interest in land.*

Suit by the zamindar of Shivagunga to recover certain land as part of his zamindari from the defendants who claimed title under a deed of gift dated 1830 from the person then in possession of the zamindari.

The istimrar zemindar died in 1829. After his death certain persons were in possession without title; but in February 1863 his daughter Katama Natchiar obtained a decree in the Privy Council against the person then in possession of the zamindari in execution of which she was put into possession. In 1876 she brought a suit against the present defendants to recover the property now in question; but that suit was withdrawn on a petition presented by her vakil stating that the case had been compromised and praying that the suit be struck off the file, which was accordingly done. She died in 1877 and the plaintiff was her successor. It appeared that *poruppu* was always paid for the land now in question.

Held, (1) that the payment of *poruppu* did not prevent the possession of the defendants from being adverse to the plaintiff as possession of a limited interest in immoveable property may be as much adverse for the purpose of barring a suit for the determination of that limited interest as is adverse possession of a complete interest in the property to bar a suit for the whole property;

(2) that the date of the Privy Council decree could not be taken as the starting point of limitation;

(3) that the transactions in reference to the suit of 1876 did not amount to an acknowledgment of the zamindarni's title and did not give a new cause of action to her successors;

(4) that the cause of action having arisen to the then rightful owner of the zamindari in 1830, the plaintiffs' suit was barred by limitation.

[R., 21 B. 509 (515); 27 B. 515 (536); 2 C.L.J. 25; **D.**, 9 Ind. Cas. 141=21 M.L.J. 166=9 M.L.T. 224=(1911) 2 M.W.N. 36 (42).]

APPEAL against the decree of S. Gopalachari, Subordinate Judge of Madura (East), in Original Suit No. 5 of 1888.

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* Appeal No. 170 of 1888.

1890 APRIL 14. — APPELLATE CIVIL. — 13 M. 467.

Suit by plaintiff No. 1 as owner of the zamindari of Shivagunga, to which he succeeded in 1883, to recover with mesne profits certain land, part of the zamindari. Plaintiff No. 2 was lessee from plaintiff No. 1 of the land in question. The defendants were in possession under title derived from one of a line of **[468]** occupants of the zamindari, who came into possession in 1830, but were in 1863 held not to be entitled to it. The further facts of the case appear sufficiently, for the purposes of this report, from the judgment of the High Court.

The Subordinate Judge passed a decree in favour of the plaintiffs.

The defendants preferred this appeal.

Mr. *Johnstone* and *Pattabhiramayyar*, for appellant.

Subramanya Ayyar and *Bhashyam Ayyangar*, for respondents.

The following cases were quoted in the argument on the question of limitation:—*Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1), *Aumirtolall Bose* v. *Rajoneekant Mitter* (2), *Saroda Soondury Dossee* v. *Doyamoyee Dossee* (3), *Subramaniam Chetti* v. *Subramaniam Chetti* (4), *Vijayasami* v. *Periasami* (5), *Kalee Coommar Nag* v. *Kashee Chunder Nag* (6), *Pursut Koer* v. *Palut Roy* (7), *Gya Persad* v. *Beet Narain* (8), *Srinath Kur* v. *Prosunno Kumar Ghose* (9), *Kokilmoni Dassia* v. *Manik Chandra Joaddar* (10), *Azam Bhuyan* v. *Faizudden Ahamed* (11), *Atchamma* v. *Subbarayudu* (12), *Sheo Narain Singh* v. *Khurgo Koerry* (13), *Dwarka Nath Gupta* v. *Komolmoni Dasi* (14).

JUDGMENT.

We consider that the appeal must be disposed of on the ground of limitation and that the suit is barred upon the plaintiff's own case. Their case is that the possession of those under whom defendant's claim began in 1830 under a gift by the usurping zamindar to his daughter or her husband and this possession would be adverse to the rightful owners of the zamindari from that time. Under the law of limitation, prior to Act IX of 1871 coming into force, when once a cause of action had accrued to a person capable of enforcing the same, whether that person was a full owner or not, time began to run, and no subsequent disability of any person claiming in succession to the person against whom time had so begun to run could prevent the bar of limitation arising at the expiration of the prescribed time, **[469]** and adverse possession for more than the prescribed period against a widow or other holder of a female's estate barred the reversioner—*Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1) *Aumirtolall Bose* v. *Rajoneekant Mitter* (2).

In 1830, on the plaintiffs' own case, a cause of action arose to the then rightful owner of the zamindari who was Ungamuttu Natchiar, the widow of the istimrar zamindar, and in twelve years from that time she and all those claiming in succession to her were barred.

It is argued for the plaintiffs that the widow and daughter of the istimrar zamindar could not sue for this village until their right to the zamindari had been established, which was not until the final decree of the Privy Council in favour of Katama Natchiar in 1863, and, therefore, that time did not begin to run against Katama Natchiar until the date of that

(1) B.L.R. Sup. Vol. 1008=9 W.R. 505.
(2) 2 I.A. 113=15 B.L.R. 10=23 W.R. 214.
(3) 5 C. 938.
(4) 4 M. 124.
(5) 7 M. 242.
(6) 6 W.R. 180.
(7) 8 C. 442.
(8) 9 C. 93.
(9) 9 C. 934.
(10) 11 C. 791.
(11) 12 C. 594.
(12) 5 M.H.C.R. 428.
(13) 10 C. L.R. 337.
(14) 12 C. L.R. 548.

decree, *viz.*, 8th December 1863. No express authority is quoted in support of this position, which was assumed also by the Subordinate Judge and we are not prepared, in the absence of authority, to admit its soundness. Doubtless it would have been highly inconvenient for the rightful owner of the zamindari to be bringing suits against the various persons in wrongful possession of portions of the estate, while their title to the whole estate was as yet unestablished; but this inconvenience can be no reason for allowing exceptions to the law of limitation which are not to be found in it. Even if the rather vague words of exception in Clause 4 of Section 18 of Madras Regulation II of 1802 could be stretched so as to prevent time running against Ungamuttu Natchiar and Katama Natchiar until the decree of the Privy Council in the latter's favour, certainly Act XIV of 1859 contains no exception, which could be so stretched in their favour, and that Act repeals the regulation, and by Section 18, makes the limitation prescribed by the Act applicable to all suits instituted within two years from the passing of the Act, which time was extended by Act XI of 1861 to 1st January 1862, "any Statute, Act or Regulation now in force notwithstanding." In January 1862, therefore, Katama Natchiar was barred from suing for recovery of this property, not having brought a suit for that purpose within twelve years from 1830 when the cause of action accrued.

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13 M. 467.

[470] It is contended by the learned vakil for the respondent that the present suit is not barred, because, before the bar was complete under the former Act, Act IX of 1871 came into force and introduced a new limitation for persons entitled to immoveable property on the death of a Hindu female (Art. 142, Sch. II of Act IX of 1871), *viz.*, twelve years from the death of such female. This argument depends for its validity upon the contention that time began to run against the rightful owners of the zamindari only from the date of the Privy Council decree in 1863, which position we have already decided to be untenable. In our opinion the cause of action arose at the time when adverse possession began in 1830 and Katama Natchiar was barred by Act XIV of 1859 before Act IX of 1871 came into force. If this were so, then, by Section 2, paragraph 2 of Act XV of 1877, nothing in that Act or in Act IX of 1871 contained, revived any right to sue barred by Act IX of 1871 or any enactment thereby repealed. Neither Article 142 of Act IX of 1871 therefore nor Article 141 of Act XV of 1877 can help the plaintiffs. Article 142 of Schedule II of Act IX of 1871 could not help them in any case, for it only applies to widows and does not affect the question of limitation in the case of persons claiming in succession to Katama Nachiar, whose estate was not a widow's but a daughter's estate. Article 141 of the present Limitation Act (XV of 1877) extends the provision to the case of all Hindu and Muhammadan females, but that cannot help plaintiffs. But, in our view, neither of these articles apply to this case.

The Subordinate Judge got over the difficulty of limitation by treating the proceedings resulting in the withdrawal of Original Suit No. 7 of 1876 by Katama Natchiar as amounting to the creation of a fresh title by her in favour of defendants, and holds, therefore, that the cause of action to the first plaintiff's father to set aside such alienation and recover the village only accrued on Katama Natchiar's death, and the present suit being brought within twelve years from that date is not barred.

We cannot agree in this view of the effect of the withdrawal of the suit. All that is proved is that the Rani's vakil presented a petition (Exhibit F-1) to the Court, stating that the case had been compromised and asking

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that the suit might be struck off the file, which was ordered accordingly (Exhibit F-2). There is also some evidence that the defendants in that suit paid Rs. 1,300 to the Rani, but they did not join in any application to the Court and **[471]** there is nothing to show that they acknowledged the right which the Rani asserted in the suit. On the contrary, it would appear, from the vakil's application (Exhibit F-1), that the terms of compromise were that they were to continue to enjoy the village at the same rent as before. The transaction would certainly not have been a sufficient acknowledgment of the Rani's title to give a new starting point under the law of limitation, and *a fortiori* it would not be sufficient to create a new title in the defendants and give a new cause of action to the Rani's successors. To allow a mere withdrawal by a plaintiff, in which defendants did not formally concur to operate as the creation of a new title in defendant which gets rid of all questions of adverse possession and limitation would, we think, open a door to fraud and be contrary to all principles of equity.

It is argued, for respondents, that possession never was in fact adverse to the zamindari because *poruppu* was always paid and that therefore the question of limitation does not really arise. The answer to this is that possession of a limited interest in immoveable property may be just as much adverse, for the purpose of barring a suit for the determination of that limited interest, as is adverse possession of a complete interest in the property to bar a suit for the whole property—see *Madhava* v. *Narayana* (1).

As we hold that the plaintiffs' suit is barred by the law of limitation, it is unnecessary to decide the other questions raised in this appeal.

We must reverse the decree of the Lower Court and dismiss the suit with costs throughout.

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13 M. 472.

[472] ORIGINAL CIVIL.

Before Mr. Justice Handley.

MACKENZIE AND OTHERS (*Plaintiffs*), *v.* STRIRAMIAH (*Defendant*).*
[17th and 22nd July, 1890.]

Contract Act, Section 27—Restraint of trade.

One having a license for the manufacture of salt entered into a contract with a firm of merchants, whereby it was provided that he should not manufacture salt in excess of the quantity which the firm at the commencement of each manufacturing season should require him to manufacture; and that all salt manufactured by him should be sold to the firm for a fixed price. The agreement was to be in force for a period of five years. In a suit by the merchants for an injunction restraining the licensee from selling his salt to others:

Held, that whether or not the first of these clauses was invalid under Section 27 of the Contract Act, it was separable from the second clause which was not bad as being in restraint of trade.

[**N.F.**, 9 C.L.J. 216 (222) = 13 C.W.N. 388; **F.**, 23 B. 103 (112); **R.**, 22 B. 861 (866); 19 C. 765 (773); 5 Bom.L.R. 878 (881).]

SUIT by the members of the firm of Messrs. Arbuthnot & Company for an injunction restraining the defendant from selling salt manufactured by him under a license to others.

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* Civil Suit No. 144 of 1888.
(1) 9 M. 244.

1890 JULY 22. — ORIGINAL CIVIL. — 13 M. 472.

The defendant was the holder of a license for the manufacture of salt and had entered into an agreement with the plaintiffs for the sale to them of all the salt manufactured by him. The material parts of the agreement which was executed in counterpart are set out in a judgment of the Court.

Krishnasami Ayyar, for the defendant, objected that the contract was void as being in restraint of trade. Reliance was placed on the judgment of Muttusami Ayyar, J., which is printed at the end of this report, and upon *Oakes* v. *Jackson* (1), *Brahmaputra Tea Company* v. *Scarth* (2), *Madhub Chunder Poramanick* v. *Rajcoomar Doss* (3), *Auchterlonie* v. *Bill* (4), Pollock on Contracts, p. 301. *Vaithelinga* v. *Saminada* (5), *Catt* v. *Tourle* (6) *Allsopp* v. *Wheatcroft* (7).

[473] Mr. *K. Brown*, for the plaintiffs, referred to *Donell* v. *Bennett* (8), *Montague* v. *Flockton* (9), *Wolverhampton and Walsall Railway Company* v. *London and North-Western Railway Company* (10), *Brahmaputra Tea Company* v. *Scarth* (2), *Prem Sook* v. *Dhurum Chand* (11) and to the illustrations to Section 57 of the Specific Relief Act and Section 87 of the Contract Act. He argued that the decision of Muttusami Ayyar, J., could not be regarded as governing the present case as it proceeded upon the terms of a contract which was not now available for reference and which appeared to have been very wide in its provisions for its duration. It was also contended that the construction put on Section 27 on behalf of the defendant involved the substitution of the words "restrained *in* exercising," &c., for the words "restrained *from* exercising," &c.

Judgment having been reserved was delivered as follows:—

JUDGMENT.

HANDLEY, J.—"Additional issue. Is the contract evidenced by agree-"ments of 23rd April 1887 in paragraphs 1 and 2 of the plaint mentioned "void as being in restraint of trade?" I thought it convenient to decide this point at once, as the objection goes to the root of the plaintiffs' case, and, if I found the issue in defendant's favour, it would dispose of the case. But on consideration of the arguments and the authorities quoted on both sides, I am satisfied that there is nothing in the objection. The defendant's vakil relies on the judgment of Muttusami Ayyar, J., in *Ragavayya* v. *Subbayya* (12). The point decided in that case following the decisions in *Oakes* v. *Jackson* (1), *Brahmaputra Tea Company* v. *Scarth* (2), and *Madhub Chunder Poramanick* v. *Rajcoomar Doss* (3) is that Section 27 of Indian Contract Act does away with the distinction, observed in English cases following upon *Mitchel* v. *Reynolds* (13) between partial and total restraint of trade and makes all contracts falling within the terms of the section void, unless they fall within the exceptions. I was quite prepared to follow the decision upon this point, but I am asked to follow it still further and to hold that because the contract in question in that case appears (as far as one can tell from the judgment) to have been a salt contract similar to the one in **[474]** question in this suit, therefore the contract, the subject of this suit, is void. This, I think, I am not bound to do. Whether a contract is in restraint of trade within the meaning of Section 27 of the Contract Act is

(1) 1 M. 134. (2) 11 C. 545. (3) 14 B.L.R. 76.
(4) 4 M.H.C.R. 77. (5) 2 M. 44. (6) L R. 4 Ch. App. 654.
(7) L.R. 15 Eq. 59. (8) L.R. 22 Ch. D. 835. (9) L.R. 16 Eq. 189.
(10) L.R. 16 Eq. 433. (11) 17 C. 320.
(12) Civil Revision Petitions, Nos. 3 to 16 of 1889, *vide* below (13 M. 475, *infra*—ED.)
(13) 1 Sm. L.C. 406.

1890 JULY 22. — ORIGINAL CIVIL. — 13 M. 472.

a question to be determined on construction of the contract in each case. I have no copy of the contract in question in the case before Mr. Justice Muttusami Ayyar, and, I think, I cannot safely take that decision as any guide in deciding whether the contract in this suit is in restraint of trade or not, and I do not consider that it is. The clauses in the contract, which are said to be void, or as follows:—

Clause 6.—The licensee shall not manufacture any salt in excess of the quantity which the said firm of Arbuthnot & Company shall, from time to time, at the commencement of each manufacturing season, require the licensee to manufacture.

Clause 12.—All salt manufactured and stored by the licensee under the said license, and, in accordance with these presents, shall be sold by the licensee to the said firm of Arbuthnot & Company at, and for the price or sum of Rs. 11-8-0 for each and every garce of 120 maunds of the said salt measured and taken delivery of by them at Madras, and the licensee shall and will accept such sum of Rs. 11-8-0 for every such garce of salt in full payment and satisfaction for the same.

I think these clauses may be separated and that it does not follow that because one is bad the whole contract is void. Clause 6 may be bad: it is not necessary to pronounce an opinion upon that; it is not in question in this suit and is not sought to be enforced. Clause 12 does not, in my opinion, purport to restrain defendant from exercising his trade or business within the meaning of Section 27 of the Contract Act. It is merely an agreement to sell all the salt he manufactures during a certain period to plaintiffs at a certain price. No doubt a negative covenant not to sell to anybody else may be implied, but that is not such a restraint from exercising his trade or business as the section contemplates. In one sense, every agreement for sale of goods whether *in esse* or *in posse* is a contract in restraint of trade for, if *A. B.* agrees to sell goods to *C. D.*, he precludes himself from selling them to anybody else. But a reasonable construction must be put upon the section and not one which would render void the most common form of mercantile contract.

[475] I understand the section to aim at contracts, by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade or business, not contracts by which, in the exercise of his profession, trade or business, he enters into ordinary agreements, with persons dealing with him which are really necessary for the carrying on of his business. I think I am supported in this decision by the Calcutta cases of *Carlisles Nephews & Company* v. *Ricknauth Bucktearmull* (1), *Prem Sook* v. *Dhurum Chand* (2) and by the principles which govern the English decisions upon the subject.

I find the additional issue for plaintiffs as far as Clause 12 of the contract is concerned. The case must proceed.

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(1) 8 C. 809. (2) 17 C. 320.

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APPELLATE CIVIL.

13 M. 475.

13 M. 475.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

RAGAVAYYA AND OTHERS (*Plaintiffs*), *Petitioners* v. SUBBAYYA AND OTHERS (*Defendants*), *Respondents*.* [7th August and 3rd September, 1889.]

[N.F., 13 M. 472 (473).]

THIS was a petition under Provincial Small Cause Court Act of 1887, Section 25, praying for the revision of the proceedings of T. Ramachandra Row, District Munsif of Nellore, in small cause suit No. 664 of 1887. The plaint, as summarised by the District Munsif, was as follows:—

The plaint sets forth that in 1883 defendant No. 1 obtained a license to sell salt in the Salt Factory at Krishnapatam: that, on 15th July 1884, he executed an agreement, along with some others, to Messrs. Mulam Krishnayya and Company providing (1) that defendant No. 1 should manufacture salt in the said factory as long as the excise system would be in force and deliver the same to plaintiffs for sale; (2) that plaintiffs should pay him at 12 rupees per garce for kudivaram, &c., (3), that defendant No. 1 should receive 4 rupees per garce in advance for manufacturing expenses; (4) that, after delivery of salt defendant No. 1 should receive from plaintiffs the balance of money due as kudivaram, after deducting the advances made; (5) that plaintiffs should execute all the necessary repairs in the said factory, except those for saltpans; and (6) that plaintiffs should be responsible for any loss that might result from failure to execute the repairing; that, relying on the said agreement, plaintiffs executed, at great cost, permanent, as well as temporary repairs; that defendant No. 1 delivered to plaintiffs the salt manufactured by him in 1885, and received all his dues; that defendant No. 1 received advances from [476] plaintiffs up to 18th April 1886; that, in violation of the contract, defendant No. 1 sold to defendant No. 2 the 18 garce of salt manufactured by him in 1886, and put plaintiffs to great loss; that interest is charged on the advances made to defendant No. 1, though not provided for in the registered deed, as there was an oral agreement on the subject; and that defendant No. 2 also is responsible, as he purchased the salt with notice of the contract between defendant No. 1 and plaintiffs. Hence the suit against both defendants to recover (1) Rs. 132-10-9, advances received by defendant No. 1 and interest thereon and (2) Rs. 852-12-0, as damages for the breach of contract on the part of defendant No. 1, or, in all, Rs. 985-6-9.

Rama Rau, for petitioners.

Anandacharlu, for respondents.

Judgment having been reserved was delivered as follows:—

JUDGMENT.

MUTTUSAMI AYYAR, J.—It is contended in support of this petition that the Small Cause Court was in error in holding that the agreement sued on was in restraint of trade and void as such under Section 27 of the Indian Contract Act. The petitioners-plaintiffs are dealers in salt and the first counter-petitioner-defendant

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* Civil Revision Petitions, Nos. 3 to 16 of 1889.

1889 SEP. 3. — APPELLATE CIVIL. — 13 M. 475.

was a licensee entitled to manufacture and sell salt in the Salt Factory at Krishnampatam. On the 15th July 1884, the agreement sued on was entered into between defendant No. 1 and others on the one part and the plaintiffs and their partners on the other part. It was to be in force as long as the excise system was in force and it provided *inter alia* that defendant No. 1 was to deliver all the salt he manufactured to the plaintiffs for sale and to sell it to no one else, and that in return the plaintiffs were to pay him Rs. 12 per garce for kudivaram and to execute all the necessary repairs in the factory save those which might be required for the salt pans. As licensee, defendant No. 1 would be at liberty but for the agreement to sell the salt manufactured by him to any one he liked and at such price as he might fix. But the agreement in question debarred him from selling the salt to any but the plaintiff and demanding as its price more than the stipulated kudivaram. The question for decision is whether, by reason of such restraint, the agreement is void under Section 27 of Act IX of 1872. That section provides that "every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extend void." Of the three exceptions to that section, the second and the third pre-suppose the relation of partners between the parties and the first premises that of the buyer and the seller of the good-will of a business, and, in dealing with this revision petition, I may dismiss them from consideration. The rule of English law on the subject, as laid down in the case of *Mitchel* v. *Reynolds* (1), is that law favours trade much, and all restraints of trade are bad, subject, however, to the exception among others recognised by that leading case, *viz.*, when the restraint is only partial in respect to time or place and there is good consideration given to the party restrained, the restraint is not unlawful. A partial restraint is again good or bad according as the consideration given for it is adequate or inadequate. On a comparison of the rule, as illustrated by English decisions with the rule embodied in Section 27 of the Indian Contract Act, two questions arise for consideration, *viz.*, (1) whether Section 27 intended to vary the English rule, and (2) if not, whether the restraint imposed by the agreement in the cases before me can be upheld according to English cases.

[477] As to the first question, the omission to make an exception in favour of a partial restraint of trade to the general prohibition contained in Section 27 clearly indicates an intention not to give legal effect to such restraint in this country. It was so held by KINDERSLEY, J., in *Oakes* v. *Jackson* (2), though he was also of opinion that the covenant in that case was unreasonable even under the English law. In *Madhub Chunder Poramanick* v. *Rajcoomar Doss* (3), Couch, C.J., and Pontifex, J., held that the words in Section 27 "Restrained from exercising a lawful profession, trade or business" do not mean an absolute restriction and are intended to apply to a partial restriction also. That decision was followed by the High Court at Calcutta in *Brahmaputra Tea Company* v. *Scarth* (4). The conclusion I come to, therefore, on the first question, is that the agreement, so far as it restrains the sale to others than the plaintiff, is bad.

In this view it is not necessary to decide the second question. I may add, however that the restriction is to endure according to the agreement so long as the excise system is in force and it is not confined within a reasonable limit in respect of time. Practically, the agreement was intended to debar the first defendant from dealing in salt which he might manufacture for an indefinite period, except with the plaintiffs and for the stipulated kudivaram. It seems to me that such agreement would be unreasonable even if legal effect could be given to a partial restraint. The decision of the District Munsif is not illegal, and I dismiss this petition with costs.

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(1) 1 Sm. L.C. 406. (2) 1 M. 134.
(3) 14 B.L.R. 76. (4) 11 C. 545.

13 M. 477.

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APPELLATE CIVIL.

13 M. 477.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Weir.

SAMA (*Plaintiff*), *Appellant v.* STRINIVASA (*Defendant*), *Respondent.** [8th August, 1890.]

Revenue Recovery Act (Madras)—Act II of 1864, *Sections* 42, 44—*Sale of part of a holding for arrears of revenue due on another part.*

The plaintiff sued, as the purchaser under a Court-sale, for possession of certain land, which the defendant's vendor had purchased at a sale held under the Revenue-Recovery Act for arrears of revenue accrued due on other land belonging to the judgment-debtor:

Held, the suit should be dismissed.

SECOND appeal against the decree of C. W. W. Martin, District Judge of Salem, in appeal suit No. 246 of 1887, reversing the decree of T. S. Kristna Ayyar, District Munsif of Krishnagiri, in original suit No. 123 of 1887.

[478] Suit for the declaration of the plaintiff's title to, and for possession of, certain land with mesne profits.

The land in question was formerly the property of one Krishna Char. The land was sold in execution of a decree against Krishna Char and the plaintiff became the purchaser and it was ordered that possession be given to him. The defendant put in an objection petition, stating that he had purchased the land from one Venkataramayyan, who purchased it at a Revenue sale under Act II of 1864 for arrears of revenue due to Government by Krishna Char in respect of some other lands. The Court allowed the objection and ordered the plaintiff to give up possession to the defendant. The plaintiff, therefore, now sued as above.

The District Munsif passed a decree for plaintiff, which was reversed, on appeal, by the District Judge, who said :—

"The words, immoveable property, in Section 5, of the Revenue "Recovery Act, refers to immoveable property other than land and includes "house, &c., not standing on land subject to the payment of revenue. "The Act does not give the defaulter the power to elect what portion of "his land shall be held to be in arrear. Whether he has one patta or "many, he has a certain amount on the aggregate to pay to Government, "and, if he falls into arrear, the Collector may say that he considers the "arrear to be due from one piece of land in his holding as much as "from another, though the defaulter may have absolutely paid up the "dues on that patta for that particular piece of land ; but it is made the "duty of the Collector to sell only such portion of the whole land as will "satisfy the arrear and to give such notice of the sale of the land on the "land itself as will enable incumbrancers to protect their own interests "by paying up the arrears."

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* Second Appeal No. 1298 of 1889.

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The plaintiff preferred this second appeal.

Seshagiri Ayyar, for appellant.

Parthasaradhi Ayyangar, for respondent.

JUDGMENT.

Having regard to the language of Sections 42 and 44 of the Revenue Recovery Act, we think the District Judge has arrived at a right conclusion.

In sales of land for arrears of revenue no procedure other than that of Section 42 of the Act is provided. No provision is made for the case of separate portions of a holding, on which arrears have not actually accrued, being sold subject to incumbrances, and **[479]** the only procedure prescribed for sales for arrears of revenue is that contained in Section 42, which enacts that the lands shall be sold free of all incumbrances.

Then Section 44 provides that it shall be lawful for a Collector to sell the whole or any portion of the land of the defaulter. These words, in our opinion, clearly mean the whole or any portion of the holding of the defaulter and not merely the whole or any portion of the fraction of the holding on which the arrears have actually accrued.

The object of making the provision so wide in its terms is the necessity of securing the public revenue.

For the same reason we are of opinion that the words "the land," in Section 2, where it is said that the land, &c., ... shall be regarded as the security for the public revenue, mean the lands of the holding and not the portion of land in respect of which the arrears may accrue.

The appeal fails and is dismissed with costs.

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13 M. 479.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

PALANI (*Defendant No.* 1), *Appellant v.* PARAMASIVA (*Plaintiff*), *Respondent.** [12th August, 1890.]

Regulation XXV of 1802 (*Madras*), *Section* 12—*Revenue Recovery Act II of* 1864 (*Madras*), *Sections* 32, 41—*Rent Recovery Act—Act VIII of* 1865 (*Madras*), *Sections* 3, 19.

The purchaser at a revenue sale is *prima facie* entitled to claim the faisal rate of rent.

SECOND appeal against the decree of V. Rangayyar, Subordinate Judge of Salem, in appeal suit No. 120 of 1888, confirming the decree of D. Iyyavayyar, District Munsif of Namkal, in original suit No. 410 of 1887.

Suit by the plaintiff, a mittadar, who had purchased the land now in question at a Revenue sale, to enforce the acceptance by the defendants of pattas for Fasli 1294, containing a stipulation **[480]** for the payment of rent at the faisal rate. The defendants pleaded that they were only liable to pay rent at a lower rate in accordance with a cowle, to which it was not alleged that the plaintiff had been a party.

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* Second Appeal No. 1037 of 1889.

1890 AUG. 12. — APPELLATE CIVIL. — 13 M. 479.

The District Munsif, and, on appeal, the Subordinate Judge, decreed in favour of the plaintiff. The following cases were alluded to in their judgments:—*Ramchandra Mankeshwar* v. *Bhimrav Ravji* (1), *Adimúlam Pillai* v. *Kovil Chinna Pillai* (2), *Venkatagopal* v. *Rangappa* (3).

The defendants preferred this second appeal.

Sadagopacharyar, for appellant.

Bhashyam Ayyangar and *Desikacharyar*, for respondent.

JUDGMENT.

It is argued that the lower Court is wrong in holding that, as purchaser at the revenue sale, respondent is entitled to demand the faisal rate. Having regard to Section 12 of Regulation XXV of 1802 and to the provisions of Sections 32 and 41 of the Revenue Recovery Act, the purchaser at a revenue sale is *prima facie* entitled to demand the faisal rate. In the present case the tenant (now appellant) has cited no evidence to show the circumstances under which the lower rent was accepted, or that the purchaser was under any legal obligation to accept such lower rate.

This second appeal is dismissed with costs.

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13 M. 480.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

NATESAYYAN (*Plaintiff*), *Appellant v.* NARASIMMAYYAR (*Defendant*), *Respondent.** [20th and 21st March and 8th May, 1890.]

Minor—Suit against guardian of a minor—Immaterial irregularity—Minor's interest bound.

In a suit by an adopted son, after the death of his adoptive father, to recover ancestral land sold in execution of a decree against his adoptive mother therein [481] described as the guardian of the present plaintiff, who was then an infant, it appeared that the decree had been passed on a bond executed by the then defendant in respect of a debt due by her late husband:

Held, that the plaintiff should be regarded as a party to the suit in which the decree executed against the land had been passed, and that the present suit should be dismissed.

[R., 20 B. 534 (536); 9 C.P.L.R. 50 (51); 3 M.L.J. 264 (266).]

APPEAL against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in original suit No. 28 of 1887.

The plaintiff sued to recover possession from the defendants of certain land, part of the property left by his adoptive father, Mahalinga Ayyar, who died in August 1869. It appeared that, on the death of Mahalinga Ayyar, his wife, Seshi Ammal, took the management of the property, the plaintiff being a minor. Seshi Ammal in 1870 executed a bond in favour of one Subramanya Sastri, who, in 1872, brought a suit upon it against her and obtained a decree and in execution brought the land now in question to sale. The plaint and the decree in that suit described the defendant as "Seshi Ammal, guardian and mother of Natesan (the present plaintiff) 11 years old, adopted son of Mahalinga Ayyar deceased, residing at Veppattur," and the sale certificate issued to the execution-purchaser from

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* Appeal No. 182 of 1888.

(2) 1 B. 577. (2) 2 M.H.C.R. 22. (3) 7 M. 365.

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13 M. 480.

whom the present defendant derived title described her in similar language.

In the present suit the plaintiff's case was that Seshi Ammal's debt did not bind him and that the decree against her and the proceedings taken in execution of it could not affect his title to the land.

The Subordinate Judge held that Seshi Ammal's bond was executed in respect of a debt due by her late husband and that the plaintiff was to be regarded as a party by his guardian to the suit brought upon it, notwithstanding the informality in the description of the parties, which was found not to have prejudiced the plaintiff: he accordingly dismissed the suit.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Pattabhirama Ayyar*, for appellant.

Ramachandra Rao Saheb and *Mahadeva Ayyar*, for respondent.

JUDGMENT.

MUTTUSAMI AYYAR, J.—The property in dispute originally belonged to one Mahalinga Ayyar, who died in August 1869, leaving him surviving a widow, named Seshi Ammal, and the appellant, his adopted son. The appellant was then a minor and attained his majority only in 1879. During his minority [482] it would seem his adoptive mother was in management of the property. In 1872 one Subramanya Sastri instituted original suit No. 119 on the file of the District Munsif of Kumbakonam upon a bond executed in his favour by the guardian in 1870 and it resulted in a money decree in his favour in July 1872. In execution of that decree the property in dispute was put up to sale and Subramanya, the then plaintiff, became its purchaser. In consequence of other transactions, which it is not necessary to mention here in detail, the property passed from him to the respondent, who entered into possession in 1875. It is not disputed that the decree passed in original suit No. 41 of 1875 for Rs. 8,500 and odd created a valid charge on the property in question and that Subramanya Sastri satisfied the charge before he resold the property to the respondent. The appellant's case was that he was not properly made a party to original suit No. 119 of 1872, that the debt which was decreed in that suit was fictitious, or even if real, not binding upon him, and that he was entitled to set aside the Court sale as fraudulent and to recover back the property subject to payment of what might be found due on account of the charge created by the decree in original suit No. 41 of 1875. The Subordinate Judge has found that the bond, which was the basis of original suit No. 119 of 1872, was executed by Seshi Ammal for a debt due by Mahalinga Ayyar and not either for money raised for her own purposes or without consideration.

The oral evidence as to the nature of the debt was conflicting and satisfactory reasons are given by the Subordinate Judge in support of his finding. The admission before us that Exhibit III is genuine and the appellant's omission to produce the list of debts attached to his father's will appear to me also to turn the balance of testimony against him and I see no ground for disturbing the finding of the Subordinate Judge; but the substantial question for decision is whether the appellant was a party to original suit No. 119 of 1872. The plaint in that suit (Exhibit F) described the defendant in the following terms:—Seshi Ammal, guardian and mother of Natesan, 11 years old, adopted son of Mahalinga Ayyar

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deceased, residing at Veppattur, Kumbakonam taluk. The decree passed in that suit described the defendant in the same terms.

The sale certificate (Exhibit VII) described the defendant, whose right, title and interest was sold, as Seshi Ammal, guardian and [483] mother of Natesan, 11 years old. It is urged, for the respondent, that the appellant was the real defendant in the suit and that the execution sale binds him. Our attention is also drawn to the fact that the decree-debt was one which was binding on the appellant and that the description disclosed, according to the practice of the Courts prior to 1869, an intention to make the appellant liable by suing his natural guardian in her capacity as his guardian.

On the other hand, it is contended, for the appellant, that he was not a party to the suit of 1872 and that the sale is not binding on him. It is argued that the description was not in accordance with the rule of practice prescribed by the High Court on the 23rd July 1869 and that there is also no trace of Seshi Ammal's appointment as guardian *ad litem*. It is also said that, as the guardian, who executed the bond, she would not be eligible for appointment as guardian *ad litem* if the debt was to be disputed. The omissions, to which the appellant's pleader draws attention, are no doubt errors of procedure, but there remains the fact that the debt was binding upon him and there was the intention, as disclosed by the description in the plaint, decree and sale certificate, to make him liable, however defective that description might have been. In cases like this, where a Court sale is sought to be set aside nearly twelve years after it had taken place, I think we should look at the substance of the plaint and the decree and the sale certificate, and, if, by doing so, the intention to make the minor the responsible defendant is clear and the errors of procedure have in no way prejudiced him, we ought not to set aside the sale. The same principle was laid down by the Full Bench of this Court in *Ittiachan* v. *Velappan* (1), with reference to sales in execution of decrees against persons, who appear, from the proceedings in the suit, to have been sued as karnavans of Malabar tarwads. In *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb* (2) it was held by the Full Bench of the High Court at Calcutta that, when the suit was substantially brought against the minor, the error of description was one of form and could not without proof of prejudice invalidate a decree against him. The real question is whether the appellant was substantially a party to the suit. Having regard to the description of the defendant in Exhibits F, VI and VII and to the fact that the plaint of 1872 was framed in [484] accordance with the practice prior to 1869, I am unable to hold that the minor was not the real defendant in original suit No. 119 of 1872. The pleader for the appellant lays stress on the omission to appoint the natural guardian as guardian for the suit, but I fail to see how it has prejudiced him when the decree-debt was one which he was bound to pay. He had an opportunity in the present suit to show that the debt was not binding upon him, but he has failed to show it.

Reliance is placed on the case of *Ganga Prosad Chowdhry* v. *Umbica Churn Coondoo* (3), in which it was said that the Full Bench decision referred to an affidavit by the guardian. In the case before us the plaint stated that Seshi Ammal was the guardian and it was verified. In 1872, the present Procedure Code was not in force and the error of description was a mere irregularity or error of form. The plaint impugned the decree

(1) 8 M. 484. (2) 14 C. 204. (3) 14 C. 754.

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and the purchase as fraudulent, and no fraud being made out, the appellant's pleader falls back on errors of procedure, whereby he has not been prejudiced.

I do not consider that the appeal can be supported and I would dismiss it with costs. As regards the memorandum of objections we have already disposed of the question of jurisdiction, and, in the view, which I take of the merits of the appeal, it is unnecessary to discuss the other questions. It is also dismissed.

SHEPHARD, J.—I felt some difficulty in the case owing to the fact that there was no evidence that Seshi Ammal was appointed guardian to defend the suit of 1872 or that the plaintiff's interests were properly represented in that suit; but seeing that Seshi Ammal was admittedly guardian of the plaintiff and was treated as such in the proceedings in the former suit, and, moreover, that the plaintiff had no real defence, I do not think that he can now take advantage of the irregularity. In other respects I agree with the judgment of Muttusami Ayyar, J.

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13 M. 485.

[485] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

NARAYANA (*Defendant*), *Appellant v.* RAMACHANDRA AND OTHERS (*Plaintiff's Representatives*), *Respondents.**
[16th and 23rd July, 1890.]

Land Acquisition Act—Act X of 1870—*Land given as compensation—Regulation II of* 1803 (*Madras*), *Section* 44—*Darkhast rules.*

The owner of certain land taken up under the Land Acquisition Act, after the amount of compensation had been fixed, conveyed her interest to the present defendant, who applied for the land now in dispute in lieu of compensation, it being then Government waste, and this application was granted and the deed of exchange executed. The plaintiff and another had previously applied under darkhast rules for the land now in dispute, but the Collector ordered the land to be placed in possession of the defendant. The Board of Revenue, however, directed that the land be made over to the prior darkhastdars on terms which were complied with and they were put into possession. The plaintiff having been subsequently dispossessed by the defendant, now sued for a declaration of title and for possession.

Held, that the plaintiff was entitled to the land as against the defendant.

SECOND appeal against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in Appeal Suit No. 98 of 1888, confirming the decree of T. Ramachandra Row, District Munsif of Nellore, in Original Suit No. 371 of 1887.

Suit for a declaration of title to, and for possession of, certain land. The plaintiff and one Ragavacharlu (deceased) were the owners of the land adjoining the land in question in the suit; about 10 years before suit, they had darkhasted for the land now in question and the plaint set out that they had paid Rs. 300 and been put in possession on the 29th of March 1887 and that the plaintiff had since been dispossessed by the defendant of the moiety of the land which he had been put into possession.

It appeared that certain land belonging to one Kamakshamma was taken up by Government under the Land Acquisition Act in December

* Second Appeal No. 621 of 1889.

1884; the compensation was agreed upon in the following month and shortly afterwards Kamakshamma sold her interest to the present defendant, who applied for the land now in suit, which was then Government waste in lieu of money compensa-[486]tion. This application was granted, as appears by Exhibit D, which is referred to in the judgment, being a letter from the Collector of the district to the Board of Revenue, in which reference was made to G.O., No. 66, dated 15th of January 1885, of which paragraph 2 is as follows:—

"When the amount of compensation has been determined by the Court, "it will of course be open to the zemindar to accept a reduction of "peishcush or to demand payment of the amount awarded by the Court."

The Collector expressed the opinion that "in allowing the money "compensation to be commuted to land compensation" he acted in accordance with the spirit of that paragraph "which," he added "clearly "recognises the principle that it is not binding on us to pay money compen-"sation only, though it may be awarded to suit the requirements of law, "whether the party desires to have either money or land."

On the 14th of October 1885, the plaintiff and Viraragavacharlu protested against the grant of the land to the defendant, and, in right of their darkhast, offered to pay to Government the compensation money fixed for the land of Kamakshamma. This application was refused by the Collector and the defendant was put into possession; the plaintiff and Ragavacharlu appealed to the Board of Revenue, who, on receipt of the letter from the Collector alluded to above, directed that the land should be delivered to the applicants on their paying the amount which the defendant had paid for Kamakshamma's title. The applicants complied with the above condition. No patta had been issued in the name of the defendant.

The District Munsif held that the plaintiff was entitled to a half share of the land in question and passed a decree accordingly. On appeal, the District Judge confirmed this decree, observing:—"The plaintiff and "Raghavacharlu should have got the land if it had been disposed of under "the darkhast rules as prior darkhastdars and as occupants of adjacent "lands. They were entitled to the first refusal, which the Collector "would undoubtedly have allowed them and avoided interference of "the Board with his order if the whole case had been fairly laid "before him in time. If it was thought that the darkhast rules need "not be followed when lands governed by them are to be given in "exchange of lands taken up as in this case, it would have the effect of "[487] defeating *bona fide* claimants under the rules. The Collector's "order permitting exchange was not final and it was not an act done by "him under a statute, which alone would vest in the assignee an unde-"feasible title such as cannot be upset except by a law suit. The order "was appealable and reversible by the Board, who have, in the exercise "of their power, modified the order and awarded the land to the plaintiff "and Raghavacharlu. The patta is not yet issued to the defendant's "name, and, consequently, no title had been created in his favour. The "Land Acquisition Act X of 1870 does not provide for assignment of "waste land for money compensation awarded, and, consequently, assign-"ment of waste land cannot be under the Act. What was the Collector's "power? He had power to dispose of assessed waste land under the "darkhast rules, and he would be justified in granting such lands consis-"tently with the rules. His orders, are appealable to the Board of "Revenue, who have power to cancel or modify the order."

1890 JULY 23. — APPELLATE CIVIL. — 13 M. 485.

The defendant preferred this second appeal.

Bhashyam Ayyangar, for appellant.

Parthasaradhi Ayyangar and *Subramanya Ayyar*, for respondents.

JUDGMENT.

MUTTUSAMI AYYAR, J.—The question for decision in this second appeal is whether, upon the facts found, the appellant is entitled, as purchaser, to the lands sued for. Land Survey No. 654 in the village of Viragalla, Nellore taluk, belonged to a Hindu lady named Kamakshamma. In December 1884, it was taken up for public purposes by the Government under Act X of 1870, and in January 1885 compensation was awarded to her, the amount being fixed with her consent at Rs. 237 *plus* 15 per cent., thereon. In February 1885, the appellant purchased Kamakshamma's interest in the land for Rs. 300 and applied to the Deputy Collector for the land sued for being given to him in lieu of compensation in money. In October 1885, the Deputy Collector granted, with the Collector's permission, the appellant's application, and took from him a deed of exchange. The land in dispute was then Government waste. The respondent and another had previously applied for it under the darkhast rules and their application had been rejected on the ground that the land had been reserved as tank-bed. In October 1885, they protested against its grant to the appellant and contended that, as prior [488] darkhastdars and occupants of adjacent lands, they had a preferential claim under the darkhast rules. The Collector, however, overruled their objection and directed, on the 30th October 1885, that the land be placed in the appellant's possession. The respondents appealed to the Board of Revenue who ordered, on the 3rd April 1886 that the land in dispute be made over to the prior darkhastdars on their paying, within one week from that date, the purchase-money which the appellants had paid to Kamakshamma. But the appellant refused to receive the purchase-money and give up the land. On the matter being reported to the Board of Revenue, the Board directed the Collector to receive the money and place it in deposit for payment to the appellant when he might desire to take it and to put the prior darkhastdars in possession. When this order was carried out, the appellant brought a possessory suit (original suit No. 249 of 1887) on account of his dispossession and obtained a decree for possession being restored to him. Thereupon the respondent brought this suit to establish his title to the land and to recover it from the appellant. Both the Courts below upheld the respondent's claim to a moiety of the land. Hence this second appeal. I am of opinion that the decision of the Courts below is correct. Neither the appellant nor his vendor Kamakshamma had a right to insist upon a grant of land in exchange for the one taken up by the Government under Act X of 1870. That enactment only contemplates an award of compensation in money and lends no support to the appellant's claim. It is not denied that respondent was prior darkhastdar and occupied adjacent lands; consequently, the appellant's claim cannot likewise be supported under the darkhast rules which recognise the respondent's preferential claim and allow an appeal to the Board of Revenue. Assuming that the Collector granted the land as stated in Exhibit D under the impression that he was at liberty to do so with reference to the spirit of paragraph 2 of G.O., No. 66, I find no warrant in it for his declining to recognise any preferential claim which third parties may have under the darkhast rules, and I cannot therefore

1890 JULY 23. — APPELLATE CIVIL. — 13 M. 485.

say that the Board of Revenue was precluded from holding that he ought not to have refused to recognise such claim. As regards the contention that the land in question was the property of Government and after the Collector gave it under a special contract, in exchange for some land taken up for the Government, it was not competent to [489] the Board of Revenue to entertain an appeal and to rescind the contract, it is not in my judgment tenable. As already observed, the contract was not one made under Act X of 1870. Nor was the Collector authorized by the Government Order cited either to disregard preferential claims under darkhast rules or to act otherwise than subject to the supervision and the authority of the Board of Revenue. I may here refer to Section 44, Regulation II of 1803, which provides that Collectors shall not, in any case, authorize the alienation of land without authority from the Board of Revenue. The conclusion I come to is that the order of the Board is not at variance with any rule of law. On this ground, I would dismiss this appeal with costs.

SHEPHARD, J.—I am of the same opinion. The appellant's case depends on the validity of the Collector's proceedings with regard to the land in dispute. The Collector's action was overruled by the Board of Revenue in an order passed on the 5th June 1866 in favour of the present plaintiff and his fellow petitioner; and, unless the Collector was competent to give the appellant a good title, independently of the darkhast rules and the control of the Board of Revenue, it is clear that the appeal must fail. The Regulation II of 1803, to which reference was made in the argument, distinctly negatives any independent authority in the Collector to alienate public lands and the circumstances that the land was granted in lieu of compensation for other land taken up under Act X of 1870 does not make the darkhast rules any the less applicable. I would dismiss the appeal with costs.

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13 M. 490.

[490] APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

KANHARANKUTTI (*Plaintiff*), *Appellant v.* UTHOTTI (*Defendant*), *Respondent.** [21st July and 5th August, 1890.]

Malabar law—Right of pre-emption under otti—Waiver—Limitation Act—Act XV of 1877, *Section* 28.

A jenmi having demised certain land in Malabar on otti to defendant No. 3 in 1869, sold the jenm title to the plaintiff and defendants Nos. 1 and 2 in 1886. In 1888 defendant No. 3 made a further advance to and obtained a renewed demise from defendants Nos. 1 and 2. The plaintiff now sued more than six years after the sale to recover his share (defendant No. 3 being in possession) on payment of one-third of the otti amount:

Held, that (whether or not the suit was maintainable as framed) the third defendant had a right of pre-emption as *ottidar*, which had not been waived by him and was not barred by limitation, and which constituted a good defence to the suit.

[R., 15 M. 401 (402); 20 M. 305 (310); 24 M. 449 (464); 29 M. 336 (341) = 1 M.L.T. 153; 30 M. 388 (391) = 17 M.L.J. 329 = 2 M.L.T. 354; 17 Ind. Cas. 337 (338) = 23 M.L.J. 607 = 12 M.L.T. 535 = (1912) M.W.N. 1217 (1218).]

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* Second Appeal No. 970 of 1889.

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SECOND appeal against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in Appeal Suit No. 478 of 1888, confirming the decree of V. Kelu Erati, District Munsif of Pynad, in Original Suit No. 176 of 1888.

Suit to recover a one-third part of a paramba demised on otti to defendant No. 3 on 28th January 1869.

It appeared that plaintiff and defendants Nos. 1 and 2 were the younger children of the jenmi, by whom the land in question was demised on otti to defendant No. 3 on the above date. The eldest son of the jenmi took the land on lease from defendant No. 3. Subsequently, in October 1886, the jenmi sold her right to the paramba now in question to the plaintiff and defendants Nos. 1 and 2 and sold the jenm of another paramba to the wife of her eldest son, reserving the otti of Rs. 300 due to defendant No. 3 equally on each of them. Defendant No. 3 brought original suit No. 277 of 1887 against his lessee and the vendees of the jenmi for recovery of both parambas under the otti and obtained a decree on the 15th of February 1888. After the decree, defendant No. 3 **[491]** advanced a further sum of Rs. 50 to defendants Nos. 1 and 2 and a further sum to the wife of the lessee and obtained renewed demises of both parambas.

The District Munsif dismissed the suit, holding that the plaintiff's purchase was invalid as against defendant No. 3, who, being the holder of the otti, had a right of pre-emption, which he held had not been waived. His decree was affirmed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Sankaran Nayar, for appellant.

Sankara Menon, for respondent.

JUDGMENT.

The first point argued before us on second appeal is that third defendant's right of pre-emption, assuming it to exist, is no bar to this suit, inasmuch as it does not invalidate the sale to plaintiff and first and second defendants altogether, but only gives third defendant a right to have the sale transferred to him on offering to pay the price paid to the jenmi. In support of this contention *Ajudhia Bakhsh Singh* v. *Arab Ali Khan* (1) and *Vasudevan* v. *Keshavan* (2) are relied on. Neither of these cases appears to us to be in point. The case of *Ajudhia Bakhsh Singh* v. *Arab Ali Khan* (1) relates to the right of pre-emption among co-sharers under Muhammadan law, which is a very different thing from the right of pre-emption of an otti-holder under Malabar law. In *Vasudevan* v. *Keshavan* (2) all that was decided was that a holder of a veppu mortgage, which appears to carry with it the right of pre-emption and also the preferential right to make further advances, had no right to set aside the further mortgage, but was only entitled, on tendering the price, to claim that the further mortgage should be transferred to him. As to the right of pre-emption it was found in that case that an offer was made to the karnavan at the auction sale to purchase at the price offered by the highest bidder and the offer was refused, so that the question of pre-emption did not arise On the other hand, *Cheria Krishnan* v. *Vishnu* (3) is a distinct authority that the right of pre-emption is a good defence to a suit to redeem.

Another point raised is that the third defendant's right of pre-emption is extinguished by Section 28 of the Limitation Act, more than

(1) 7 A. 892. (2) 7 M. 309. (3) 5 M. 198.

six years having elapsed since the sale; but Section 28 only [492] applies to suits for possession of property. Third defendant has no need to bring any suit for possession of the property in question. He has already obtained a decree for such possession. The only suit he would have to bring to assert his right of pre-emption would be a suit to set aside the sale to the plaintiff and the first and second defendants and to compel them to convey the property to him on his paying the price they had paid, and, even if such a suit is barred, the right is not extinguished by Section 28.

It has been found by both Courts that third defendant's right of pre-emption has not been waived; and, that being so, it is a good defence to this suit and it is unnecessary to consider the other ground upon which the District Munsif decides against plaintiff, *viz.*, that he cannot redeem one-third of the paramba on paying one-third of the otti amount due on it, though that appears to us equally fatal to plaintiff's suit as framed. The second appeal fails and must be dismissed with costs.

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13 M. 492.

APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Weir.

SUNDARAM (*Plaintiff*), *Appellant v.* ANNANGAR AND OTHERS (*Defendants*), *Respondents.** [22nd July, 1890.]

Civil Procedure Code—Act XIV of 1882, *Sections* 561—*Act VII of* 1888, *Section* 48—*Time allowed for memorandum of objections.*

An appeal cannot definitely be posted until the Court has ascertained that notice of the appeal has been served on the respondent and a date must then be fixed not less than one month from the date of service.

SECOND appeal against the decree of W. F. Grahame, District Judge of Tinnevelly, in Appeal Suit No. 1691 of 1888, modifying the decree of C. Srirangachariar, District Munsif of Srivelliputur, in Original Suit No. 335 of 1887.

Suit for Rs. 300 for damages for defamation. The District Munsif passed a decree that the plaintiff do recover from all the defendants, other than the defendants Nos. 9 and 14, Rs. 10.

[493] On appeal against this decree, which appeal was disposed of less than a month after the date of the service of notice on the plaintiff, the District Judge modified the decree of the District Munsif by decreeing the plaintiff four annas damages with proportionate costs.

The District Judge said :—" For plaintiff, as respondent, I have been " told that I ought not to take up the appeal until a month has elapsed " from the date of plaintiff receiving notice, because he is 'thinking' of fil- " ing a cross-appeal in the shape of a memorandum of objections under " Section 561, Civil Procedure Code, and that, under Section 561, as amend- " ed by Act VII of 1888, respondent can file a memorandum of objections " within a month from the date of receiving notice. No petition was filed " informing me of plaintiff's intention or asking for an adjournment, and I " was not asked in so many words to adjourn the appeal to enable plaintiff " to put in a memorandum of objections. I was merely told that the

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* Second Appeal No. 908 of 1889.

1890 JULY 22. — APPELLATE CIVIL. — 13 M. 492.

"pleader would like the hearing to be put off, because plaintiff is 'thinking whether he will put in a memorandum of objections or not.' Plaintiff "signed his pleader's vakalat on 16th instant just a fortnight ago and he "is not, in my opinion, entitled to have an appeal kept pending merely to "enable him to make up his mind. I am the less inclined to put off the "hearing, inasmuch as I find that plaintiff is entitled to no more than four "annas damages for his wounded feelings."

The plaintiffs preferred this second appeal.

Parthasaradhi Ayyangar, for appellant.

Sankaran Nayar, for respondents.

JUDGMENT.

The law—Section 561, Civil Procedure Code, as amended by Act VII of 1888, Section 48—allows a respondent to file a memorandum of objections within one month from the date on which notice has been served on him or on his pleader. The right so conferred is an absolute right and the hearing of the appeal cannot be advanced so as to defeat this provision. The District Judge in this case was made aware that the respondent contemplated, but had not quite decided on filing a memorandum of objections; but this circumstance was, we think, immaterial. Whether the District Judge knew of the respondent's intention or not, the respondent had a month's time within which to file his memorandum of objections, and the appeal could not be definitely [494] posted, we consider, until the Court or its officer had ascertained that notice had been served. It should then have been posted for some date not less than a month from the date of service on the respondent.

We must, therefore, allow this appeal, and, reversing the District Judge's judgment, we remand the appeal for rehearing, after giving due notice to the parties and allowing to the respondent the time prescribed by law for filing a memorandum of objections.

The second appellant will have his costs in this appeal. The costs in the Courts below must abide the event.

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13 M. 494.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

VENKATRATNAM (*Defendant No.* 3), *Appellant v.* REDDIAH AND OTHERS (*Plaintiff and Defendants, Nos.* 1 *and* 2), *Respondents.**
[11th August, 1890.]

Evidence Act—Act I of 1872, *Section* 92—*Collateral evidence to show that an apparent sale deed was a mortgage—Variance between pleading and proof.*

In a suit by an attaching creditor to set aside an order (which allowed an objection made to his attachment by one claiming under a sale-deed from the judgment-debtor), and for the declaration of the judgment-debtor's title, the sole issue framed was whether the sale-deed was *bona fide* and supported by consideration:

Held, that the plaintiff was entitled to show by collateral evidence that the sale-deed was really a usufructuary mortgage and that the mortgage had expired.

[R., L.B.R. (1893—1900) 154 (156); 3 N.L.R. 19 (31); 72 P.R. 1901=114 P.L.R. 1901; Cons., 16 M. 80 (81).]

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* Second Appeal No. 830 of 1889.

1890 AUG. 11.

APPELLATE CIVIL.

13 M. 494.

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 745 of 1888, reversing the decree of M. B. Sundara Rau, District Munsif of Masulipatam, in original suit No. 42 of 1888.

In original suit No. 669 of 1885 in the Subordinate Court of Cocanada, the present plaintiff obtained a decree against defendant No. 1 and in execution attached the land in question in the present suit. The son, since deceased, of defendant No. 3, intervened in execution, claiming title under a registered instrument, dated 24th May 1877, and executed to him and defendant No. 2 by defendant **[495]** No. 1. That claim having been allowed, the plaintiff now sued for the cancellation of the order allowing that claim and for a declaration of the title of defendant No. 1.

The only issue which was framed in the case was as follows:—

"Was the suit property sold *bona fide* to defendant No. 2 and the "late son of defendant No. 3 and for consideration ?"

The District Munsif recorded a finding on this issue in the affirmative and accordingly dismissed the suit. On appeal the District Judge, relying upon the oral evidence of the case and upon certain letters, which had passed between defendants Nos. 1 and 2 and the son of defendant No. 3, came to the conclusion that the sale-deed was in reality a usufructuary mortgage which had now spent itself and that it was accordingly open to the plaintiff to attach the land.

Defendant No. 3 preferred this second appeal.

Mr. *Ramasami Raju*, for appellant.

Rama Rau, for respondents.

JUDGMENT.

It is argued that document I being registered, the Judge was in error in finding that the real transaction between the parties was a mortgage. We do not consider that Section 92 of the Evidence Act has any bearing on the question. Where one party alleges that a transaction is a sale and the other contends that it is a mortgage, it has been held that oral evidence is admissible to prove that the real transaction was a mortgage (see *Govinda* v. *Jesha Premaji* (1), *Mahadaji Gopal Baklekar* v. *Vithal Ballal* (2), *Hem Chunder Soor* v. *Kally Churn Das* (3), *Baksu Lakshman* v. *Govinda Kanji* (4), and *Kashi Nath Dass* v. *Hurrihur Mookerjee* (5).

Another contention is that neither plaintiff nor defendant alleged that the transaction was a mortgage, as found by the District Judge. There is, however, in the third defendant's written statement a distinct reference to a promise made by the third defendant's son to restore the land on payment of the money due to him, and the issue framed in the case admitted of either party showing what the transaction really was. The fact of plaintiff (a stranger) having stated that the sale was for no consideration and collusive did not preclude the Judge from finding, upon the evidence, that there was consideration and that the transaction was in fact a mortgage. We dismiss the second appeal with costs.

(1) 7 B. 73. (2) 7 B. 78. (3) 9 C. 528. (4) 4 B. 594. (5) 9 C. 898.

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LATE
CIVIL.

13 M. 496.

13 M. 496.

[496] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

BANGARUSAMI (*Plaintiff*), *Appellant* v. BALASUBRAMANIAN AND ANOTHER (*Defendants*), *Respondents*.*
[17th and 28th July, 1890.]

Judgment of foreign Court—Jurisdiction—Notice.

The defendants, who were British subjects, purchased goods from the plaintiff in French territory. The plaintiff sued the defendants in the French Court and obtained judgment against them, but the defendants neither resided nor owned property in French territory, and did not appear at the trial and had no actual notice of the proceedings. In a suit brought in British India on the judgment of the French Court:

Held, that the want of notice to the defendant was fatal to the suit.

Quære, whether the French Court would have had jurisdiction (apart from the question of notice) if it had been proved that it was intended that payment should be made in French territory?

[R., 24 B. 86 (88); 28 C. 641 (651) = 5 C.W.N. 741.**]**

SECOND appeal against the decree of S. Gopalachari, Subordinate Judge of Madura (East), in appeal suit No. 55 of 1888, confirming the decree of P. S. Gurumurti Ayyar, District Munsif of Madura, in original suit No. 163 of 1887.

The plaintiff, who was a merchant of Karikal within the French dominions, sold goods to the defendants who were British subjects and resided at Madura. Their dealings extended from 17th August 1878 to 22nd August 1884. For the balance due to the plaintiff in respect of such dealings, *viz.*, Rs. 402-11-2, he sued the defendants in the Karikal Court and obtained a decree *ex parte* on 14th March 1885. The defendants having no property within the French territories, he got a certificate to collect the debt from them in British India. He accordingly brought this suit as above on the judgment of the Karikal Court.

The defendants admitted the dealings from October 1879 to September 1883, but denied being indebted to the plaintiff. They pleaded that they were not aware of the decree or other proceedings in the Karikal Court, that the Karikal Court had no jurisdiction as they neither resided nor owned properties within the French territory, that the decree relied on by the plaintiff was **[497]** obtained fraudulently, that they could not defend the case for want of notice and summons, that the suit was time-barred, &c.

Both the District Munsif and, on appeal, the Subordinate Judge found that the defendant had no notice of the French suit, and that the French Court had no jurisdiction, and accordingly passed decrees for the defendants.

The plaintiff preferred this second appeal.

Mr. *Wedderburn*, for appellant.

Mr. *Gantz*, for respondents.

Reference was made in the argument to the following cases besides those referred to in the judgment, *viz.*, *Hinde & Co.* v. *Ponnath Brayan* (1), *Parry & Co.* v. *Appasami Pillai* (2), *Copin* v. *Adamson* (3).

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* Second Appeal No. 1711 of 1888.

(1) 4 M. 359. (2) 2 M. 407. (3) L.R. 9 Ex. 345.

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13 M. 496.

JUDGMENT.

MUTTUSAMI AYYAR, J.—This second appeal arises from a suit brought by the appellant upon a judgment which he had obtained against respondents in the French Court at Karikal. Both the Courts below held that the foreign tribunal had no jurisdiction, and that respondents had no actual notice of the proceedings. The District Munsif held, also, that the French judgment was at variance with the Act of Limitations in force in British India, but on appeal the Subordinate Judge expressed no opinion on that point. He referred, however, to the appellant's statement that respondents had promised to make payments at Karikal and carried on dealings with him on that footing and to the respondents' denial that such was the case, but he considered that such promise would not, even if true, give jurisdiction, and, therefore, that it was unnecessary for him to come to a distinct finding upon the conflicting evidence on the record. The contention in second appeal is that the French Court had jurisdiction.

The principle upon which actions on foreign judgments rest is that the judgment of a Court of competent jurisdiction imposes a duty on the defendants to pay the sum for which the judgment has been given (*Russell* v. *Smyth* (1) and *Williams* v. *Jones* (2). The material question, therefore, is whether upon the facts of this case the French Court had jurisdiction.

The question of jurisdiction depends on the consideration whether the defendant owed, at the time the suit was brought, **[498]** allegiance to the French law, either permanent or temporary, or voluntarily submitted to the foreign jurisdiction. In the case before us, respondents were not French subjects and they were not domiciled in French territory, and, therefore, they owed no permanent allegiance to the French law. Nor did they reside or own property in French territory when the suit was brought or at any other time. Taking the word "domicile" in its widest sense, there is no foundation for saying that they owed at least temporary, if not permanent, allegiance, or had the protection of the French law in respect of their property. So far the decision of the Courts below is right. It is argued by the appellant's counsel that respondents bought goods at Karikal, they were there when they did so, and that that circumstance was sufficient to give jurisdiction to the French Court. To this contention I cannot accede. In *Mathappa Chetti* v. *Chellappa Chetti* (3) the defendant casually resorted to the foreign territory of Puducottah, and, whilst there drew a bill for money due to the plaintiff who resided in that territory, and this Court held, relying on the Civil Law, that a casual passage through, or a momentary presence in, a state was not sufficient to create jurisdiction, but that something much more permanent was necessary, although it might not amount to *domicilium*. Again in *Rousillon* v. *Rousillon* (4) the defendant, a Swiss subject, entered into the agreement sued upon with the plaintiffs, French subjects, residing in France when he was in France on a temporary visit, and Fry, J., held that that circumstance was not sufficient to give jurisdiction to the French Court, and observed that at the time of making the contract there was no intention on his (defendant's) part, or, as far as he can gather, on the part of the plaintiffs that he should take up his residence in France. As to the *dictum* of Blackburn, J., in *Schibsby* v. *Westenholz* (5), on which the appellant's counsel appears to rely, Fry, J., considered that the *dictum*

(1) 9 M. & W. 810. (2) 13 M. & W. 628.
(3) 1 M. 196. (4) L.R. 14 Ch. D. 351. (5) L.R. 6 Q.B. 155.

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referred to a causal unexpected leaving of the foreign country by a person who was permanently resident there at the time when the contract was entered into. It is an undisputed fact in the case that the respondents did not appear during the trial in the French Court and that judgment was passed against them *ex parte*, consequently no question of voluntary submission to jurisdiction or waiver could arise from their conduct with reference to the trial in [499] the Court at Karikal. There is, however, one point in regard to which further inquiry might be necessary before adopting the opinion of the Lower Courts as to jurisdiction. The Subordinate Judge considered it unnecessary to decide whether the respondents promised to make payments to the appellant at Karikal, and if so, whether Karikal was not the *locus solutionis*. On this point Fry, J., observed in *Rousillon* v. *Rousillon* (1) that the place where the contract is to be performed is a very material circumstance, adding, however, that in that case the contract was one which might be performed or broken anywhere. The question does not appear to have arisen in *Mathappa Chetti* v. *Chellppa Chetti* (2). The passage on which the Subordinate Judge apparently relies is the one in which Bar is cited as having remarked that Savigny's rule—the place of fulfilment indicates the proper *forum*—although very often giving the true solution, cannot be treated as a principle. The Subordinate Judge has evidently misapprehended the import of this passage. Both Bar and Wharton while referring to the rule that the debtor's domicile indicates the competent *forum* as embodying the true general principle, they do not deny that the *locus solutionis* is material, but say, on the contrary, that when the obligation definitely fixes the place of performance, it will furnish the true solution. The finding in this case, however, that the respondents had no actual notice of the proceedings in the French Court is decisive. The general rule is that a personal judgment based solely on extra-territorial service, the defendant not being domiciled within the jurisdiction, is internationally invalid, and one state cannot in this way obtain jurisdiction over a person domiciled in another state—See Wharton 649. Whatever effect, therefore, the service under the *Code Civil* of France may have in French territory, it cannot be treated as sufficient when the defendant is a British subject domiciled in British territory where there is no special contract on his part for service and when the service is internationally invalid.

The case of *Becquet* v. *MacCarthy* (3) is not in point, for the Island of Mauritius at the time of the suit belonged to the Sovereign of Great Britain, though French law was administered there, and the defendant was only absent from the island when the proceedings were instituted there.

[500] On this ground, I am of opinion that the second appeal cannot be supported and must be dismissed with costs.

SHEPHARD, J.—The appellant's suit, based on a judgment of the French Court at Karikal, has been dismissed on the ground that that Court had no jurisdiction and that the defendants had no notice of the proceedings against them. The defendants reside in Madura and are British subjects, and it is not suggested that they even have property in Karikal. But it is argued that the French Court, nevertheless, had jurisdiction, because it was at Karikal that the goods were purchased in respect of which a balance was claimed by the appellant, and there is evidence, with regard to which the Subordinate Judge has recorded no decided finding, that a

(1) L. R. 14 Ch. D. 351. (2) 1 M. 196. (3) 2 B.& Ad. 951.

promise was made by the defendants to pay at that place. It is further contended that sufficient notice of the proceedings was conveyed to the defendants.

The exact circumstances under which the dealings between the plaintiff, who resides in Karikal, and the defendants took place are not stated, and it does not appear that the defendants personally visited Karikal, but it is said that whether he did go there or not, he must be taken to have promised to pay at that place and that, therefore, Karikal was the proper *forum*. Reliance is placed on a passage in Blackburn, J.'s, judgment in *Schibsby* v. *Westenholz* (1) where that learned Judge says :—"Now on this "we think some things are quite clear on principle. If the defendants had "been at the time of the judgment subjects of the country whose judgment "is sought to be enforced against them, we think that its laws would "have bound them. Again, if the defendants had been at the time when "the suit was commenced resident in the country, so as to have the benefit "of its laws protecting them, or, as it is sometimes expressed, owing tempor-"ary allegience to that country, we think that its laws would have bound "them. If at the time when the obligation was contracted the defendants "were within the foreign country, but left it before the suit was instituted, "we should be inclined to think the laws of that country bound them; "though before finally deciding this we should like to hear the question "argued."

It is said that this *dictum* justifies us in holding that a traveller casually passing through a foreign country and incurring a debt **[501]** thereby, becomes subject to the jurisdiction of the Courts of that country and therefore under an obligation to obey their judgment.

The decision in *Mathappa Chetti* v. *Chellappa Chetti* (2) is a distinct authority against this contention, and I can find no support for it in the later case of *Rousillon* v. *Rousillon* (3), which was also cited. In the course of the argument in that case Fry, J., asks whether in the passage above cited, Blackburn, J., did not refer to a casual unexpected leaving of the foreign country by a person who was permanently resident there at the time when the contract was entered into, and the decision was that as the defendant's stay in France, where the contract was made, was only temporary and casual, and it did not appear that either party contemplated performance in France, the judgment of the French Court imposed no duty upon him. Although not an authorlty for the main contention of the appellant's counsel, this judgment would tend to support the proposition that the French Court might have had jurisdiction if it had been proved that it was intended that payment should be made at Karikal; and the decision in *Mathappa Chetti* v. *Chellappa Chetti* (2) is in no wise inconsistent with that proposition. (See also Wharton's Conflict of Laws, first edition, § 793). It is not, however, necessary to express any opinion on this point, because I think that the finding that no notice was given to the defendant is fatal to the plaintiff's suit—see Wharton, second edition, § 654. On this latter point, the case of *Becquet* v. *MacCarthy* (4) was cited by Mr. Wedderburn. But that case is an entirely different one from the present, for it appeared there that the testator,, whose executrix was defendant, had been possessed of real estate in the Island of Mauritius, and that in the case of a person formerly resident in the island absenting himself and not leaving any attorney, it

(1) L.R. 6 Q. B. 155.
(2) 1 M. 196.
(3) L.R. 14 Ch. D.351.
(4) 2 B. & Ad. 951.

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was the duty of the Procurator-General to take care of his interests. No such circumstances were proved in the present case. The service of notice may have been sufficient for the purpose of the French Court; but in reality there was no service at all.

The appeal must be dismissed with costs.

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13 M. 502.

[502] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

MALIKAN (*Plaintiff*), *Appellant v.* SHANKUNNI AND OTHERS (*Defendants,*) *Respondents.** [11th and 12th August, 1890.]

Malabar Compensation for Tenants' Improvements Act—Act I of 1887 (*Madras,*) *Section* 7—*General Clauses Act, s* 6.

A suit to recover property in Malabar demised on kanom was pending when the Malabar Compensation for Tenants' Improvements Act came into force :

Held, on the construction of Sections 1, 5, and 7, that the tenant's right to compensation should be dealt with in accordance with the provisions of that Act.

[Diss., 32 M. 1=18 M.L.J. 98 (100)=3 M.L.T. 291.]

SECOND appeal against the decree of E. K. Krishna Menon, Subordinate Judge of South Malabar, in appeal suit No. 280 of 1888, modifying the decree of N. Sarvothama Row, District Munsif of Calicut.

This was a suit filed before the Malabar Compensation for Tenants' Improvements Act came into force to recover a paramba, which had been demised to the defendants on kanom; the plaintiff offered to pay a certain sum in respect of the improvements effected on the property by the defendants and the amount of the compensation was the substantial question in the suit.

The District Munsif passed a decree for the plaintiff, fixing the sum payable in respect of the improvements Rs. 706-3-8; on appeal the Subordinate Judge modified the decree by reducing the sum payable to Rs. 561-5-8.

The plaintiff preferred this second appeal.

Sundara Ayyar, for appellant.

Sankaran Nayar, for respondents.

JUDGMENT.

The first contention in support of this appeal is that due effect has not been given to Exhibit H. That document shows that the sub-kanomdar paid the kanomdar in 1871 compensation for 201 cocoanut trees, but the jenmi was no party to the instrument, and the Subordinate Judge relied on the report made by two commissioners regarding the age of the trees. The [503] jenmi paid costs for improvements in 1851, and the finding that compensation is now payable for trees, which are planted or came to bear fruit afterwards, is open to no legal objection.

The next contention is that the present suit was pending when Madras Act I of 1887 came into force and that the Sub-Judge was in error in assessing the compensation under the Act. Our attention is also drawn to Section 6 of the General Clauses Act and to the decision of this

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* Second Appeal No. 897 of 1889.

Court in *Avudulla* v. *Mahadevi* (1). It is provided by Section 1 of Act I of 1887 that the Act shall come into force at once and by Section 5 that, whenever a Court makes a decree for the ejectment of a tenant, it shall determine the amount of compensation (if any) due to the tenant for improvements and make the decree conditional on the payment of that amount to the tenant. It is further provided by Section 7 that nothing in any contract made after the 1st January 1886 shall take away or limit the right of a tenant to make improvements and claim compensation for them in accordance with the provisions of this Act.

The present suit was instituted after the 1st January 1886, and Section 7 discloses an intention to recognize the tenant's right to claim compensation from that date in accordance with the provisions of the Act, notwithstanding an express contract to the contrary. The customary mode of computing compensation cannot have a higher effect than an express contract. The decision in *Avudulla* v. *Mahadevi* (1) is not in point. This second appeal cannot be supported and is dismissed with costs. The memorandum of objections is not pressed and it is also dismissed with costs.

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13 M. 504.

[504] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

MUTTIA (*Plaintiff*), *Appellant v.* APPASAMI AND OTHERS (*Defendants*), *Respondents.** [18th and 24th April, 1890.]

Civil Procedure Code,—Act XIV of 1882, *Sections* 244, 318, 334—*Petition by purchaser at Court-sale for possession—Obstruction—Appeal against order—Limitation Act—Act XV of* 1877, *Schedule II, Articles* 167, 179.

On an application made in 1888 under Civil Procedure Code, Section 318, by the purchaser at a Court-sale (who was the assignee of the decree which was being executed), praying for delivery of possession of the property purchased, it appeared that the sale took place in 1885, that it was confirmed in 1886, and that in January 1887 an order was made for delivery of possession to the purchaser. The judgment-debtor had resisted the purchaser's efforts to obtain possession in 1887 and set up in bar of the application in 1888 an oral agreement alleged to have been made between him and the purchaser. The application was rejected:

Held, (1) that an appeal lay against the order rejecting the application ;

(2) that the application not being a complaint of obstruction, was not barred by limitation and should be heard and determined on the merits.

[**F.**, 35 B. 452=13 Bom. L.R. 661 (668)=11 Ind. Cas. 987 ; 16 Ind. Cas. 432=(1913) M.W.N. 179 ; 8 M.L.J. 193 (194) ; **Appr.**, 8 M.L.T. 388; **R.**, 17 A. 222 (224) ; 31 A. 82 (90)=6 A.L J. 71=5 M.L.T. 185 ; 16 M. 20 (22) ; 26 M. 740 (741)=13 M.L.J. 237 (238) ; 28 M. 87 (88)=14 M.L.J. 474 ; 32 M. 136=19 M.L.J. 224 (226)=4 M.L.T. 350 ; 1 S.L.R. 172 (174) ; **Disappr.**, 1 C.W.N. 658 (659); **D.**, 15 M. 226 (229); 19 M. 29 (31) ; 26 A. 365 (366)=A.W.N. (1906) 46.]

APPEAL against the order of C. Venkoba Chariar, Subordinate Judge of Madura (West), made on miscellaneous petition No. 181 of 1888 in original suit No. 36 of 1878.

Application under Civil Procedure Code, Section 318, for delivery of immoveable property in the occupancy of the judgment-debtor. The

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* Appeal against order No. 16 of 1889.

(1) Appeal No. 164 of 1887 (not reported).

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judgment-debtor set up an agreement between him and the applicant in bar of the application and raised also a plea that since a former attempt to obtain delivery was rendered futile by the assertion of his right, the present application was barred under Limitation Act, Schedule II, Article 167. The Subordinate Judge held that the application was not barred by limitation, and, after referring to circumstances which in his view rendered the agreement set up probable, added that "as the obstruction was under colour of a legal right," the matter should be determined in a regular suit, which under the circumstances should be brought by the present applicant.

The plaintiff preferred this appeal.

[505] *Subramanya Ayyar*, for appellant.

Mr. *Wedderburn*, *Bhashyam Ayyangar* and *Sambamurti Ayyar*, for respondents.

JUDGMENT.

BEST, J.—The appellant is the assignee of the decree obtained by the plaintiff in original suit No. 36 of 1878 on the file of the Subordinate Court of Madura (West). As such assignee he executed the decree, and on the attached property being put up for sale, himself purchased the house now in question. Respondent No. 1 was one of the defendants in the suit No. 36 of 1878 and owner of this property at the time of the sale above mentioned. The order appealed against was passed by the Subordinate Judge on a petition presented by the appellant as purchaser at the auction sale for possession of the property under Section 318 of the Code of Civil Procedure, which application was opposed by the respondent No. 1, alleging that he was entitled to retain the property under an oral agreement come to between himself and appellant subsequent to the sale. He further contended that appellant's present application was barred under Article 167 of Schedule II of the Limitation Act, by reason of a period of more than 30 days having elapsed since appellant was obstructed by respondent No. 1 in former proceedings taken for obtaining possession of the same property.

The Subordinate Judge has held this latter objection to be invalid on the authority of *Ramasekara* v. *Dharmaraya* (1) ; but he has at the same time rejected the appellant's application to be put in possession of the property on the ground that the first respondent's obstruction is "under " cover of a legal right, though inchoate and contingent, and this being so, " the question practically is, who has to go to a regular suit to establish " his right," and that, " in the circumstances, the purchaser should have " recourse to it."

The preliminary objection is taken on behalf of respondent No. 1 that the order objected to is not appealable.

If the order in question had been passed on a complaint of resistance made either under Section 334 or under Section 328 of the Code of Civil Procedure, it is possible that both the objections (1) that the order is not appealable, (2) that the application as made to the Lower Court was time-barred, would have had to be **[506]** allowed. But as a matter of fact, the application made by the appellant was expressly made with reference to Section 318 of the Code, for delivery of possession of the property purchased. It was in no sense a complaint either under Section 328 or under Section 334 of the Code. The mere fact of the Court below applying these sections to the case is not sufficient to deprive the appellant

(1) 5 M. 113.

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of the right of appeal that he might otherwise possess. Section 334 is solely for the benefit of a purchaser at a sale in execution, and read with Section 328 it is very clear that it is not imperative on the part of such purchaser to complain of resistance or obstruction; as pointed out by West, J., in *Balvant Santarem* v. *Babaji* (1), the language of Section 328 is that the decree-holder "may," not that he "must," proceed in the way indicated. There is, therefore, nothing to prevent the decree-holder or purchaser who has been obstructed or resisted in his attempt to get possession of the property decreed or purchased (as the case may be) from making a fresh application for delivery, without making any complaint under Section 228 or 334 of the Code.

The question is one relating to the execution of the decree between the representative of the original decree-holder (now assignee) and one of the defendants in the suit. It falls, therefore, within Section 244 of the Code of Civil Procedure and is appealable. The fact of the decree-holder having subsequently become the purchaser of the property makes no difference, as has been held by this Court in *Viraraghava* v. *Venkata* (2) and *Vallabhan* v. *Pangunni* (3).

Being a question falling within Section 244, it must be decided by the Court executing the decree and not in a separate suit; consequently the Lower Court's order is erroneous in that it leaves the matter in dispute for settlement in a regular suit to be brought by the appellant as purchaser.

The Subordinate Judge is also in error in saying that the purchase by the decree-holder was in 1884. The sale took place on the 9th May 1885, but it was not confirmed till 2nd August 1886, and the first order for delivery of the property to the purchaser (now appellant) was made on the 12th January 1887.

The case must be remanded for disposal by the Lower Court unless, as contended by respondent No. 1, the application is barred **[507]** under Article 167 of Schedule II of the Limitation Act. That article is, however, inapplicable for, as already pointed out, this was not a complaint of resistance or obstruction, but an application for delivery of possession in execution of a decree, the limitation period for which is three years under Article 179 of Schedule II.

The Lower Court's order must, therefore, be set aside and the case remanded for disposal on the merits.

Respondent No. 1 must pay the appellant's costs of the appeal. The rest of the costs incurred hitherto will be provided for in the order to be passed by the Sudordinate Judge.

MUTTUSAMI AYYAR, J.—I am also of opinion that the matter in dispute between the purchaser at the Court-sale and the judgment-debtor should be determined under Section 244 of the Code of Civil Procedure. Having regard to the language of Section 334, I am unable to uphold the contention that the Court-sale operated to satisfy the decree in original suit No. 4 of 1882 and that a subsequent agreement regarding the purchase prior to the delivery of possession under Section 318 does not relate to the execution of the decree. The purchaser in this case was the decree-holder and the party obstructing the delivery of possession was a judgment-debtor, and the oral agreement set up in justification of the obstruction prevents in effect the completion of the purchase by transfer of possession. By declaring in Section 334 that the provisions of Chapter XIX relating to resistance or obstruction to a decree-holder in obtaining possession of the

(1) 8 B. 602. (2) 5 M. 217. (3) 12 M. 454.

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property adjudged to him are applicable to resistance or obstruction to the purchaser of any immoveable property at a Court-sale obtaining delivery of the property purchased, the Legislature regarded such delivery as a step in execution of the decree. When the purchaser is also the decree-holder, the question whether there was a just cause for the obstruction caused by the judgment-debtor, is also one relating to the execution of the decree between the parties to it within the meaning of Section 244. The intention of the Legislature in such cases seems to be, as pointed out by the late Chief Justice in *Viraraghava* v. *Venkata* (1) to prevent matters in execution becoming the cause of fresh litigation. I may also here draw attention to the fact that Section 334 renders the provisions of the **[508]** whole chapter applicable, whilst Section 268 of Act VIII of 1859 rendered only Sections 226, 227 and 228 applicable.

For these reasons I think an appeal lies and concur in the order proposed by my learned colleague. I do not consider that the question of limitation under Article 167 arises, for the application for delivery under Section 318 is substantially an application for execution of the decree by ordering delivery of possession of the property purchased.

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13 M. 508.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAMASAMI AND ANOTHER (*Plaintiffs*), *Appellants v.* SUBBUSAMI (*Defendant No.* 2), *Respondent.** [15th September, 1890.]

Court Fees Act—Act VII of 1870, *Schedule I, Article* 1, *Schedule II, Article* 17.

In a suit upon a hypothecation bond it was found by the Court of first appeal that the bond and the debt secured thereby were binding on the first defendant, but not on the second defendant. The plaintiff preferred a second appeal against the second defendant as sole respondent:

Held, that the Court fee payable on the second appeal should be calculated on the amount of the debt sought to be recovered.

[**F.**, 12 C.P.L.R. 43 (45); **R.**, 30 M. 96 (98) = 16 M.L.J. 458 = 1 M.L.T. 311 (**F.B**).]

SECOND appeal against the decree of P. Narayanasami Ayyar, Acting Subordinate Judge of Tanjore, in Appeal Suit No. 829 of 1888, reversing the decree of W. Gopalachariar, District Munsif of Tiruvadi, in original suit No. 101 of 1888.

The plaint set out that defendant No. 1 had executed to plaintiff No. 1 (who with plaintiff No. 2 was the manager of their undivided Hindu family) on 22nd October 1882 a hypothecation bond for Rs. 900, that certain payments had been made and credited towards the amount of the bond, and the prayer of the plaint was as follows:—

"We therefore pray for a decree for the recovery of the amount "undermentioned due on the said hypothecation bond, together with "the subsequent interest and the costs of the suit, making the property "hypothecated liable, as also the body of **[509]** plaintiff No. 1 who "executed the hypothecation bond and such other property as the defend-"ants may own.

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* Second Appeal No. 1136 of 1889.

(1) 5 M. 217.

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"To be recovered—

	RS.	A.	P.
"The principal of the said bond	900	0	0
"Interest thereon at $\frac{3}{4}$ per cent. per mensem as shown "in the bond from the date of the bond to date ...	435	6	0
"Total principal and interest ...	1,335	6	0
"Amount of credit as made in the bond of the payment "on the 14th June 1886 towards the principal ...	196	0	0
"Amount of counter-interest thereon from the said date "to date at the above rate of $\frac{3}{4}$ per cent. ...	30	8	6
"Total payment with counter-interest ...	226	8	6
"Balance due ...	1,108	13	6"

Defendant No. 2, who had been adopted by the husband (deceased) of defendant No. 1, claimed that the debt was not binding on him.

The District Munsif passed a decree against the defendants for the amount claimed and directed that if that amount were not paid before 12th April 1889, it should be "realised by the sale of the hypotheca "mentioned in the plaint, and that, if deficiency should arise, the second "defendant's other properties may be proceeded against."

On appeal the Subordinate Judge said:—"the only point for determination is whether the debts referred to in the hypothecation bond "were *bona fide* contracted for the second defendant's benefit," and having determined this point in favour of defendant No. 2, he passed a decree exonerating the second defendants and his property, including the land hypothecated.

The plaintiffs preferred this second appeal, joining the second defendant only as respondent and affixing to the memorandum of appeal a Rs. 10 stamp as if a declaratory decree were sought.

Subramanya Ayyar, for appellants.

Rama Rau, for respondent.

JUDGMENT.

The appeal is substantially to establish the plaintiffs' right to render the hypothecated property belonging to the second defendant liable to be sold in satisfaction of the debt **[510]** claimed in the suit. The Court fees payable must, therefore, be calculated on this amount.

The appellant is allowed six weeks within which to pay the deficient Court fees.

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13 M. 510.

APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

SHAIK SAHEB (*Plaintiff*), *Appellant* v. MAHOMED AND ANOTHER (*Defendants*), *Respondents*.* [4th August, 1890.]

Civil Procedure Code—Act XIV *of* 1882, *Sections* 13, 102, 158—*Failure to pay Commissioner's fee*—Res judicata.

A suit for land was dismissed in 1886 on the plaintiff's failure to comply with an order to pay a fee for the appointment of a commissioner to value the land.

* Second Appeal No. 964 of 1889.

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APPELLATE CIVIL.

13 M. 510.

No issues were framed in the suit, and the order directing payment of the fee prescribed no time within which it was to be made. The plaintiff now sued the defendants again for the same land :

Held, that the claim was not *res judicata*.

[R., 18 M. 466 (467).]

SECOND appeal against the decree of S. T. McCarthy, District Judge of Chingleput, in appeal suit No. 387 of 1888, reversing the decree of V. Subramania Sastri, District Munsif of Poonamallee, in original suit No. 107 of 1887.

Suit to recover possession of certain land. It appeared that in original suit No. 13 of 1886 on the file of the District Munsif of Poonamallee the plaintiffs had sued to eject the defendants from the same land ; that a question having arisen as to the valuation of that suit, the plaintiff was ordered to pay a fee for a commissioner to be appointed to value the land, and that the plaintiff having failed to comply with this order, the suit was dismissed, no issues having been framed.

The District Munsif passed a decree as prayed, holding that the suit of 1886 was no bar to the present suit. Upon this question he referred to *Alwar* v. *Seshammal* (1), *Venkatachalam* v. *Mahalakshmamma* (2), *Shankar Baksh* v. *Daya Shankar* (3), *Ganesh Rai* [511] v. *Kalka Prasad* (4), *Kudrat* v. *Dinu* (5) and expressed the opinion that the suit had not been disposed of under Civil Procedure Code, Section 102, which was not alluded to in the order of dismissal, but under Section 158 ; and in that view he held that the matter in dispute was not *res judicata* under Section 13, because the issues arising in the suit had not been heard and determined.

The District Judge on appeal reversed the decree of the District Munsif, holding that the present suit was barred, whether the suit of 1886 was dismissed under Section 102 or Section 158.

The plaintiff preferred this second appeal.

Sundara Ayyar, for appellant.

Balaji Rau, for respondents.

JUDGMENT.

We are of opinion that the District Judge has erred in holding that the suit is *res judicata*. Without expressing an opinion on the decision relied on by the District Judge, *Venkatachalam* v. *Mahalakshmamma* (2), we are of opinion that the circumstances of the former suit did not fall under Section 158 of the Civil Procedure Code, inasmuch as, although there was a default in respect of paying the commissioner's fee, it appears that no time was granted, or in other words no date was fixed within which the fee should be paid. We think the somewhat stringent provisions of this section cannot be put in force unless the party has had distinct notice in respect of *time*, of what is required of him, and that default in the matter of time (compare *Ramaya v. Rangaya*, (6), is of the essence of the particular kind of default contemplated. In the present case an order was made in general terms that the commissioner's fee should be paid and the suit was adjourned to a certain date for inquiry.

As there was in our opinion no such default as is provided for in Section 158 of the code, we must hold that the case was not dealt with

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(1) 10 M. 270. (2) 10 M. 272. (3) 15 C. 422.
(4) 5 A. 595. (5) 9 A. 155. (6) 7 M. 41.

1890 AUG. 4. — APPELLATE CIVIL. — 13 M. 510.

under that section, and that therefore the suit now brought is not governed by the opinion expressed in *Vencatachalam* v. *Mahalukshmamma* (1). It is clear also from Exhibit VI that the case was not disposed of under Section 102 of the code.

We must therefore take it that the former suit was not disposed of under any of the special sections of the code which raise a statu- [512] tory bar to the present suit, and as it was not adjudicated on the merits, it cannot be barred under Section 13 of the code.

For the reasons stated we allow the appeal and reverse the District Judge's decision and remand the appeal for retrial on the merits.

The costs of the suit and appeal will abide the result. Appellant will have his costs in this second appeal.

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13 M. 512.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SAMBASIVA (*Plaintiff*), *Appellant v.* RAGAVA (*Defendant No.* 44), *Respondent.** [15th July, 1890.]

Limitation—Act XIV of 1859, *Section* 1, *Cl.* 12—*Act XV of* 1877, *Schedule II, Article* 141—*Hindu law –Suit by reversioner on expiry of widow's and daughter's estate.*

Plaintiff sued in 1887 to recover property as part of the estate of his maternal grandfather, who died about 1845, leaving (1) a widow, who inherited the property and died in 1846, (2) his daughter by her, who took the property on her mother's death and alienated it to the defendants about 1850 and died before suit, and (3) the plaintiff's mother, who was his daughter by another wife. The plaintiff's mother made no claim on the property and died in 1883 :

Held, the suit was not barred by limitation.

[**F.**, 198 P.L.R. 1912=1 P.W.R. (N.W.F.P.) Civil 1912 ; **R.**, 19 A. 357 (371) ; 2 Bom. L.R. 106 (107).]

SECOND appeal against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 758 of 1888 modifying the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in original suit No. 12 of 1887.

The plaintiff sued in 1887 as reversioner to recover possession of certain immoveable properties that had belonged to his grandfather Venkatachalla and thence descended to his widow Thevanai and thence to his daughter Bapu, who was a half-sister of plaintiff's mother Swarnam, a daughter of Venkatachalla by another wife. Bapu inherited the property about the year 1846 and about 1850 made alienations of it to the defendants. Her half-sister Swarnam, plaintiff's mother, who was entitled to joint [513] possession of these properties, made no claim to them then, nor up to the time of her death, which happened in 1883.

The District Munsif passed a decree for the plaintiff against the defendants Nos. 1—44, who were the alienees of the grandfather's property. Defendant No. 44 alone appealed against this decree and the District Judge reversed it as against him, holding that the plaintiff had not established title to part of the land claimed from the appellant and that the claim as a whole was barred by limitation.

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* Second Appeal No. 962 of 1889.

(1) 10 M. 272.

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APPELLATE CIVIL.

13 M. 512.

On the question of limitation the District Judge said :—

"It will be seen from the facts stated above that plaintiff's mother's "cause of action arose in 1850 and became barred in 1862 or thereabouts. "The question is whether her son can claim the benefit of Article 141 of "the second schedule of the Limitation Act of 1877 and thereby gain "twelve years to sue from the date of his mother's death in 1883, in "which case his present suit would be in time. Now this case must be "governed by the Limitation Act XIV of 1859, for the cause of action "became barred by limitation under that Act, that is, in 1862 or 1863, "long before the Act of 1871 or 1877 came into operation. Under that "Act it has been held by the Privy Council that the period of limitation "as against the reversionary heir of a dispossessed female claiming the "succession after the female's death is to be reckoned not from the time "of the female's death, but from the time from which it would have run "against the female had she lived and sued to recover the inheritance (see "*Amirtolal* v. *Rajoneekant Mitter*) (1). That it seems to me settles the ques-"tion here. It is said by plaintiff's vakil in reply that there is a difference "between dispossession by trespass and loss of possession by alienation, "a distinction recognized by the Calcutta High Court—*Gya Persad* v. "*Heet Narain* (2). But the point for the purposes of limitation is, when "did the possession of others become adverse to plaintiff's mother, and it is "clear that it became so on the alienation of the property (in which she "had a joint inheritance) to strangers. That was about the year 1850, and "it was then that her cause of action arose, and she had only twelve "years from that date to sue according to the old Act. The ruling of "the Privy Council above quoted must, therefore, govern this case, "and *Atchamma* v. *Subbarayudu* (3) must be considered as overruled by "the Privy Council's decision. The Full Bench Ruling of the Calcutta "High Court, *Srinath Kur* v. *Prosunno Kumar Ghose*(4), applies to the Limi-**[514]** "tation Acts of 1871 and 1877, and in that case the female's right to "sue was not barred before the coming into operation of the former Act. The "case of *Kokilmoni Dassia* v. *Manik Chandra Joaddar* (5) would, however, "appear to extend the principle of that ruling to a case where the female's "right was so barred; but there is no express ruling to that effect and "the exact point does not seem to have been considered. The Limitation "Act of 1877 (Section 2) itself declares that nothing contained therein "shall be deemed to revive any right to sue barred under previous Acts, so "it is not probable the High Court of Calcutta would have thought of "ruling otherwise by finding that a new cause of action to parties was "given under the latter Act.

"I must accordingly find that the plaintiff's suit was barred by "limitation, and, in allowing the appeal, I dismiss the suit with costs "throughout as regards the 44th defendant, the appellant."

The plaintiff preferred this second appeal.

Mr. *Gantz* and *Krishnasami Ayyar*, for appellant.

Bhashyam Ayyangar, for respondent.

JUDGMENT.

The appellant claims as daughter's son of one Venkatachalla, who died, leaving a widow and two daughters.

The widow died in 1846, and subsequently, in 1850, one of the daughters, Bapu, made an alienation of the property claimed by the 44th

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(1) 15 B.L.R. 10. (2) 9 C. 93. (3) 5 M.H.C.R. 428.
(4) 9 C. 934. (5) 11 C. 791.

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defendant. Her sister, the plaintiff's mother, made no claim to it and died in 1883. It does not appear when Bapu died. The plaintiff sued to set aside the alienation in 1887. The Judge found that the suit was barred by limitation and that the plaintiff had failed to prove his reversionary right to items Nos. 91, 32 and 88. The question is whether the appellant's claim in regard to the other items is barred. At the date of the suit the present Act of Limitation was in force and Article 141 would be applicable.

As the plaintiff's mother died only in 1883, the period would run from that date, provided that, as observed by the Judge, his right was not barred by the Act of 1859. Under that Act, Section 1, Clause 12, the period would run from the date when the cause of action accrued. The point for determination is when the cause of action arose in the case before us. Under Hindu Law the widow and the daughters take a qualified estate, which is interposed between that of the last male owner and the male reversioner, but as between the family and strangers each also represents the **[515]** inheritance for the time being. In *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1) it was held that when a stranger dispossessed the widow by an act of trespass and remained in possession for twelve years, his possession was adverse as well against the reversioner as against the widow. This principle has been approved by the Privy Council in *Amirtolal* v. *Rajoneekant Mitter* (2). But where the possession of the defendant originates in an invalid alienation by a widow, the alienee is entitled to continue in possession during the widow's lifetime and the reversioner's estate becomes an estate vested in possession on her death only, and from that date only the period of limitation would run against him. This view was adopted by this Court in *Atchamma* v. *Subbarayudu* (3). We take it therefore as settled law that when the defendant gets into possession under an invalid alienation made by a widow, his possession is not adverse against the reversioner until the widow's death, but when a defendant comes into possession by an act of trespass, then the title which he acquires is good against the representative of the inheritance for the time being and consequently against the reversioner.

The peculiar feature in this case is that there were two daughters, Bapu and Swarnam, and though the former took the property in 1846 and alienated it in 1850, the latter did not assert her claim either to participation in enjoyment of the profits or to her right of survivorship on Bapu's death. It is argued for the respondent that Swarnam would at any rate be barred if she brought the suit after the lapse of twelve years from Bapu's death, and that the plaintiff's claim must, therefore, be taken to be barred.

We are, however, unable to adopt this view. The plaintiff as reversioner does not claim from or under his mother but as the next male sapinda of his maternal grandfather. Even assuming that a suit by the mother either to establish her right of survivorship or her right of participation had she been alive and brought a suit at the date of the present suit would have been barred, it would by no means follow that the plaintiff's claim would be also barred. The title which the alienee would acquire as against the plaintiff's mother by the lapse of twelve years could not be higher than that which might be created by a conveyance by the plaintiff's mother. It is hardly necessary to observe that it has **[516]** been repeatedly held that the title acquired by adverse possession

(1) B.L.R. Sup. Vol. 1008. (2) 15 B.L.R. 10. (3) 5 M.H.C.R. 428.

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for twelve years is only equivalent to that given by a parliamentary grant of the interest vesting in the party affected by the adverse possession.

We do not consider that the existence of two daughters instead of one daughter makes any difference as to the time when the period of limitation would run against the reversioner, when the person in possession has obtained possession under an invalid alienation as in this case; none of the cases cited is on all fours with this.

We are of opinion that the ruling of the District Judge that the claim as against the 44th defendant is barred by limitation is wrong.

The decree appealed against will, therefore, be set aside so far as it relates to items other than 91, 32 and 88 and the decision of the Subordinate Judge restored. As regards the items mentioned, the decree appealed against is confirmed. The respondent will pay appellant's costs in this and in the Lower Appellate Court.

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13 M. 516.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

RAMACHANDRA AND OTHERS (*Plaintiffs*), *Appellants v.* VENKATARAMA AND OTHERS (*Defendants*), *Respondents.**
[7th August, 1890.]

Transfer of Property Act, Section 135 (*d*)—*Adjudication on claim.*

In a suit upon a hypothecation bond brought by an assignee for value from the obligee, it appeared that the obligee had previously to the assignment obtained a decree by consent against the obligors for an instalment of the money due upon it, and had also made good his claim to the land comprised in it as against an attaching-creditor of the obligors:

Held, that there had been no adjudication on the claim to exclude the rule in Transfer of Property Act, Section 135, and accordingly the plaintiff was entitled to recover only the sum paid by him for the assignment with interest from the date of payment to the date of the decree.

[R., 18 A. 265 (267) (F.B.); 21 C. 568 (574).]

APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in original suit No. 1 of 1888.

[517] This was a suit upon a hypothecation bond for Rs. 5,599 which was executed on the 22nd June 1871 by the first defendant and the father (deceased) of the defendants Nos. 2, 3 and 11 to Rangappa Naidu, and which was assigned by Rangappa Naidu's sons after his death to the plaintiff on the 20th of April 1883.

It appeared that Rangappa Naidu sued defendant No. 1, defendant No. 2, the father of defendant No. 3, defendant No. 4, and defendant No. 11 for the first instalment of the amount due on the bond in original suit No. 131 of 1873 in the Court of the District Munsif at Nellore, and obtained a decree on the 8th March 1873, the decree being passed by consent. One Chenchu Rama Reddi, a creditor of the defendants' family, sued them in original suit No. 433 of 1873 to recover a debt, and, having obtained a decree by consent on 16th September 1873, caused the property comprised in the hypothecation bond now sued upon to be attached. Rangappa Naidu intervened in execution, claiming title under the bond and his

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* Appeal No. 47 of 1889.

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claim was allowed on the 24th of August 1874. On 22nd December 1875, one Ayyappa Naidu obtained a decree against the defendants in Original Suit No. 219 of 1875; that decree was also passed by consent, and in accordance with its terms some of the land comprised in the hypothecation bond was mortgaged to satisfy the decree.

With regard to the assignment of the bond to the plaintiff, it was admitted that the assignment was taken merely as a speculation and not in satisfaction of any debt due to the assignee by the assignor, who received only Rs. 2,600 in consideration of the assignment. It further appeared that that sum was paid by instalments, which began after the expiration of one year from the date of the assignment.

The District Judge passed a decree for the plaintiff for the sum of Rs. 2,600 with interest calculated from the date of the payment of that sum to the assignor of the bond up to the date of the plaint.

The plaintiff preferred this appeal.

Seshagiri Ayyar, for appellants.

Mahadeva Ayyar, for respondents.

JUDGMENT.

It is first contended that, although Section 135 of the Transfer of Property Act is applicable, the case falls within the fourth proviso, inasmuch as on a claim being made by the plaintiff's transferor as against third persons, who had attached **[518]** the property in execution of a decree against the present defendants, an order was passed in favour of the transferor. Such order cannot be accepted as an adjudication within the meaning of the proviso, nor in fact was it an adjudication as between the transferor and the debtors. Our attention is next drawn to the judgment in Original Suit No. 131 of 1873 brought to recover the first instalment due under the mortgage. That again is no adjudication on the claim now set up. The appellants, however, were clearly entitled to interest on the price paid not only up to date of plaint but up to date of decree, and the decree must be amended by awarding interest on the sum of Rs. 2,600 at 4 per cent. for the interval. As regards interest from the date of the assignment to the date on which Rs. 2,600 was paid, we are referred to no evidence that the plaintiffs did make any payment over and above the Rs. 2,600.

As to the costs of attachment before judgment, the Judge considered the attachment unnecessary and refused to allow them as costs in the suit. We see no sufficient reason to interfere with the discretion exercised in the matter. The decree must be amended as indicated above, but in other respects is affirmed.

Under the circumstances we direct that each party do bear their own costs.

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APPEL-
LATE
CRIMINAL.

13 M. 518=
1 Weir 730.

13 M. 518=1 Weir 730.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins. Kt., Chief Justice, and Mr. Justice Weir.

QUEEN-EMPRESS *v.* SHAIK IBRAHIM.*
[24th July and 14th August, 1890.]

District Municipalities Act (Madras)—Act IV of 1884, *Section* 103—*Attachment of moveable property—Doors of a house.*

The doors of a house are not attachable as moveable property under District Municipalities Act (Madras), Section 103.

[F., 14 M. 467 (469); R., 16 Ind. Cas. 877 (880)]

CASE referred for the orders of the High Court by A. W. B. Higgens, Acting District Magistrate of Ganjam. The facts of this case were stated in the letter of reference as follows:—

[519] "The Sub-Magistrate convicted one Shaik Ibrahim of Chicacole for resisting an attachment made under Section 103 of Madras "Municipal Act IV of 1884, and sentenced him to pay a fine of Rs. 5, but "the Principal Assistant Magistrate reversed the conviction on appeal on "the ground that the front doors of appellant's house are not moveable "property and the house to which they belonged was not the house in "respect of which the tax was due.

"I consider that the conviction should be upheld, as Section 103 "of the Act empowers the Chairman to distrain moveable property of "defaulter wherever it is, and as attaching doors is a most frequent form "of attachment."

The *Government Pleader* and *Public Prosecutor* (Mr. *Powell*), for the Crown.

JUDGMENT.

This was a case referred to the High Court by the Acting District Magistrate of Ganjam.

The principal facts of the case were as follows:—Shaik Ibrahim of Chicacole was convicted for resisting an attachment made under Section 103 of the Madras Municipal Act IV of 1884 and sentenced to pay a fine of Rs. 5. On appeal, the Principal Assistant Magistrate reversed the conviction, and the question for the High Court to decide is, was such reversal of the conviction right.

It appears that Shaik Ibrahim was assessed in the sum of Rs. 5 for house-tax under the above Act, and, on his refusing to pay, a warrant of attachment of his moveable property was granted. The officer charged with the execution of the attachment went to the dwelling house of Shaik Ibrahim and demanded the tax, and, upon being told by Shaik Ibrahim to go to the house upon which the tax was due and seize moveable property there, refused to do so and proceeded to take off the outer doors of the house. Shaik Ibrahim tried to prevent the removal of the doors of the house, but the officer and those with him persisted and ultimately removed the doors from their hinges. The attempt made by Shaik Ibrahim to prevent his doors from being removed was the resistance to the attachment with which he was charged.

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* Criminal Revision Case No. 631 of 1889.

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Section 103 of the Madras Act IV of 1884 enables a Municipality to recover the amount of a tax remaining unpaid after fifteen days' service of a notice by distress and sale of the moveable property of the defaulter, and the question before us is whether the outer door of a house is moveable property.

[520] We are clearly of opinion that the Principal Assistant Magistrate was right in reversing the conviction; the front or outer door of a house is not moveable property, and is, therefore, not liable to be distrained. The terms immoveable and moveable property have been defined in various Acts of the Indian Legislature (General Clauses Act I of 1868, Section 2 (5) and (6), Indian Penal Code, Section 22, and Indian Registration Act III of 1877, Section 3); the definitions thus given render it clear that that which is attached to the earth is not moveable property, and the words attached to the earth have been interpreted by the Legislature itself to mean attached to what is imbedded in the earth for the permanent beneficial enjoyment of that to which it is attached, Transfer of Property Act, Section 3 (*c*). Moreover by the Transfer of Property Act (IV of 1882), Section 8, it is enacted that when the property is a house, the transfer thereof includes, *inter alia*. the doors.

It has been held in *Peru Bepari* v. *Ronuo Maifarash* (1) that the doors of a building form part of an immoveable property. We are, therefore, of opinion that the conviction was wrong and that the doors of a house cannot be distrained under the first portion of Clause (1) of Section 103 of the Madras Act IV of 1884.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

KALIMA (*Defendant No.* 1). *Appellant in Appeal No.* 28 *of* 1888, MAHOMED (*Defendant No.* 7), *Appellant in Appeal No.* 66 *of* 1888 *v.* NAINAN KUTTI (*Plaintiff*), *Respondent in both cases.**
[24th and 28th July, 1890.]

Civil Procedure Code—Act XIV of 1882, *Section* 331—*Appeal—Jurisdiction—Civil Courts Act* (*Madras*)—*Act III of* 1873, *Section* 13.

The plaintiff being the holder of a decree of a Subordinate Court for more than Rs. 5,000 was obstructed in execution by the present defendants. He applied to [521] the Court for the removal of the obstruction, the property, which was the subject of the application, being valued at less than Rs. 5,000, and the Subordinate Judge directed that the application be registered as a regular suit under Civil Procedure Code, Section 331, and ultimately passed a decree in favor of the plaintiff:

Held, that the appeal against this decree did not lie to the High Court.

[R., 22 C. 830 (834).]

APPEALS against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in Original Suit No. 77 of 1885.

The facts of the case appear sufficiently for the purposes of this report from the judgments of the High Court.

Mr. *Gover*, for appellant in Appeal No. 28 of 1888.

Sankara Menon and *Narayana Rau*, for respondent.

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* Appeals Nos. 28 and 66 of 1888.

(1) 11 C. 164.

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Sundara Ayyar, for appellant in Appeal No. 66 of 1888.
Narayana Rau and *Ryru Nambiar*, for respondent.

JUDGMENT.

SHEPHARD, J.—A preliminary objection was taken by Mr. Sankara Menon on behalf of the respondent that no appeal lay to this Court, because the value of the subject-matter of the suit was less than Rs. 5,000, and, therefore, the appeal ought to have been instituted in the District Court.

It appears from the schedules attached to the petition in which the suit originated that the whole property, in respect of which obstruction to execution was complained of, was valued at Rs. 4,549 3-6, of which property the plaintiff claims two-sevenths, that share being valued at Rs. 1,299-12-5. Whether we take the value of the entire property or the value of the plaintiff's share, the value of the subject-matter is therefore below Rs. 5,000. Our attention, however, has been called to two cases which lend some support to the contention that the appeal was nevertheless rightly instituted in this Court and not in the District Court, the subject-matter of the original suit having exceeded Rs. 5,000 in value. In *Ravloji Tamaji* v. *Dholapa Raghu* (1) the same point arose with reference to a section of the Bombay Civil Courts Act similar to that in the Madras Act and to the Code of Civil Procedure of 1859. It was decided that, although the property attached was worth less than Rs. 5,000, the District Judge had rightly held that an appeal from the decision of the Subordinate Judge who had passed the decree in the original suit did not lie to him. In *Sithalakshmi* v. *Vythilinga* (2) the point decided was that, in a claim arising in execution of the decree of a Subordinate Judge, that Judge had jurisdiction to try it notwithstanding that the subject-**[522]** matter of the claim was less than Rs. 2,500 in value. In the judgment of the majority of the Court in this case the decision in the Bombay case is approved and some doubt is thrown on the judgment in an earlier Madras case, *Muttammal* v. *Chinnana Gounden* (3). For the purposes of the case before the Court, it was not, however, necessary to consider the position laid down in *Muttammal* v. *Chinnana Gounden* (3), *viz*., that by Section 229 of the Code of 1859, a special jurisdiction was given only in those cases in which the value of the property claimed is not at the date of the claim in excess of the ordinary power or the pecuniary limit of the jurisdiction of the Court that passed the decree. If it were necessary to consider that proposition in the present case, I should be disposed to agree with the reasoning of Muttusami Ayyar, J., in his two judgments in *Muttammal* v. *Chinnana Gounden* (3) and *Sithalakshmi* v. *Vythilinga* (2). But, accepting the reasoning of the majority of the Court in *Sithalakshmi* v. *Vythilinga* (2) as to the object of the Legislature in enacting the provisions of the Code with respect to claims of property attached in execution of decrees, I fail to understand how it follows that the rules as to appeal from the decision of a Court upon a claim must differ from the rules governing appeals from decrees in ordinary suits. I can see no reason why any special character should attach to the suit instituted under Section 331 of the Code of Civil Procedure after it has once been disposed of and a decree has been passed on it. And in the last clause of that section it is expressly provided that the order having the same force as a decree shall be subject to the same conditions as to appeals or otherwise. The similar

(1) 4 B. 123. (2) 8 M. 548. (3) 4 M. 220.

provision in Section 229 of the Code of 1859 is not noticed in the judgment of the Bombay High Court. 1890 JULY 28.

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I am of opinion that the amount now in dispute being under Rs. 5,000, although the subject-matter of the original suit exceeded that amount, the appeals do not lie to this Court. The petitions of appeal must, therefore, be returned to be presented to the proper Court and the appellants must pay the respondent's costs.

MUTTUSAMI AYYAR, J—I am also of opinion that the appeal lies to the District Court and not to the High Court. The subject-matter of the respondent's claim, so far as it was investigated under Section 331 of the Code of Civil Procedure, was [523] valued at Rs. 1,299-12-5; and under Section 13 of Act III of 1873 the District Court is the proper appellate tribunal. The decision in *Sithalakshmi* v. *Vythilinga*(1) is an authority only for the proposition that a Subordinate Court has a special jurisdiction as the Court executing a decree to try under Section 331 a claim of which the value of the subject matter falls below the pecuniary limits of its ordinary jurisdiction, Rs. 2,500. The question which we have now to decide is whether an appeal lies to the High Court from the decree of the Subordinate Judge exercising the special jurisdiction when the value of the subject-matter of the claim is below Rs. 5,000. It is provided by Section 331 that the Court (executing the decree) shall proceed to investigate every such claim "in the same manner and with the like power as if a suit for the property "had been instituted by the decree-holder against the claimant under the "provisions of Chapter V and shall pass such order as it thinks fit for "executing or staying execution of the decree and that every such order "shall have the same force as a decree and shall be subject to the same "conditions as to appeal or otherwise." According to the language of the section, the claim is to be regarded as a suit to recover the property claimed from the person or persons obstructing the execution of the decree and the order adjudicating upon it as a decree passed in such suit subject as to appeal to the law by which such decree would ordinarily be governed. It may be that a spcial original jurisdiction is created in favour of the Court executing the decree in consideration of special convenience, but those considerations have no bearing on the question whether the Appellate Court should be the District Court or the High Court. It is said that it is the value of the entire property which was the subject-matter of the decree under execution that ought to be considered; but this contention is inconsistent with the plain wording of Section 331, which only places the claim on the same footing with an original suit instituted to recover the specific property claimed and as to which the respondents have obstructed execution. As to the decision reported in the Bombay series, I was one of the Judges who dissented from it in *Muttammal* v. *Chinnana Gounden* (2), and, though the majority of the Court did not approve of it in *Sithalakshmi* v. *Vythilinga* (1), it was on a point which does not arise in the suit [524] before us. I think that the preliminary objection must prevail and that the order should be that the appeals be returned to the appellants for presentation, if so advised, to the District Court. The appellants must pay respondent's costs.

(1) 8 M. 548. (2) 4 M. 220.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RANGACHARIAR (*Defendant*), *Appellant v.* YEGNA DIKSHATUR (*Plaintiff*), *Respondent.**
[24th, 26th and 27th February and 2nd April, 1890.]

Hindu law—Succession to a jeer of a mutt—Nomination requiring assumption of the character of a sannyasi—Time fixed by decree for assumption of that character—Enlargement on appeal of that time—Evidence of custom.

The plaintiff sued for a declaration of his right as jeer of a mutt and for possession of the property of the mutt. The plaintiff alleged that the immemorial custom with reference to the succession to the office of jeer was that the jeer for the time being nominated his successor, and that, failing such nomination, the disciples assembled at the place where he died, elected his successor, and that the person so nominated became jeer by virtue of such nomination alone. The plaintiff's case was that he was nominated by the late jeer, although the nomination was not concurred in by the disciples, and that the late jeer had initiated him and directed him to become a sannyasi a day or two after his initiation, and that he was accordingly entitled to the rights and privileges of jeer. The plaintiff obtained a decree which was, however, made contingent upon his assuming the character of a sannyasi within the period of four months. The defendant preferred an appeal against this decree, and the plaintiff preferred an appeal praying for the enlargement of the period fixed, within which he was to become a sannyasi, pending the disposal of the appeal preferred by the defendant.

On the plaintiff's appeal;

Held, the Court had power to extend the time as prayed.

On the defendant's appeal:

Held, (1) on its appearing that the plaintiff did not repeat the presha mantram that his upadesam was insufficient;

(2) that the plaintiff's right, if any, to the status of jeer ceased on his omission to become a sannyasi soon after the initiation alleged;

(3) on the evidence that no similar case of succession had taken place in the history of the institution that the plaintiff had established merely an imperfect nomination which could not be upheld on the principles deducible from the known cases of succession.

[525] APPEAL against the judgment of Mr. Justice Kernan sitting on the Original Side of the High Court in Civil Suit No. 256 of 1888.

Suit for a declaration of the plaintiff's title as the lawfully appointed successor of the late jeer of the Ahobalam mutt at Trivellore to a branch of that mutt situated in Madras, &c.

The facts of the case appear sufficiently for the purposes of this report from the judgment on appeal, Mr. Justice Kernan passed a decree as prayed, provided, however, that, if the plaintiff did not become a sannyasi within the period of four months from the date of the decree, the suit should stand dismissed.

The plaintiff, on the 16th August 1889, preferred Appeal No. 16 of 1889, on the ground that he was entitled to have a longer period fixed than the four months provided in the decree. The defendant, on 22nd August 1889, preferred against the decree generally Appeal No. 20 of 1889, in which the plaintiff raised objections to the decree as being defective in some particulars.

* Appeals Nos. 16 and 20 of 1889.

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The appeal by the plaintiff came on for hearing on the 23rd August 1889.

The *Advocate-General* (Hon. Mr. *Spring Branson*), for appellant.

The decree appealed against was passed on 3rd May 1889 and the object of the provision now sought to be varied was to prevent the plaintiff from being compelled to take the irrevocable step of becoming a sannyasi until his right to be jeer is finally decided. The time should have been made to run from the date when the defendant's right to appeal should become barred or from the date of the decree passed in such appeal.

Mr. *Norton*, for respondent.

If this appeal is allowed while the defendant's appeal is pending, the result will be that ultimately there will have to be two decrees in one suit.

(*Muttusami Ayyar*, J.—Is it not the rule that the decree affects the interest only of the particular appellant?)

Not quite so when one appellant claims a right which the other appellant claims against him. If *Phear*, J., is right in *Lalla Rughoobuns Sahoy* v. *Mussamut Asloo* (1) there should be only one **[526]** decree in cross-appeals. That case is a distinct authority against the plaintiff's present application. Again, the application to vary rests upon the assumption that the plaintiff is entitled to the decree, that he be jeer if he become a sannyasi, and the application cannot be granted except upon that assumption which prejudges the defendant's appeal which is not yet ready.

The plaintiff was not entitled to the decree on the case set up in the plaint, even if the findings of the learned Judge are correct. The plaintiff sued as jeer; the learned Judge found he was not a jeer when he sued as he was not a sannyasi. The suit should accordingly have been dismissed, and the learned Judge should not have given him a relief he never asked for by allowing him time to fulfil what was admittedly a condition precedent to the assumption of the character of jeer. *Hunsbutti Kerain* v. *Ishri Dutt Koer* (2), *Eshenchunder Singh* v. *Shamachurn Bhutto* (3).

Moreover the Court had no jurisdiction to entertain the suit conferred on it merely by the fact that the mutt has a branch at Madras for the cause of action, *viz.*, the trespass to title took place outside the jurisdiction. As to the right construction of Letters Patent, Section 12, see *Jairam Narayan Raje* v. *Atmaram Narayan Raje* (4).

JUDGMENT.

We think the decree should be amended by extending the time during which the plaintiff may become a sannyasi to twelve months from the date of the decree (instead of four months), and we order the decree to be amended accordingly. The issuing of the decree with such amendment is postponed until after the hearing of the respondent's appeal. The other questions argued by the respondent's counsel are reserved until the hearing of the respondent's appeal. This appeal is adjourned until such hearing.

The appeals came on for hearing together on 24th February 1890.

Mr. *Norton*, for appellant.

The suit should have been dismisssd on its appearing that the plaintiff who sued as jeer was not within the spiritual brotherhood of the person to whom he claimed to have succeeded. Spiritual succession cannot exist except between persons who are within spiritual brotherhood—See

(1) 20 W.R. 294 (296). (2) 5 C. 512. (3) 11 M.I.A. 7. (4) 4 B. 482.

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Giyana Sambandha Pandara Sannadhi [527] v. *Kandasami Tambiran* (1) and here the plaintiff was not even a sannyasi. He may have held the rank of a disciple who merely recites mantrams and does certain temple duties, but he was not a member of the inner circle from which only the the jeer can be chosen, and it appears that after his alleged appointment he actually went back to his family. The evidence shows that no one not a sannyasi has ever before been made a jeer and the plaintiff has failed to establish that the custom of the institution admits of the claim which he sets up as jeer. See *Srimati Janoki Debi* v. *Sri Gopal Acharjia* (2). Nor is it open to the Court to introduce a new custom into the institution—*Genda Puri* v. *Chhatar Puri* (3). It may be that one not being a sannyasi may be elected, but his appointment is not complete and he acquires no right until he assumes that character, and the plaintiff has not been in any way obstructed from assuming it. There is no authority for supplementing a defective appointment as has been done by the learned Judge: see 2 Sugden on Powers, p. 143—*Buckell* v. *Blenkhorn* (4). And the analogy from adoption into a natural as distinguished from a spiritual family supports the contention that the present objection is fatal to the plaintiff's case—*Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondari Dasi* (5).

Further, the relief given was not asked for, and since the right, according to the above argument, was not and is not vested in the plaintiff, it is questionable whether the relief could have been given in the form of a declaration under Specific Relief Act, Section 42. To satisfy the requirements of that section the right must be a vested right, as to which compare Indian Succession Act, Sections 106, 107, and *Davis* v. *Angel* (6). Here there is a condition precedent, and the rule in *Greeman Singh* v. *Wahari Lall Singh* (7) is applicable.

(*Muttusami Ayyar*, J.—We have refused to follow that case.)*

There must be a present interest and not a mere expectancy in any view of the section.

Again, as to the jurisdiction of the Court, the existence of property of the mutt in Madras is not sufficient. The words "other cases" in the Letters Patent, Section 14, do not mean suits [528] which include relief in respect of immoveable property out of the jurisdiction—see *Jairam Narayan Raje* v. *Atmaram Narayan Raje* (8), and as to the meaning of cause of action see *Saikappa Chetti* v. *Rani Kulandapuri Nachiyar* (9), *Sami Ayyangar* v. *Gopal Ayyangar* (10), and compare *Kessowji Damodar Jairam* v. *Luckmidas Ladha* (11).

The *Advocate-General* (Hon. Mr. *Spring Branson*) for respondent.

No relief was in fact granted which was not asked. The plaintiff asserted the right which was found to exist in him and which it was unnecessary for him to seek to have declared in terms. He desired to be permitted to qualify himself for the full enjoyment of the right and for the discharge of the duties it involved. The assumption of the character of a sannyasi, which, according to the appellant's argument, was necessary to complete the status of jeer, was not in fact on the evidence of custom or on general principles necessary for that purpose, although it was no doubt necessary to enable him to enter upon the duties of the office. It

* See 10 M. 90.

(1) 10 M. 375 (384). (2) 10 I.A. 32. (3) 13 I.A. 100.
(4) 5 Hare 131. (5) 7 I.A. 250. (6) 4 De. G.F. and J. 524.
(7) 8 C. 12. (8) 4 B. 482. (9) 3 M.H.C.R. 84.
(10) 7 M.H.C.R. 176. (11) 13 B. 404.

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is similar to a case where one appointed to an office has to take a prescribed oath before he discharges the functions which become incumbent on him by reason of his appointment in itself complete, rather than to an ordinary case of Hindu adoption. The evidence shows that there is a distinction to be observed between nomination and appointment in the present case. The plaintiff was nominated by the late jeer, who, according to the evidence, if not according to the defendant's admissions, was entitled to nominate his successor, and he then and there received an initiation from the late jeer. Complete initiation as a sannyasi was not necessary to a complete nomination to the office. It might be that the right of the plaintiff under the nomination was liable to disfeasance on failure of the further initiation as sannyasi, which was, however, in the nature of a condition subsequent. That condition would have been fulfilled had it not been for the obstruction of the defendant and his party, but it will be fulfilled within the time named by the Court. The late jeer himself regarded this further step as distinct from the upadesam conferred by him, for he did not direct that it should be taken at once.

JUDGMENT.

[529] As the lawful successor of the late jeer of the Ahobalam mutt at Trivellore in the Chingleput District, the respondent brought this suit on the original side of the High Court to recover possession of a branch mutt at Madras, together with its endowments. The appellant claimed to be already in possession by virtue of his appointment as jeer. The late jeer died on the 10th August 1888. It is stated in the plaint that, prior to his death, he nominated the respondent as his successor according to immemorial custom, and that, by reason of such appointment, he became the lawful jeer of the Ahobalam mutt, and, as such, entitled to possession of the said mutt and of all its branches and their endowments. After describing the ground of claim and the interest, which vested in the respondent, the plaint proceeded to state that there was a branch mutt at Madras, that it had, in moveable property, an endowment of Rs. 32,200 value, that the appellant had it in his possession, and that such possession being unlawful, he was bound to deliver it up to the respondent. The plaint then prayed, first, for a decree declaring the respondent to be entitled to such possession and directing the appellant to deliver it up to him; secondly, for an account of moveable property belonging to the branch mutt and its endowments and of their net income realized by the appellant and for a decree for possession and payment in accordance with such account; and, thirdly, for an injunction restraining the appellant from interfering for the future with the respondent's possession of the branch mutt and its endowments.

For the appellant it was contended that this Court had no jurisdiction, that the so-called branch mutt was not a mutt at all, but that it was a small house belonging to the mutt at Trivellore and occasionally used as a residence by its disciples and servants who visited Madras on business, that the moveable properties mentioned in the plaint were *not* in the said house nor anywhere else at Madras, that the Ahobalam mutt had no branch mutt at all, that its head-quarters were at Trivellore, and that the appellant neither resided at Madras nor carried on business, nor personally worked for gain there.

Another ground of defence was that the respondent was not and could not, be the jeer of the mutt in question, unless and until he was properly constituted a sannyasi and initiated in [530] accordance with

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the rules and usages of the institution, and that, without first acquiring that *status*, he had no right to sue for possession of the properties attached to the mutt.

It was next urged that the late jeer had no absolute authority to nominate his successor as alleged in the plaint; that, in fact, he never nominated the respondent; that, even if he made the nomination, it was most prejudicial to the interests of the institution, and, as such, it was invalid.

It was further alleged that at a meeting held at Trivellore on the 5th August 1888 a large body of disciples then present strenuously opposed the respondent's nomination and nominated the appellant as a fit successor to the late jeer, who approved of such nomination; that on the 13th August 1888 a very large number of disciples from various districts, then present at Trivellore, appointed the appellant as jeer conformably to the usage of the institution and pursuant to the arrangement made on the 5th August 1888.

The Ahobalam mutt is an ancient religious and charitable institution established for the spiritual instruction and benefit of Vaishnava Brahmins and others of the Vadakalai sect, and it has a large number of disciples in Southern India, and endowments of considerable value in immoveable and moveable properties in different districts in this Presidency. As regards the immemorial custom of the institution with reference to the right of succession to the office of jeer, the averment in the plaint is that the jeer for the time being nominates his successor, and, failing such nomination, the disciples assembled at the place where he dies select his successor, and that the person so nominated becomes jeer without more and by virtue of such nomination. In his written statement the appellant admits that when a successor has to be appointed after the death of the jeer, it is customary for the disciples present at the spot on the occasion to appoint such successor, provided no appointment had previously been made during the lifetime of the jeer. The contention, however, as to his power of appointment according to custom is that he had no *absolute* authority to nominate his successor as alleged by the respondent, and it is therefore urged that the respondent's nomination, even if true, was not valid, as it was prejudicial to the institution. It must be noted that the appellant did not say in his written statement how the jeer's **[531]** authority was limited, if not absolute, but it is suggested at the hearing of this appeal that the disciples ought to ratify the nomination. The issues recorded for decision were—

(1) Whether this Court had jurisdiction in respect of the subject-matter of the suit;

(2) Whether the plaintiff was the properly-constituted jeer of the mutt;

(3) What was the nature and value of the property belonging to the mutt in the hands of the defendant; and

(4) To what relief, if any, the plaintiff was entitled.

Mr. Justice Kernan who tried the issues held that there was no question as to jurisdiction and that there was no evidence as to the property at Madras except the house. As regards the second question, the learned Judge held that the respondent's nomination took place on the 4th August, that it was publicly announced on the 5th August, and that the result of the nomination was that the respondent became, by custom, entitled, from the date of the nomination, to succeed the jeer on his death whenever that should take place, and on the death of the late jeer, the respondent

became the legally-constituted jeer and the property of the mutt, together with the right of management, vested in him. The learned Judge observed further that the respondent was no doubt bound to go through any ceremonies not already gone through and necessary to becoming a sannyasi and thereby to become a sannyasi, but that it was not indispensable to the validity of the respondent's title as jeer accruing immediately after the death of the former jeer that he should have performed any of the ceremonies before the jeer died. He observed also that custom no doubt required these ceremonies should be performed within a few days after the death of the last jeer, and that the respondent had not become a sannyasi as yet, but that such omission was not fatal to his claim, as the appellant was the cause of such non-compliance, first, by denying his nomination, and secondly, by occupying the mutt. He accordingly passed a decree in favour of the respondent declaring that the late jeer nominated him as his successor, and that, by virtue of such nomination, the respondent immediately upon the deathof the former jeer became, according to custom, legally appointed, and, as such, entitled to the position of jeer and to the possession and management of the mutt in Madras and bound to perform the duties of jeer, and directing [532] that the respondent be put into the possession of the house and ground mentioned in the plaint, that he do perform the necessary ceremonies for becoming a sannyasi within a period of four months, and that, in default of his becoming a sannyasi as aforesaid, the suit do stand dismissed with costs. From this decree the defendant has preferred this appeal.

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We agree with the learned Judge that the late jeer intended to nominate the respondent as his successor and expressed his desire to do so both on the 4th and 5th August 1888. There is evidence for the respondent to that effect (see Exhibits A, F and G besides oral evidence), and the appellant did not and does not deny that such was the case. His contention was that when the late jeer expressed such desire on 5th August, his disciples objected and suggested that the appellant was a fit successor and that the jeer then changed his mind and approved of the suggestion.

As regards this alleged change of intention, we agree with the learned Judge that, up to the moment of his death, the late jeer desired to appoint no one as his successor but the respondent. Any other view is utterly inconsistent with his conduct on the 5th in sending to vakils, Messrs. Sadagopa Chariar and Vijia Raghava Chariar, in instructing the former on the 8th August to apply to the Deputy and District Magistrates for aid to carry out his intention, and in thinking of making a will and sending for Messrs. Sadagopa Chariar and Rama Row on the night of his death. On this point the evidence of the 2nd and 13th witnesses for the plaintiff and that of the 13th and 14th witnesses for the defendant and Exhibits F and G are conclusive.

The suggestion for the defence is that on the 5th August the jeer gave up his desire to appoint the plaintiff after listening to the remonstrance of his disciples against the intended nomination, but again changed his mind and wished to carry out his original intention. But the conduct of the jeer described above negatives any such change of purpose. Moreover, it is immaterial whether the jeer wavered between the 5th and 9th August, since it is admitted that he adhered to his intention from before the 9th August. Though the 4th witness for the plaintiff states that the meeting on 5th August was adjourned to 12th, yet he adds it was arranged on Saturday that upadesam should take place on

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Sunday. This is quite consistent with the view that, owing to the obstruction caused by the disciples, the jeer then intended to [533] defer the upadesam to the 12th and hoped to secure the aid of superior Magistrates in the meantime.

The material question of fact in connection with the appellant's claim is whether the jeer made upadesam to him or initiated him in the presha or sannyasa mantram on the morning of the 10th and gave him the cloth called kashayam in token of sannyasiship on the same night shortly before his death. The learned Judge found as a fact that upadesam was made and kashayam was given as alleged. We shall discuss the evidence and the probabilities of the case bearing on this point later on in this judgment; but we shall now refer to the appellant's version of what took place on the 5th August. The incidents of that meeting according to such version are that when the disciples opposed the plaintiff's nomination, the late jeer made two alternative proposals: that the one was that he would abdicate his office and allow the disciples to appoint any person they might like in case Rs. 20,000 was paid to him, that the other alternative was that the person selected should lead the life of a disciple without transgressing his orders until he died and hold the office after his death:—that when the disciples were considering these proposals, the Tahsidar of Trivellore, who was present, said that the defendant could alone manage the office, all the disciples present except three concurred in that opinion, that the three suggested, however, that no decision should then be arrived at, as the mutt had a large number of disciples in many parts of the country and their opinion should be taken, and that all the disciples then agreed that eight days' time should be allowed and notice given:—that the defendant was then asked to which of the two alternatives he would agree, that he agreed to the second proposal, and that it was arranged to hold a meeting on the 12th August. It is then alleged that the jeer died without making upadesam and giving kashayam to the plaintiff on the 10th August, that on the 12th and 13th the disciples met and appointed the defendant, that he became a sannyasi on the 14th August and took charge of the mutt and its property on the 15th.

The plaintiff's case was that it was not the jeer who demanded Rs. 20,000 for abdicating his office, but that the defendant offered Rs. 20,000 and the jeer declined the offer with indignation and contempt, that he never wavered in his determination to appoint the plaintiff, and did not agree to nominate the defendant or to any [534] adjournment, and that, as the local Magistrate sided with the disciples instead of assisting him, he forbore to make upadesam that day lest there might be interruption and disturbance. There was conflict of evidence as to what actually occurred on the 5th August, but the learned Judge, who had the witnesses before him and was dissatisfied with the demeanour of the witnesses of the appellant, came to the conclusion that the plaintiff's version was true. We cannot interfere with the finding of the Judge on this point on a bare perusal of the evidence, especially as it is more probable that an office-seeker like the defendant stooped to such conduct than that the old jeer did so with the prospect of approaching death before him.

The substantial question, however, before us is whether the plaintiff became the duly constituted jeer and not whether the defendant was disqualified for the office by disgraceful conduct, and whether he is lawfully in office. On this point the learned Judge was of opinion that mere

nomination by the jeer on the 4th and 5th August was sufficient to create a right for the plaintiff to succeed him on his death.

As to the legal effect of such nomination, there can be no doubt and it is indeed conceded on both sides that it is in the usage of the institution a rule of decision must be found. The learned Judge considers it to be this:—the person nominated becomes, immediately on the death of the jeer, the legally appointed jeer, and, as such, entitled to the possession and management of the mutt and the endowment and bound to perform the duties of the jeer, though subject to the obligation of becoming a sannyasi within a few days after the death of his predecessor. The appellant's contention is that mere nomination by the jeer is by usage of no legal effect whatever, unless it is concurred in by his disciples and unless and until the person nominated becomes a sannyasi. In this connection the opinion of the late jeer as to what was necessary to give the respondent the *status* of jeer is of importance. The plaintiff states in his evidence that the jeer said on 4th August:—" the essential to this office is upadesam of mantrams or initiation." He states again that the late jeer said on the night of the 10th August:—"' upadesam " had been done,' and wished to give me the cloth that pertained to the " office, gave it to me and admonished me to use my office properly." The plaintiff then went on to say: " the performance of upadesam, [535] the " delivery of the kashayam, and the saying of the jeer that he gave me " over the seat or office, by these means, I have become jeer." On the respondent's own evidence, then, mere nomination was not sufficient and upadesam or initiation in the sannyasam or what is called " Presha mantram" was an essential, and the investiture or delivery of the cloth pertaining to the office and the formal declaration that he gave over the office was another requisite.

Again, the respondent's own case as attempted to be established by evidence was that the late jeer made up his mind to nominate him on 4th August and expressed his determination to do so on 5th August, prepared to make upadesam or initiate him in the sannyasa mantram at 9 o'clock in the morning, which he considered to be a propitious hour, but that, fearing a disturbance owing to the opposition made by his disciples, the altercation which ensued thereupon, and the reluctance of the local Magistrate to help him, the late jeer gave up the attempt that day on plea that the propitious hour had passed, that from the 5th to the 9th he had been endeavouring to procure the aid of superior Magistrates through his vakils in order that he might make upadesam and install the plaintiff with such aid, that on the 10th he became worse, changed his mind, and made upadesam in the morning between 9 and 10, and that about 9 or 10 at night, apprehending that he might die soon, sent for the respondent, gave him kashayam, and saying that he gave over his office, admonished him to use it well. He stated further that the jeer uttered the sannyasam or " Presha mantram," but that he (respondent) did not repeat it, that he intended to do so when he becomes a sannyasi, and that it was the utterance of the mantram by the jeer that he characterised as initiation. He added that it was necessary that he should become a sannyasi, but not at the time of appointment. The declaration, therefore, that a person becomes by mere nomination a legally appointed successor on the death of his predecessor and that his right of succession is a vested interest goes beyond the respondent's case and practically treats even upadesam and gift of kashayam as surplusage.

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Turning to the evidence regarding custom, there is no dispute as to two of its incidents. The first is, when a jeer nominates his successor, when the person nominated is either present in the [536] mutt or arrives at once and accepts the nomination, and when the disciples present on the occasion do not object, and the jeer makes him a sannyasi and instals him as his successor, the appointment is valid according to the usage of the mutt. The second incident is that when the jeer dies without nominating a successor, the disciples select his successor, who thereupon becomes sannyasi and then the lawful jeer. The first case rests on the principle that when the jeer makes the person nominated a sannyasi, and the person nominated becomes a sannyasi disciple, the latter dies a civil death, and passes from his natural into the jeer's spiritual family. The spiritual relation of guru and disciple, both being sannyasis, is completed and the disciple succeeds his preceptor or spiritual father. (See Mitakshara, Chapter II, Section VIII). The second case recognises the principle that the body of disciples as benificaries interested in keeping up the mutt may select and appoint a successor and thereby perpetuate the jeer's spiritual family for their own spirtual instruction and benefit. No case can possibly arise which may be regarded as *res integra*, on one for which custom provides no rule of decision. The nomination made by the jeer is either a perfect and valid appointment or imperfect and invalid. In the one case there can be no second appointment, and in the other there is no appointment at all which the Courts can recognize according to custom. The contest in this case was as to what was to be done when the jeer desires to appoint a successor, the disciples object to his appointment, and the jeer dies without making his nominee his sannyasi disciple and installing him as his successor, though he desired to do so during his life. The question whether the nomination under such circumstances can be treated as complete and valid is one of evidence to be determined as any other matter of fact with reference to the usage of the institution, and if there is no sufficient proof, it is not a case of *res integra* in the sense that the Court is competent to apply what might appear to it an equitable rule. The question is one of usage in a religious institution, and failing such proof, the decision ought to be that the person claiming the office has failed to support his case by proof of custom obtaining in the institution as he is bound to do.

We shall now proceed to consider the evidence as to the custom, and in doing so have regard to the several subsidiary questions decided by the learned Judge, *viz.*—

[537] (1) The concurrence of the disciples in the nomination made by the jeer is not essential to its validity.

(2) It is not necessary that the person nominated by the jeer should at once become a sannyasi though he is present at the spot and accepts the nomination.

(3) That if initiation into "Presha mantram" and the gift of kashayam are necessary, the respondent has had both.

(4) That the mere uttering of presha mantram by the jeer is sufficient initiation, and that the person nominated is at liberty to abstain as stated by the plaintiff from repeating it until he becomes a sannyasi.

(5) That the late jeer did initiate the plaintiff in the sense indicated above and give him kashayam on 10th August as alleged by him.

(6) That though the person nominated must become a sannyasi within a few days after the death of the late jeer and the

plaintiff had not become a sannyasi until suit, his omission to do so was immaterial, because the becoming of a sannyasi is not a condition precedent to acquiring the *status* of jeer; and because the delay on the part of the plaintiff was due to the obstruction caused by the defendant unlawfully denying his nomination and seizing the mutt and its property at Trivellore.

The evidence on record refers but to three cases of succession. The first is the appointment of Sadagopa Jeer by Veera Raghava Jeer; the second is the appointment by Sadagopa of the Attipat Jeer; and the third is the appointment by the Attipat of the last jeer.

The plaintiff's evidence related to the third case of succession. He made only a general statement without going into detail and said :—" the " last jeer was appointed in the same way I was appointed; disciples " were present, but they were not consulted, and they were not called on " to express an opinion."

The second witness, the plaintiff's brother, also gave evidence on the point. In his examination in chief he attempted to speak of the second and third cases of succession. As to the former he deposed, the jeer before the last was appointed when the former jeer was about to die; he said he appointed Attipat Sreenivasa Raghava Chari, but the nominee was not present. The jeer made [538] a will and the person named by him was recognized. As to the appointment of the last jeer the witness added, " when Sreenivasa Raghava Jeer was about to die, he called the "last jeer and handed to him the kashayam and then died. I have never " known any jeer to be elected by disciples, nor did I hear of it.". He said further when the kashayam was handed to the last jeer by his predecessor, the latter told the former to perform the duties of the office. In cross-examination he said he was not present at the appointment of the jeer before the last. He stated further that the last jeer on the day he was appointed went through jeeva-sraddham or death ceremony.

We may observe that according to Hindu ritual a Brahman, when he is about to be come a sannyasi, performs a ceremony whereby he is considered to have suffered civil death and determined his secular *status* prior to entering the order of sannyasi. That ceremony is called jeeva-sraddham.

Exhibit J is the will referred to by the witness, dated the 10th September 1879. The material passage runs in these terms :—

" Therefore I have, while in the enjoyment of good memory and with good intention (sound mind), sent a message to a person named Sreenivasa Raghava Chariar who is residing in Attiputtoo to come here to be installed in lieu of me in our Ahobala muttum on account of his being a very learned man that observes religious rites and one more versed in the traditional doctrines of the muttum than others. Therefore after he arrives, I shall have him installed in this office. In case of my departing this life before his arrival, he shall be installed in this office and all the properties connected with this muttum and the devasthanams or temples which are under the control (or in the possession) of the sannidhy shall be put in his possession and all the immoveable and moveable properties which are with Vanamamala Charry shall also be put in his possession. The aforesaid Attiputtoo Sreenivasa Raghava Chariar shall, after I depart this life, enjoy all [affairs] the properties connected with this muttum. In the case of the aforesaid Attiputtoo Sreenivasa Raghava Chariar not agreeing to [accept] this office, then as Kalathoor Narasimha Raghava Chariar has been declared to be competent for this office, it has

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been determined that this office should be conferred on him. Therefore the aforesaid person shall be installed in the aforesaid [539] office and he shall take the immoveable and moveable properties of the aforesaid Lakshmi Narasimha Swami."

The evidence as to jeeva-sraddham or death ceremony is important as showing that the last jeer performed it at once. The passage in the will is important as showing that a former jeer believed that he should see his nominee installed if he arrived before his (the jeer's) death. It is also important as showing that he directed his installation on his arrival after death. It shows further that the possibility of a refusal was anticipated and that it had been declared and determined with reference to such contingency that the office should be conferred upon another person named in it.

The third witness is a *purohit* specially sent for, as he states, by the late jeer in order that the ceremonies necessary to make the plaintiff a sannyasi might be performed. Adverting to jeeva-sraddham or death ceremony he stated that the late jeer said to the plaintiff, among other things, "you should go through the ceremony of jeeva-sraddham (death "ceremony) *to-morrow*. In case I have strength of body to do this, I will "do it, if not, you had better get it performed properly to-morrow." The jeer told me, the witness adds, to be with the plaintiff and to get the ceremony of sannyasam performed properly *that day*. The witness is the plaintiff's cousin and his evidence is important as showing that the late jeer enjoined the plaintiff to perform the jeeva-sraddham and go through the sannyasam ceremony on the next day afer upadesam or initiation.

The fourth witness, a cook in the service of the late jeer, deposes only that the last jeer's predecessor sent for him and gave him kashayam. This witness signed Exhibit III.

The next witness is Pullapakam Nattu Ramanuja Chari and he is a grandson of the late jeer. He gives the same evidence as the last witness. He signed Exhibit III, which purports to be signed by those who were willing that the defendant should succeed the last jeer, and states, though he calls himself a shrotriyamdar, that he signed it under the impression that it related to the appointment of an archaka.

The next witness is Moragasi Ranga Chari of Kolattur and speaks to the appointment of the last jeer. He says:—"the jeer before him sent "for him, told him to take up the office, handed [540] to him the kasha-"yam, and said, I have given you the office; manage for the future." The witness' father was in the employment of the last jeer.

The next witness is one Neeradi Raghava Chari, who gives evidence regarding the second and third cases of succession. He deposes:—"I know "the last jeer, the jeer who preceded him, and the jeer before that. "The jeer before the last was appointed by Sadagopa Jeer. Sadagopa "made the will (Exhibt J). Ceremonies were performed afterwards, "kashayam and jeeva-sraddham. There is a practice of taking up "kashayam after appointment. The Attipat Jeer acted until his "death, appointed the last jeer, and gave him kashayam. The last "jeer got other ceremonies performed for himself with the aid of books "and purohits." In cross-examination he continues:—"Attipat "was a sannyasi. He was called jeer from the time kashayam was "taken. Kashayam is a token of sannyasiship. Until the other cere-"monies are performed, he need not wear it. The consent of disciples was "not taken when either Attipat or the last jeer was appointed. Plaintiff

"pronounced mantram apparently. I did not hear: ceremony lasted "quarter or half an hour. The man who makes upadesam sits down "and the disciple stoops in front and puts his ear close to the "mouth of the man who makes the upadesam. This is done to be a jeer. "There is no man among Vadagalai Brahmans who is a jeer and not a "sannyasi. A man who is made a jeer may afterwards become a sannyasi, "but the *time is only for a day or two*, and in that time he may take up "the property. Attipat Jeer was house-holder when he received kashayam "and afterwards got the ceremonies of jeeva-sraddham performed and "became a sannyasi. *He did not go back after receiving kashayam to be* "*house-holder, but lived in the mutt.* The last jeer received kashayam on "the last day he was house-holder, and *on the next day* he got jeeva-"sraddham performed. I do not know any instance among Vadagala "heads of mutts not being sannyasis. There are certain of them being "jeer *and not a sannyasi for a day or two.*"

This witness is one of those who deposed that he saw the late jeer make upadesam to the plaintiff and give him kashayam though he signed Exhibit III, which acknowledged the defendant as jeer. His explanation is that he signed that document under the impression that it related to the appointment of some archaka. **[541]** The next witness is one Varadachari, a sub-magistrate near Trivellore, and wrote about six years ago a draft will. He deposes that the last jeer was installed at or about the time the Attipat Jeer died in the presence of disciples. "There were "two or three candidates, and *all people were saying that the last jeer* "*should get it.* I told this to Attipat Jeer: he said the same 'I don't "know the custom who is to appoint.'" This witness is a Tengalai Vaishnava Brahman. The foregoing is the evidence for the respondent about prior practice.

On the other hand four witnesses gave evidence on the same subject on behalf of the appellant.

Rangachari (seventh witness) gave evidence about the first case of succession. He stated that the disciples consulted together, selected Sadagopa Jeer, and asked Veera Raghava Jeer to appoint him, and that Veera Raghava did so. Sadagopa was made a sannyasi and upadesam was made the next day. He pronounced the mantrams and took kashayam. He owns lands and looks after some muttam lands. The eighth witness, T. Srinivasa Chari, also gave evidence about the first case of succession, and stated that at the request of the disciples Veera Raghava appointed Sadagopa Jeer. He said also that after all the ceremonies were gone through, Veera Raghava pronounced the upadesa mantram and told Sadagopa to repeat it and that kashayam was then given. The witness was questioned about the practice when there was a disagreement between the jeer and his disciples. He said there was no such case; the disciples would not disagree; the jeer has power to appoint without consent; if the nominee was a proper man the disciples would necessarily agree with the jeer. Another witness is Sreenivasa Raghava Chari, who is the defendant's nephew and the son of Sadagopa Jeer. He states that his father asked the disciples first and then nominated the Attipat Jeer. When the last jeer became jeer, the witness says, the disciples asked him to become jeer and Attipat Jeer was unconscious for three days prior to his death. The next witness is S. Venkata Chari agent or srikarya of the mutt. He says:—"I was at the mutt "when the last jeer was appointed. He was appointed there, he was "made a sannyasi there, and he was put in the place by the jeer and by

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"all the disciples. Attipat Jeer whom he succeeded took no part in the "appointment and he was unconscious at the time." He states again that Sadagopa Jeer [542] asked the disciples who should be appointed. They named Attipat, and he appointed him.

Having stated the evidence on both sides, we now proceed to consider its effect as to the usage of the institution. We must premise that the evidence is very meagre. The last jeer was the 35th in the order of succession, the mutt has a large number of disciples throughout the Presidency, and yet the evidence above referred to is the only material upon which we have to form an opinion.

As to the first of the three cases of succession, the jeer nominated his successor, initiated him, gave him kashayam and saw him installed and become a sannyasi before he died. The relation of father and son in a spiritual family was thus completed. As to the second case of succession, the person nominated by the jeer did not arrive until after the jeer had died. The disciples recognized the appointment when he arrived, and he became a sannyasi at once. It is a case of nomination which was not accepted until after the death of the jeer and which, when accepted, the disciples recognized. The second witness for the plaintiff and his brother refer to the recognition. The nominee became a sannyasi at once.

This was a case of incomplete nomination by the jeer as it was not known before he died whether the nominee would accept the office and as he was at liberty to refuse it. It was also a case in which the disciples honored the nomination by their guru in theory the appointment was made by the disciples, the relation of preceptor and disciple not being constituted by upadesam between the jeer and his nominee.

As regards the third case, there is a conflict of evidence. The witnesses for the appellant say that the Attipat Jeer was unconscious and that it was the disciples who appointed him. On the other hand, the witnesses for the respondent state that Attipat made upadesam to the last jeer and gave him kashayam. They add, however, that the last jeer performed jeeva-sraddham and became a sannyasi next day: the witness Neeradi Raghava Chari adds that he never returned to his house again nor resumed the *status* of a house-holder, and that the nominee must, according to usage, become a sannyasi in a day or two after upadesam. Taking the view most favourable to the plaintiff, this is a case in which the dying jeer made the upadesam and gave kashayam [543] and the nominee became a sannyasi next day. This was precisely what the last jeer told the plaintiff to do according to his third witness, but which he did not do.

According to the evidence on both sides, there was no disagreement prior to the present litigation as to the fitness of the person nominated by the jeer. Though several of the plaintiff's witnesses deny that the disciples were ever consulted, his own witness, K. Varadachari, who is a sub-magistrate near Trivellore, states that the disciples suggested the appointment of the late jeer.

The conclusion we have to come to is that the plaintiff's case is anomalous in three ways:—(i) It is not a nomination concurred in by the disciples. (ii) He did not repeat the presha mantram when he was initiated. (iii) He did not become a sannyasi in a day or two after his initiation as stated by his own witness Neeradi Raghava Chari, nor abstain from returning after upadesam and acceptance of kashayam to be a house-holder and to live with his family. His case stands by itself and

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is not supported by custom in the sense that there was a similar case before, though the last jeer was the 35th in the order of succession, and though looking to the number of disciples which the Ahobalam mutt has, evidence must be available if the plaintiff's case was warranted by any precedent in the history of the mutt.

Another serious defect in the plaintiff's case is that he was not initiated in the proper sense of the expression. In ordinary parlance, the essence of initiation consists in the person initiated repeating the presha or sannyasa mantram as it is pronounced by the jeer who nominates him. Not one of his witnesses states that such is not the case. On the other hand his own witness, Neeradi Raghava Chari, deposes that the plaintiff apparently repeated the mantram and describes initiation as including such repetition. The text of presha mantram; as given in the Vaidyanatha Diskshitiyam, means I hereby ronounce love of children, of wealth, and of the world; and when time and circumstances permit, it is uttered whilst going through the ritual prescribed for becoming sannyasi and after performing certain preliminary ceremonies, one of which consists in jeeva-sraddham, whereby the person becoming sannyasi is required to perform his own sraddha or death ceremony and thereby determine his *status* as a grihastha or a house-holder or in legal phraseology to suffer civil death in relation to his natural family. He receives upadesam, if made **[544]** in the regular mode, after performing jeeva-sraddham and by pronouncing presha mantram.

The intention in making upadesam and giving kashayam otherwise than during the ritual is to constitute the spiritutal relation of guru and disciple by fulfilling what is the essential part or mantric essence of the ritual in advance when there is urgency for it. such as the jeer's approaching death, and there is no time for going through it in detail and to leave its religious efficacy to be perfected by the observance of the ritual as soon as possible. Having regard to the intention with which the upadesam is made, the repetition of the upadesa mantram by the disciple was of its essence, otherwise he could not have become the disciple of the late jeer.

The plaintiff himself admits that the effect of repeating it is equivalent to a determination of his *status* as a house-holder. Save his own interested statement, there is no evidence to show that he may be considered to have received upadesam though he has not repeated the presha mantram. The evidence of the defendant's witnesses and of his own witnesses Neeradi Raghava Chari and of the practice of those nominated before are inconsistent with such view. The inference is irresistible that he had not been properly initiated according to the usage of the institution. There is no doubt upon his own evidence and that of his witnesses that the late jeer considered that upadesam was an essential.

There is another defect in the plaintiff's case. His own witness, Neeradi Raghava Chari, states that none can be a jeer without being a sannyasi, and that the person receiving upadesam must become a sannyasi in *a day or two*. The late jeer died on 10th August 1888 and this suit was brought on 13th November 1888, and until then or now the plaintiff has not become a sannyasi, but continued to be a house-holder and lived with his family. The delay is fatal to his claim. There has been no such instance in the history of the mutt. The ritual for becoming a sannyasi is postponed for a day or two, not in view to allow the plaintiff to take his own time, but as a matter of necessity and on the understanding that it is to be deferred only for a day or two, so that it may relate back

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to the upadesam and both may form together, as nearly as possible, one continuous ceremony by analogy to [545] ritualistic or regular upadesam and sannyasam and be unbroken by resumption of the *status* of house-holder. According to the plaintiff's own third witness the late jeer enjoined the plaintiff to perform jeevasraddham and become a sannyasi on the *day after upadesam.* According to the plaintiff's brother and his witness Neeradi Raghava Chari, the last jeer performed his own jeeva-sraddham and became a sannyasi the day after his initiation. The learned Judge considered that the delay was excusable because the defendant denied the plaintiff's nomination and occupied the mutt, but we do not see how this conduct of the defendant can operate to dispense with the customary requisite of a valid nomination. The intention was to perfect and validate the relation of spiritual father and son by the formal observance of the ritual prescribed for a sannyasi and thereby to generate the capacity to impart spiritual instruction to the disciples of the mutt. How can the defendant's wrong abrogate the requirement of the religious usage of the institution? The learned Judge has apparently come to this conclusion, because he has held that no ceremony at all needs be performed before the jeer's death.

The question is not simply between the plaintiff and the defendant, but is one of custom regulating the relation between the head of a mutt and his disciples. It is not in our power to dispense with one of the incidents of custom and to impair the efficiency of his spiritual instruction in the estimation of his disciples. The plaintiff's delay in becoming a sannyasi cannot be justified by the usage of the institution and must be taken to disentitle him to the *status* of a jeer. It is true that when the person nominated does not arrive before the jeer's death, the ceremony of sannyasam is gone through after he takes up the appointment. But that is in principle a case of nomination by the disciples in deference to the suggestion of their guru and not by virtue of the relation of preceptor and disciple constituted by upadesam. If not, why did the late jeer say upadesam and kashayam are essentials, and why did he enjoin the plaintiff to go through his own death ceremony and become a sannyasi next day? The principle underlying the nomination of the jeer is that upadesam followed up at once or in a day or two by the observance of sannyasam ritual is indispensable to the nominee's admission into the jeer's family as his sannyasi-disciple or spiritual son. Nomination by disciples is an inferior substitute [546] sanctioned by necessity like adoption to prevent the extinction of the spiritual family.

Again, the learned Judge deduces the plaintiff's title to the position of jeer from his nomination by the late jeer on the 4th or 5th August and considers that such nomination alone is sufficient. This was not the late jeer's opinion, and he considered that the making of upadesam and gift of kashayam as a token of sannyasiship were essential. We see another difficulty in adopting the learned Judge's view. The late jeer made a distinction between a mere nomination and the formal declaration of transfer of office after upadesam and gift of kashayam and treated the latter as essential. In the petition presented to the Deputy Magistrate by his vakil on the 9th August it is stated, with reference to what took place on 5th August, that "your petitioner was *compelled to forbear from making his nomination* conformably to *the usage of the adhinam.*" How is this to be accounted for except on the view indicated above, and that the word nomination is used in the sense of final or irrevocable appointment.

Again, the plaintiff himself referred in his evidence to the declaration after upadesam and kashayam "I have given the seat or office" as one of the means by which he became jeer. It is also stated by several of his witnesses that the late jeer and his predecessors used to make such declaration or to say something equivalent to it after they made upadesam and gave kashayam. We are of opinion that the nomination on the 4th and 5th August was not the final nomination in accordance with the usage of the mutt, which appears to point to the existence of other requisites, *viz.*, upadesam and gift of kashayam with the declaration that the nominee has been appointed successor subject to his going through the sannyasam ritual in a day or two.

We do not also see our way to believe that the late jeer made upadesam to the plaintiff or gave him kashayam. Most of the witnesses who gave evidence in his favour are his relations or servants of the former jeer, or men who at one time acknowledged the defendant's nomination by signing Exhibit II or III. The defendant's witnesses 1, 4, 5, 6, 8, 10, 15, and 22 deny that on the 10th August upadesam was made to the plaintiff or kashayam given The probabilities of the case are also against the plaintiff's evidence. The 13th witness, Sadagopa Chariar, denies that the plaintiff ever told him of upadesam though he was with [547] him on the 10th August. The story about the gift of kashayam is inconsistent with Sadagopa Chariar's statement that the plaintiff was with him in the village at the time kashayam is alleged to have been given in the mutt and until the jeer died on 10th August. Both he and Rama Rao say that on the evening of the 10th, the jeer asked them to call next morning as he felt a little better. Is it likely that he would have done so if he had got so far worse on the 10th as to resolve to make upadesam in the morning contrary to his previous arrangement with Sadagopa Chari for postponing it until the aid of superior magistrates was secured? It is, again, in evidence that the disciples who opposed the plaintiff's nomination were watching in the mutt on the 10th August and that there were police men both inside and outside the place. Is it probable that the upadesam would have taken place quietly on the morning of the 10th when there was so much opposition and excitement on the 5th? Exhibit III shows that the evidence about the place being watched is *bona fide*. It is much more probable that the jeer was looking forward to the arrival of the Deputy Magistrate on the 11th August to initiate and install the plaintiff, but that his illness took a critical turn after Rama Rao and Sadagopa Chariar had left the mutt and that it terminated in his death before he could carry out his intention. The defendant's conduct on the 5th August in offering Rs. 20,000 to the late jeer for his nomination marks him, as observed by the Judge, as a very unscrupulous person. The unfavorable impression produced by such conduct has led the learned Judge not to attach the weight which he should have attached to the improbabilities in the plaintiff's case. But the *onus* of proof is on the plaintiff, and the question is one of compliance with the usage of a religious institution. His case must stand or fall according as he proves or fails to prove such compliance, irrespective of the defendant's conduct or title. We find it difficult to believe that this plaintiff's story about upadesam and the gift of kashayam is true.

Another question is whether the concurrence of the disciples is necessary to the validity of the appointment of a jeer. The power of nomination vests in the jeer, but the weight of evidence is that, according to practice, the disciples are consulted. This is asserted

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by the witnesses for the defendant, and the plaintiff's witness, Varadachari, who is a sub-magistrate, states that the last jeer was suggested as a fit person by the disciples, and that [548] the jeer made the appointment in accordance with such suggestion. Seeing that installation ordinarily takes place with their co-operation, the probability is in favour of such consultation. There is no evidence, however, that any formal subsequent ratification is necessary. Whether, if not consulted, the nomination is good is a question in regard to which there is no evidence of prior usage. The power of nomination is a power to be exercised for the benefit of the institution and the general body of disciples attached to it. The principle that ought to guide its exercise, as enunciated by a former jeer in his will (Exhibit J.) is that the person selected should be "a very learned man that observes religious rites and one more versed in the traditional doctrines of the mutt than others." The ground of opposition on the part of the disciples was that the late jeer desired to befriend his brother's son, and that such a nomination would bring the mutt under the unwholesome influence of a single family, of which several members held influential positions in connection with the mutt and had leases of mutt lands. It may be that usage sanctions such consultation to ensure due exercise of the power for the end for which it is conferred and to prevent its exercise for the improper advancement of relatives of the jeer for the time being in his natural family to whom he is civilly dead, and regard and love for whom he has solemnly abjured, or from any other indirect motive. Or it may be that the power of nomination vests in the jeer, as the recognized principle of succession is the relation of the nominee to him as his disciple and that the disciples were consulted as a matter of expediency. The question is one of very great importance to the institution and one that ought to be determined in strict conformity to usage. The learned Judge himself observes that the persons who gave evidence in plaintiff's favour are interested parties and the material before us is extremely meagre. If it were necessary to determine this question for the purposes of this appeal, we should order a more extended inquiry as to usage and as to the opinions of experts connected with the mutt.

We agree with the learned Judge in the opinion he has expressed about the defendant's conduct, but we are unable to uphold the plaintiff's nomination on the grounds :—first, that he probably received no upadesam at all; secondly, that the upadesam alleged to have been received by him is not sufficient; [549] thirdly, that his right, if any, to the *status* of jeer ceased on his omission to become a sannyasi in a day or two, or soon after the alleged upadesam or initiation; fourthly, that there was no similar case of succession in the history of institution; fifthly, that his case is one of imperfect nomination which cannot be upheld on principles deducible from the known cases of succession.

The appeal must be allowed, the decree appealed against must be set aside, and the suit dismissed.

We have already referred to the defendant's conduct as unscrupulous and discreditable in offering to buy the sacred office from the late jeer so properly animadverted upon by the learned Judge. We also see reason to think that his story that the late jeer changed his mind and agreed to nominate him and actually asked him to attend upon him at the moment of his death is absolutely false and apparently designed to tack on his appointment by the disciples after the jeer's death to the alleged nomination by the jeer himself during his life and thereby to create an analogy

between his case and the second case of succession. Under these circumstances we consider that we must dismiss the suit without costs both in this Court and in the Court below. We dismiss also the memorandum of objections.

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Biligiri Ayyangar, attorney for appellant.

Branson & Branson, attorneys for respondent.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

IYYAPPA (*Defendant*), *Appellant* v. RAMALAKSHMAMMA (*Plaintiff*), *Respondent*.* [1st and 5th August, 1890.]

Civil Procedure Code, Section 50—*Inconsistent causes of action—Specific Relief Act—Act I of* 1877, *Section* 40—*Cancellation of instruments—Interest necessary to support the suit.*

In a suit for cancellation of a sale-deed by the person whose name appeared on it as executant, it was alleged in the plaint that it was a forgery, and that if it was not a forgery, its execution had been obtained by fraud and that it was, **[550]** moreover, void for want of consideration. The plaintiff's interest in the property to which the instrument related had been assigned by her to another by a conveyance which contained certain covenants by her with regard to the land:

Held, that the plaintiff was not entitled to maintain the suit.

Per cur: The gist of the plaintiff's charge against the defendant was that she had never executed a sale-deed in his favour, and that the document set up by him was a forgery. It was not competent to the plaintiff to combine with this charge as an alternative the wholly inconsistent charge that if she did execute the document no consideration was received by her or that fraud had been practised upon her.

[Diss., 18 A. 125 (127); **R.**, 23 B. 375 (380); 8 Bom. L R. 921 (928); 5 Ind. Cas. 633 (635) = 12 Bom. L.R. 53; 9 Ind.Cas. 469 (470) = 4 Bur. L.T 24 = 5 L.B.R. 251 (253); 1 O.C. 175 (177); **D.**, 8 Ind. Cas. 845 = 9 M.L.T. 210.**]**

APPEAL against the decree of C Ramachandra Ayyar, Acting District Judge of Nellore, in original suit No. 13 of 1888.

Suit to cancel a sale-deed as to which it was alleged in the plaint that the defendant had forged it in the name of the plaintiff as executant, and also that if it was in fact executed by the plaintiff, the execution had been obtained by fraud, and no consideration had passed under it. It appeared at the hearing that the plaintiff had assigned all her interest in the property to which the sale-deed related to her nephew under an instrument which contained certain covenants by her with regard to the land.

The following were the issues framed in the suit:—

1. Whether or not the sale-deed was in fact executed by the plaintiff?
2. Whether or not the plaintiff received Rs. 5,000 as affirmed by the defendant?

The District Judge passed a decree declaring the sale-deed to be void for want of consideration.

The defendant preferred this appeal.

Bhashyam Ayyangar and *Desika Charyar*, for appellant.

Mr. Subramanyam and *Subramanya Ayyar*, for respondent.

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* Appeal No. 26 of 1889.

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APPELLATE CIVIL.

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JUDGMENT.

The plaintiff sues for the cancellation of a sale-deed alleged to have been "fraudulently concocted by defendant in respect of certain property," and the defendant appeals against the decree made in the plaintiff's favour. It is stated in the judgment, and is admitted by the plaintiff's counsel, that before the date of the suit the plaintiff had assigned all her interest in the property comprised in the sale-deed to the son of her husband's sister. This being so the question arises whether the plaintiff had any legal interest remaining in her entitling her to maintain this suit. Clearly she had no legal interest in the property comprised in the sale-deed, but it is suggested that she is entitled to have [551] that instrument cancelled in case any action for damages should be brought against her on the covenant contained in the document executed in her nephew's favour. We are of opinion that this bare possibility does not entitle a plaintiff who has divested herself of all interest in the property to maintain this suit. It is not alleged that the suit is brought on behalf of the person immediately concerned to have the sale-deed cancelled, and it is plain that the decision in the present suit could determine nothing as between him and the defendant.

But this want of legal interest in the plaintiff is not the only objection to the maintenance of the suit as the facts are found by the District Judge. The finding of the District Judge is that, although the plaintiff did not receive the consideration spoken to by the defendant's witnesses, she did in fact execute the sale-deed, undue advantage being taken of her ignorance and helpless condition after her husband's death. To this finding exception has been taken on behalf of the plaintiff, and it has been contended that the District Judge ought, on the evidence before him, to have found that the plaintiff never did put her mark to the instrument of sale. On the other hand it was contended on behalf of the appellant defendant that there was sufficient evidence of payment of the alleged consideration, and that the finding on the second issue was, therefore, wrong. Seeing that the suit is, for reasons already mentioned, not maintainable, we do not desire to express any opinion on these questions of fact. But assuming that the Judge's findings are right, we must observe that the suit ought to have been dismissed. The gist of the plaintiff's charge against the defendant was that she never had executed a sale-deed in his favour, and that the document set up by him was a forgery. It was not competent to the plaintiff to combine with this charge as an alternative the wholly inconsistent charge that, if she did execute the document, no consideration was received by her, or that fraud was practised upon her (see *Mahomed Buksh Khan* v. *Hosseini Bibi* (1). For this reason the second issue was, we think, an improper one, and it is further open to the objection that, assuming that the document was executed, but that the consideration did not pass, the relief prayed for in this suit could not have been granted. It is obvious that in case of default in payment of consideration the vendor's [552] right is not to have the sale-deed cancelled and delivered up, but to have the money paid to him by the purchaser.

Being of opinion that the plaintiff, having divested herself of all interest in the property, was not entitled to maintain this suit, we must reverse the decree of the District Judge and dismiss the suit; but, inasmuch as the point was not taken by the appellant, we shall make no order as to costs in this Court and the Lower Court. The memorandum of objections is dismissed.

(1) 15 I.A. 81 (86).

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(1) *Labourer—Carrier by boat.*—An advance was made under a contract by which the party who received the advance undertook to convey salt by boat, but did not bind himself to render personal labour. The party who received the advance broke the contract:—*Held*, the parties to the contract were not an employer of labour and a labourer respectively, and consequently the contract did not fall within the provisions of Act XIII of 1859. CALURAM v. CHENGAPPA, 13 M. 351=1 Weir 651 ... 957

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***Act XXVIII of 1860* (*Madras Boundary Marks*).**

(1) Ss. 21, 25, 28—*Limitation Act*, 1877, ss. 6, 14—*Appeal from decision of Boundary Officer—Limitation—Award by arbitrators—Irregular procedure.*—The appeal allowed by s. 28 of the Madras Boundary Act, XXVIII of 1860, is one from a decision recorded in the presence of the parties and duly intimated to them as required by s. 25 of the said Act. In 1883 a plaint, by way of appeal from a decision purporting to be passed under s. 25 of the Boundary Act, was presented to the Court of a District Munsif and returned on the ground that the subject-matter of the suit was beyond the jurisdiction of the said Court. The plaint was then filed in the District Court more than two months after the date, when the decision of the Boundary Settlement Officer was communicated to the parties:—*Held*, that s. 14 of the Limitation Act, 1877, applied, and that the suit was not barred by limitation. The true construction of s. 6 of the Limitation Act, 1877, is that, save as to the period of limitation, the other provisions of the Act are applicable to cases governed by special and local laws of limitation. The omission by the Collector to pass a decision in accordance with an arbitrator's award and to furnish a copy to the parties as required by s. 21 of the Boundary Act is fatal to the award. The power given by s. 21 being a judicial power, a Collector must exercise his independent judgment and should not refer the award for acceptance to the Board of Revenue and Government, nor should he adjudicate when, as Agent to the Court of Wards, he represents one of the rival claimants. SESHAMA v. SANKARA, 12 M. 1 ... 351

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***Act XX of 1863* (*Religious Endowments*).**

(1) Ss. 3, 4, 11, 12—*Suit by members of a temple committee, burden of proof—Form of decree.*—Suit by the members of a temple committee appointed under Act XX of 1863 against one claiming to be the hereditary trustee of a Hindu temple for possession of certain temple property for a declaration of their right to receive certain annual dues and for a perpetual injunction restraining defendant from interfering with those dues:—*Held*, the burden of proving that the temple was of the class mentioned in s. 3 of Act XX of 1863 lay on the plaintiffs. On its appearing that the defendant's ancestor was not the founder of the temple but was appointed trustee by the Government, as also where his successors in the office of trustee, of whom all were not members of his family:—*Held* (1) the plaintiffs were entitled to a decree declaring the temple in dispute to be of the class mentioned in Act XX of 1863, s. 3; and as such subject to their jurisdiction; (2) the plaintiffs were not entitled under Act XX of 1863, ss. 4, 11 and 12, to be put in possession of the property of the temple or in receipt of its income. PANDURANGA v. NAGAPPA, 12 M. 366 ... 604

(2) S. 7—*Reg. VII of* 1817 (*Madras*), s. 12—*Suit by a dharmakarta disaffirming the acts of his predecessor—Limitation.*—The plaintiff who had been appointed in 1886 by the Sub Collector to be dharmakarta of a Hindu temple, for which no committee had been appointed under Religious Endowments Act, s. 7, sued in 1886 to recover possession of land demised to the defendant on a perpetual lease in or about 1856 by a previous dharmakrata, who died in 1885:—*Held*, (1) that Regulation VII of 1817 having been repealed as regards Hindu temples by Act XX of 1863, the appointment by the Sub Collector gave the plaintiff no right to sue; accordingly it was necessary to determine the question whether he had such right apart from that appointment; (2) that if the above question were answered in the affirmative, the plaintiff, since he did not derive title through his predecessor in office (the grantor of the lease), would be entitled to disaffirm his acts; (3) that the period of limitation ran not from the date of the lease, but from the date of the accession of the plaintiff to his office. MOHAMED v. GANAPATI, 13 M. 277 ... 905

(3) S. 10—*Appellate jurisdiction—Order of District Judge filling vacancy on committee not appealable.*—It is not to be assumed that there is a right of

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appeal in every matter which comes under the consideration of a Judge; such right must be given by the enacted law, or equivalent authority. The High Court has no jurisdiction to hear an appeal from the order of a District Judge made by him on petition pursuant to s. 10 of Act XX of 1863 (Religious Endowments), appointing a member to fill a vacancy in a committee. Neither that Act, nor the general law, gives any right of appeal, which therefore does not exist, from such an order. In a cause which a Judge is competent to try, if the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground of irregularities, which, if objected to at the proper time, might have led to the dismissal of the suit. But when the Judge has no jurisdiction over the subject matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process. MINAKSHI v. SUBRAMANYA, 11 M. 26 (P.C.) = 14 I.A. 160 = 5 Sar. P.C. J. 54 = 11 Ind. Jur. 393 ... 18

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(5) Ss. 14, 18—See COURT FEES ACT (VII OF 1870), 11 M. 148.

***Act XVII of 1864* (*Official Trustees*).**

Civil Procedure Code, ss. 2, 268, 272—*Public officer—Attachment by notice.*—A decree against a married woman provided that the amount due under it should be payable out of the separate estate of the judgment-debtor. The judgment-debtor was entitled to a life interest in certain trust funds under a settlement of which the Official Trustee was the trustee. The decree-holder proceeded to execute his decree against this life-interest of the judgment-debtor by notice to the Official Trustee under s. 272 of the Code of Civil Procedure, but there were no funds in the hands of the Official Trustee which would have been attachable under s. 268. The decree-holder now applied that the life interest might be sold:—*Held*, that the interest of the judgment debtor was not validly attached. *Semble.*—The Official Trustee is a public officer within the meaning of s. 2 of the Civil Procedure Code. ABDUL LATEEF v. DOUTRE, 12 M. 250 ... 524

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(3) Ss. 20, 21—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 11 M. 130.

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(1) *S.* 4—*Grant of villages enabling grantee to receive the land revenue.*—Suit to recover a moiety of two villages granted as a jaghir: *Held*, that as the original grant was not of the freehold or full ownership in the soil, the suit was barred by s. 4 of the Pensions Act, 1871. RAMA v. SUBA, 12 M. 98 = 13 Ind. Jur. 100 ... 417

(2) *S.* 4—*Religious Endowments Act*, 1863, ss. 14, 15—*Yaumia granted to mosque—Suit against co trustee for declaration of right.*—S. 4 of the Pensions Act, 1871, provides that no Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former government, whatever may have been the consideration for any such pension or grant and whatever may have been the nature of the

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payment, claim, or right for which such pension or grant may have been substituted :—*Held*, that a yaumia allowance granted to a religious institution did not fall within the purview of the Pensions Act. Where a trustee of a Muhammadan mosque sued for a declaration of his title as against a co-trustee :—*Held*, that ss. 14 and 15 of the Religious Endowments Act, 1863, were not applicable to the suit. ATHAVULLA v. GOUSE, 11 M. 283 ... 197

(3) S. 6—Specific Relief Act—Act I of 1877, s. 42—Suit for declaration of title as holder of a stanom to which a malikana allowance is attached—See SPECIFIC RELIEF ACT (I OF 1877), 13 M. 75.

Act III of 1873 (Civil Courts Act, Madras).

(1) *Jurisdiction—Suit for partition and mesne profits—Civil Procedure Code*, s. 544.—N. sued S. and others for partition of a share of certain land and claimed mesne profits from other defendants who were tenants of the land. S. obtained a decree by consent for her share and a sum of 99 rupees was decreed to her against the tenants for mesne profits. Against this decree the tenants appealed. The Subordinate Judge finding that the subject-matter of the suit, the land of which partition was claimed, exceeded the jurisdiction of the Munsif, reversed the decree of the Munsif and directed the plaint to be returned for presentation in the proper Court. It was contended, on appeal to the High Court, that the Subordinate Judge could not set aside the decree against the tenants for mesne profits :—*Held* that, as the Munsif's Court had no jurisdiction to entertain the suit for partition, it could make no decree for mesne profits. NAGAMMA v. SUBBA, 11 M. 197 ... 137

(2) *S. 12—Court Fees Act, sch. II, art. 17, s. VI—Suit to remove a karnavan—Valuation for jurisdiction.*—Although, for the purposes of the Court Fees Act, a suit to remove the karnavan of a Malabar tarwad is incapable of valuation and subject to the fee prescribed by s. VI, art. 17, of sch. II of that Act, yet, for the purposes of determining jurisdiction under s. 12 of the Civil Courts Act, the right of management, which is the subject-matter of the suit, must be valued. If the value is estimated *bona fide* by the plaintiff, the Court should adopt it. KRISHNA v. RAMAN, 11 M. 266 ... 185

(3) *S. 12—Jurisdiction—Suit to recover share of inheritance—Subject-matter of suit.*—The plaintiff sued to be declared an heir to a deceased Muhammadan and to recover her share of the inheritance, the share claimed being less than Rs. 2,500, while the value of the whole estate exceeded that amount :—*Held*, that the suit was within the jurisdiction of a District Munsif. KHANSA BIBI v. SYED ABBA, 11 M. 140 ... 98

(4) Ss. 12, 14—Court Fees Act—Act VII of 1870, s. 7, cl. 5—Civil Courts Act—Suit to enforce registration—Jurisdiction—See COURT FEES ACT VII OF 1870, 13 M. 56.

(5) *S. 13—Civil Procedure Code—Act* XIV *of* 1882, s. 331—*Appeal—Jurisdiction.*—The plaintiff being the holder of a decree of a Subordinate Court for more than Rs.5,000 was obstructed in execution by the present defendants. He applied to the Court for the removal of the obstruction, the property, which was the subject of the application, being valued at less than Rs. 5,000, and the Subordinate Judge directed that the application be registered as a regular suit under Civil Procedure Code, s. 331, and ulimately passed a decree in favour of the plaintiff :—*Held*, that the appeal against this decree did not lie to the High Court. KALIMA v. NAINAN KUTTI, 13 M. 520 ... 1075

(6) *S. 16—Suit by reversioner to recover land granted to Hindu widow—Presumption as to death of widow from absence, not a question of succession or inheritance* :—Plaintiff sued as reversioner to recover certain land granted in lieu of maintenance to a Hindu widow. The widow had left her village 16 years before suit and had not been heard of since :—*Held*, that the question whether a presumption arose that the widow was dead was not a question regarding succession or inheritance to be decided according to Hindu law within the meaning of s. 16 of the Madras Civil Courts Act, 1873. BALAYYA v. KISTNAPPA, 11 M. 448 ... 312

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S. 9—*Civil Procedure Code, s. 462—Consent by guardian of a minor defendant to accept the oath of the plaintiff.*—It was agreed by the defendants who were majors and by the father and guardian of a minor defendant on his behalf, that one of the issues in a suit should be determined under Oaths Act, s. 9, by the oath of the plaintiff. The oath was taken and a decree was passed accordingly :—*Held*, that the minor defendant was bound by the consent of his guardian since there was no evidence of fraud or gross negligence on the part of the latter, although the Court had not sanctioned the agreement under s. 462, Civil Procedure Code. CHENGALREDDI v. VENKATAREDDI, 12 M. 483 ... 686

Act XVI of 1874 (Scheduled Districts).

Ss. 1 to 7 and 11—*Penal Code—Act* XLV *of* 1860, *ss.* 1, 2—*Criminal Procedure Code, s.* 1—*Laws Local Extent Act—Act* XV *of* 1874, *ss.* 3, 4—*Criminal Procedure in the Laccadive Islands.*—The Scheduled Districts Act having been extended to the Laccadive Islands, but no notifications having been made under that Act with regard to the criminal law to be administered there, the Penal Code and the Criminal Procedure Code are in force. Accordingly, when the Sub-Collector of Malabar, as such, tried and sentenced certain persons on one of the Laccadive Islands, not observing the procedure prescribed by the Criminal Procedure Code : *Held*, that the proceedings were void and should be quashed. QUEEN-EMPRESS v. CHERIA KOYA, 13 M. 353=2 Weir 1 ... 958

Act V of 1876 (Reformatory Schools).

Ss. 2, 7—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 M. 94.

Act I of 1878 (Opium).

S. 3—*License to possess opium—Transport of opium.*—One having a license for the possession of opium as a medical practitioner, limited to eight pollums of opium, sent his servant to buy from a licensed dealer at Sholavaram and bring to Madras four pollums of opium ; he was convicted of the offence of transporting opium without a license : *Held*, the conviction was right. QUEEN-EMPRESS v. RAMANUJAM, 13 M. 191=1 Weir 834 ... 845

Act XI of 1878 (Arms).

S. 19 (*a*)—*Sale of sulphur and ammunition by agent of a license-holder.*—Sale of sulphur and ammunition by the agent of one holding a license (in form VI) under Act XI of 1878 is not illegal. QUEEN EMPRESS v. SITHARAMAYYA, 12 M. 473=1 Weir 655 ... 679

Act XXI of 1879 (Foreign Jurisdiction and Extradition).

See JURISDICTION, 12 M. 39.

Act IX of 1887 (Provincial Small Cause Courts).

(1) S. 17—Review—Deposit of costs—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 178.

(2) Sch. II, cl. 24—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 344.

(3) *Sch.* II, *art.* 38—*Jurisdiction—Suit for maintenance based on a family arrangement—Malabar law.*—A suit for maintenance based on a family arrangement is within the jurisdiction of a Mofussil Small Cause Court. A karnavan is not entitled of his own authority to set aside a family arrangement made on behalf of all the members of the tarwad. KOMU v. KRISHNA, 11 M. 134 ... 94

(4) *Sch.* II, *art.* 41—*Civil Procedure Code, s.* 586—*Suit for contribution—Joint property.*—Lands of which part belonged to the plaintiffs and part to the defendant were comprised in a patta which ran in the names of the plaintiffs and another. The defendant's share of the assessment fell into arrear and was collected from the plaintiffs who now sued to recover Rs. 200 being the amount so paid together with interest :—*Held*, the suit was of a nature cognizable by a Court of Small Causes, and so no second appeal lay. SRINIVASA v. SIVAKOLUNDU, 12 M. 349 ... 593

(5) Sch. II, paragraph I—Municipal tax—District Municipalities Act—Wrongful assessment of profession tax—Jurisdiction of Small Cause Court—Order of a Local Government—See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS) 13 M. 78.

Act VII of 1888 (Civil Procedure Amendment). PAGE

(1) S. 48—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 492.

(2) S. 56—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 M. 472.

Act X of 1888 (Presidency Small Cause Courts Law Amendment).

S. 3—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 M. 472.

II.—Madras Acts.

Act II of 1864 (Revenue Recovery, Madras).

(1) *Ss.* 1, 39, 42—*Rights of jenmi in Malabar—Grant by Government of waste land on a cowle—Sale of land for arrears of revenue.*—The Collector of Malabar in 1869 let defendant No. 2 into possession of certain waste land under a cowle, and in 1872 granted to him a patta for it. The cowledar brought the land into cultivation, but subsequently left it uncultivated and failed to pay the assessed revenue; the land was accordingly attached in 1885 for arrears of revenue under the Revenue Recovery Act, 1864, and sold to defendant No. 3. The plaintiff, who was the jenmi of the land, had no notice of the grant of either the cowle or the patta: he asserted his right to jenmibhogam in a petition presented to the Collector at the time of the sale, but the sale proceeded without reference to his claim. The present suit was brought to set aside the sale:—*Held* the interest of the jenmi did not pass by the sale. SECRETARY OF STATE v. ASHTAMURTHI, 13 M. 89 ... 772

(2) *S.* 2—*Remedies of assignee from Government of land revenue—Land security for revenue.*—The land revenue payable on certain land having been assigned to a temple by Government, which, however, continued to issue a patta for the land, the panchayat of the temple are entitled to bring the land to sale to discharge arrears accrued due. KRISHNASAMI v. VENKATARAMA, 13 M. 319 ... 934

(3) *Ss.* 25, 27—*Regulation* V *of* 1804, *s.* 20—*Notice on minor defaulter—Irregularity in revenue sale*:—A mitta consisting of an unsurveyed village of which the plaintiffs (minors) were the registered proprietors of an undivided moiety, was brought to sale for arrears of kist and was purchased for the plaintiffs by their guardian, duly appointed under Regulation V of 1804, s. 20. The sale was subsequently cancelled; and further arrears having accrued, the mitta was attached again. Before the second attachment took place, the guardian died, and no one having been appointed to succeed him, though an application was made to the Court for that purpose, a written demand under Revenue Recovery Act, s. 25, was tendered to the plaintiff's mother and affixed to the wall of the house on 17th January, and notice under s. 27 was served on 17th. February. The sale took place in September and defendant No. 2 became the purchaser. It was admitted that a division of the village was impracticable. In a suit by the plaintiffs by their mother and next friend to set aside the sale:—*Held*, since service of a demand upon the defaulter is an essential preliminary to sale, the sale was invalid so far as the share of the plaintiffs was concerned, and the sale as a whole, was vitiated by the irregularity. MEKAPERUMA v. THE COLLECTOR OF SALEM, 12 M. 445 ... 660

(4) *S.* 35—*Contract Act, ss.* 69, 70—*Right to contribution where part owner pays revenue due on whole estate to save his own interests.*—In 1881 while the patta of certain land held on raiyatwari tenure stood in the name of defendant No. 1, the real owner being defendant No 2, the revenue fell into arrear. Subsequently plaintiff and defendant No. 3 each bought a portion of the land, and defendant No. 3 sold his portion to defendant No. 4. After this, the land in plaintiff's possession was attached for the said arrears of revenue, and plaintiff paid the whole amount to prevent a sale. Plaintiff sued to recover from defendants 1 to 4 a portion of the arrears paid by him. He also prayed that the land in the possession of defendant No. 4 might be held liable. The claim was decreed, but on appeal by defendants 3 and 4, the suit was dismissed as against them. Plaintiff appealed, making defendant No.4 alone respondent:—*Held*, that plaintiff was entitled to a decree for contribution against defendant No. 4 and to a charge on the land in his possession. SESHAGIRI v. PICHU, 11 M 452 ... 315

(5) *Ss.* 41, 42—*Sale for arrears of revenue—Land subject to kanam—Purchaser's title not subject to kanam-holder's rights.*—Where land subject to a kanam

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was sold for arrears of revenue due by the pattadar and owner and the kanam-holder claimed to retain possession as against the purchaser on the ground that his rights were not affected by the sale :—*Held*, that reading ss. 41 and 42 of Madras Act II of 1864 together, the purchaser's title was not subject to the kanam. The contracts referred to in s. 41 of the Act are those which do not create a charge on the proprietary right in the land sold. KELAN v. MANIKAM, 11 M. 330 ... 230

(6) *Ss.* 42, 44—*Sale of part of a holding for arrears of revenue due on another part.*—The plaintiff sued, as the purchaser under a court-sale, for possession of certain land, which the defendant's vendor had purchased at a sale held under the Revenue Recovery Act for arrears of revenue accrued due on other land belonging to the judgment-debtor :—*Held*, the suit should be dismissed. SAMA v. STRINIVASA, 13 M. 477 ... 1045

(7) *S.* 59 —*Limitation Act, s.* 6, *Sch.* II, *Arts*, 12, 95—*Suit to set aside a sale for arrears of revenue—Fraud—Limitation.*—Suit, in July 1885, to set aside a sale of land of the plaintiff, sold in July 1884 as if for arrears of revenue under Act II of 1864 (Madras), on the ground that the sale had been brought about by fraud and collusion between the purchaser and the village officers, the plaintiff had knowledge of the alleged fraud more than six months before suit :—*Held*, that the law of limitation applicable to the case was s. 59 of Act II of 1864 and not s. 95 of the Limitation Act, and that the suit was therefore barred. VENKATA v. CHANGADU, 12 M. 168 (F.B.) ... 467

Act VII of 1865 (*Madras Irrigation*).

S. 1.—*Jurisdiction of Civil Courts in Revenue matters—Water-cess—Overflow from Government works—Water supplied or used for purposes of irrigation* —Surplus water from Government irrigation works flowed on to land of the plaintiffs which they were in the habit of cultivating with dry crops and stagnated there rendering such cultivation impossible. The plaintiffs did not want the water to flow on to their land, but being unable to exclude it, planted paddy as the best crop to cultivate under the above circumstances. Water-cess was levied on the plaintiffs under color of Act VII of 1865 :—*Held*, the water was not supplied or used for purposes of irrigation within the meaning of Act VII of 1865, s. 1, and the plaintiffs were not liable to pay the water-cess. VENKATAPPAYYA v. THE COLLECTOR OF KISTNA, 12 M. 407=13 Ind. Jur. 374 ... 633

Act VIII of 1865 (*Rent Recovery, Madras*).

(1) *Cause of action—Suit to cancel patta.*—Plaintiff sued in a Civil Court to cancel a patta which he alleged was incorrect and fraudulently antedated by the defendant with a view to prevent plaintiff from taking steps to cancel it in a Revenue court ; a copy of the patta had been affixed to plaintiff's house :—*Held*, that the plaintiff had no cause of action cognizable by a Civil Court. NURDIN v. ALAVUDDIN, 12 M. 134. ... 443

(2) Suit in Civil Court to enforce exchange of patta and muchalka—Declaratory decree—Civil Procedure Code, s. 53—Amendment of plaint—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 M. 481.

(3) See ACT XI OF 1865 (MOFUSSIL SMALL CAUSE COURTS), 11 M. 264.

(4) *Ss.* 2, 7.—In a suit by a tenant against a zamindar to release an attachment made under Rent Recovery Act, s. 40, it appeared that, according to the kistbandi obtaining in the zamindari, rent was payable in monthly instalments, commencing with November in each fasli :—*Held*, that the unit for the rule of limitation prescribed by Rent Recovery Act s. 2, for proceedings by the landlord was the aggregate rent in arrear at the end of the fasli. APPAYASAMI v. SUBBA, 13 M. 463. ... 1035

(5) *Ss.* 3, 7, 51, 87—*Jurisdiction of Civil Courts—Suit to enforce acceptance of improper patta—Decree for rent—Limitation—Evidence of local usage—Judgments not* inter partes.—A landlord sued his tenants in the Court of a District Munsif to enforce acceptance of pattas and the execution of muchalkas by them, and to recover arrears of rent. The suits were filed more than thirty days after tender of the pattas, which were found to contain certain improper stipulations : —*Held*, (1) the suit was not barred by the rule of limitation in Rent Recovery Act, s. 51 ; (2) the Civil Court had jurisdiction to entertain the suit and to modify the pattas where they

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were found to be improper and to enforce the execution of corresponding muchalkas; (3) the claim for rent should have been disallowed on the ground that the pattas as tendered were improper pattas—*Per cur.*—"The decisions [as to rates of rent] in previous suits are admissible as "evidence of local usage, though the tenants in the cases before them were not parties to them." EASWARA DOSS v. PUNGAVANACHARI, 13 M. 361 ... 964

(6) *Ss.* 3,9—*Regulation* XXV *of* 1802 (*Madras*), *s.* 12—*Revenue Recovery Act* II *of* 1864 (*Madras*), *ss.* 32, 41.—The purchaser at a revenue sale is *prima facie* entitled to claim the faisal rate of rent. PALANI v. PARAMASIVA, 13 M. 479 ... 1046

(7) *Ss.* 3, 9, 79, 80—*Yeomiah lands—Unregistered holder rendering service and granting pattas—Estoppel by acquiescence of person entitled to the yeomiah holding.*—A yeomiahdar died leaving a brother who was then out of India. Shortly before his death, he made an invalid assignment of his holding to a third person who performed the service, and granted pattas of the land. The holding was resumable on failure of the service. The brother of the late yeomiahdar returned after three years and obtained registration of his title. He now filed this suit to enforce acceptance of pattas tendered by him to the raiyats who had already accepted pattas from and executed muchalkas to the assignee:—*Held*, that the suit was not maintainable, as under the circumstances the plaintiff's conduct justified the tenant's belief that the assignee was entitled to collect rent from them until the assignment was questioned by the plaintiff and notice of his title given to them. KHADAR v. SUBRAMANYA, 11 M. 12=11 Ind. Jur. 413 ... 9

(8) *S.* 4—*Patta—Uncertainty as to amount of rent.*—An agreement in a patta to pay whatever rent the landlord may impose for any land not assessed which the tenant may take up is bad for uncertainty. RAMASAMI v. RAJAGOPALA, 11 M. 200=2 Weir 628 ... 139

(9) *Ss.* 4, 11—*Acceptance of patta not in accordance with the Act.*—A tenant having accepted a patta (which did not give the particulars described in s. 4 of the Rent Recovery Act) and having executed to the landlord a muchalka which was registered, is not entitled to obtain in a summary suit an order setting aside a distraint by the landlord for arrears of rent. APPA RAU v. VIRANNA, 13 M. 271 ... 901

(10) *Ss.* 7, 9, 39—*Copy of patta—Tender.*—A landholder tendered to his tenant a notice stating that his patta, of which the particulars were given, had been prepared and calling on him to come within a month to the zamin cutcherry to fetch the patta and execute the muchalka:—*Held*, that there was sufficient tender of a patta to support a suit under s. 9 of the Madras Rent Recovery Act. MARUTHAPPA v. KRISHNA, 12 M. 253=13 Ind. Jur. 216 ... 526

(11) *S.* 9—*Civil Procedure Code*, *s.* 13—Res judicata—*Decision of Revenue Court as to landlord's title.*—In a summary suit filed by a landlord against his tenant in the Court of the Deputy Collector under the Rent Recovery Act (Madras), s. 9, to enforce acceptance of a patta by the defendant, it appeared that, in a former suit between the same parties in the same Court, it had been decided that the defendant was the plaintiff's tenant and as such bound to accept a patta from him in respect of the land in question in the present suit:—*Held*, that the defendant was not entitled in the present suit to dispute the plaintiff's title, since the former decision constituted it *res judicata*. VENKATACHALAPATI v. KRISHNA, 13 M. 287 ... 912

(12) *S.* 9—*Joint shrotriyamdars—Distinct contract by tenant in respect of a share.*—The plaintiff was one of two joint shrotriyamdars. In fasli 1288 the defendant accepted a patta from and executed a muchalka to him in respect of the half share of the plaintiff. The plaintiff sued to enfore acceptance of a patta and execution of a muchalka for fasli 1890 and for arrears of rent:—*Held*, that the suit lay without joinder of the other joint shrotriyamdar. PURUSHOTTAMA v. RAJU, 11 M. 11 ... 8

(13) *S.* 9—*Tender of patta by post.*—A landlord sent a patta by post to his tenant, who declined to receive it:—*Held*, the tender of the patta by post was not sufficient to support a suit under s. 9 of the Rent Recovery Act. SAMINATHA v. VIRANNA, 13 M. 42 ... 740

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(14) *Ss.* 9, 10, 11—*Improper stipulations in patta—Claim of tenants to hold over land after expiry of lease.*—In summary suits brought by a landlord to enforce acceptance by his tenants of pattas tendered by him for the current *fasli*, it was pleaded that the pattas were improper in that they did not comprise certain land of which the tenants were in possession and in which they claimed permanent occupancy rights, and also in that they contained various terms which the plaintiff was not entitled to impose on the defendants, providing (*inter alia*) (1) that interest should be payable on the several instalments of rent as they became due, (2) that the defendant should not fell certain trees except for agricultural purposes, (3) that the defendants should not reap their crops without previously obtaining the plaintiff's permission, (4) that on a change made without the plaintiff's permission from dry to wet cultivation, the tenancy should be forfeited in case of default made by the defendants in paying the amount of Government assessment, and also an undetermined sum then to become payable by the defendants to the plaintiff in addition to the rent. The defendants failed to prove the permanent occupancy rights claimed over the land not comprised in the pattas, and it appeared that they had held leases from the plaintiff for the land in question for a period of three years and had held over after the expiry of the leases without the permission and contrary to the wishes of the landlord; and it further appeared that the provision as to trees did not extend to shrubs, &c., and had been an accepted term in the pattas issued for ten years. The Revenue Court modified the terms of the pattas and passed decrees that the pattas as modified be accepted, against which some only of the defendants appealed, and the District Judge on appeal introduced further modifications into the pattas:—*Held*, (1) that the District Judge had no jurisdiction under Civil Procedure Code, s. 544, to introduce further modifications into the pattas in favour of the defendants who had not appealed according to the opinion formed by him in appeals preferred by the defendants in other suits; (2) that the defendants were not entitled to have the pattas modified by enlarging the extent of the land comprised in them, or by the cancellation of the provisions as to interest and as to felling trees; (3) that the defendants were entitled to have the pattas modified by the cancellation of the provision as to reaping crops and of the provision for forfeiture. APPA RAU *v.* RATNAM, 13 M. 249 ... 885

(15) *Ss.* 9, 10, 11.—A summary suit by a landlord to enforce the acceptance of a patta under the Madras Rent Recovery Act should not be dismissed on a finding by the Appellate Court that the patta tendered was not a proper patta. The Appellate Court ought to pass the decree which the Court of First Instance should have passed. NAGARAJA *v.* KASIMSA, 11 M. 23 ... 16

(16) *S.* 12—*Surrender by abandonment.*—In a suit to recover possession of a certain land comprised in an unexpired lease granted to the plaintiff by the first defendant it was pleaded that the plaintiff had left the land waste, and had refused to pay rent or give a written relinquishment of the land, and that the first defendant had accordingly let it to the second defendant;—*Held*, that, although the defence did not disclose a surrender by the plaintiff, recorded as prescribed in the Rent Recovery Act, s. 12, the Court should determine the issue whether there had been a surrender by the plaintiff. NARASIMMA *v.* LAKSHMANA, 13 M. 124 ... 798

(17) *S.* 17—*Attachment and sale of the tenant's interest in the land for arrears of rent.*—When default has been made in the payment of rent and the saleable interest of the defaulting tenant in the land is attached, the attachment cannot be declared invalid in a summary suit under s. 17 of the Rent Recovery Act. Under s. 38 of the same Act a landlord cannot attach the saleable interest of a defaulting tenant in the land until the expiry of the current revenue year. THAYAMMA *v.* KULANDAVELU, 12 M. 465 ... 673

(18) S. 27, Order under—Civil Procedure Code, s. 2—Decree—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 248.

(19) *S.* 78—*Limitation Act—Act* XV *of* 1877, *ss.* 4, 6, 14—*Proceedings* bona fide *prosecuted in a Court without jurisdiction—Rent claimed by landlord not having tendered legal patta.*—A landlord not having tendered a legal patta to his tenant, made a demand on him as for rent, and, on his

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refusal to pay, attached his holding. The tenant, to release the attachment. paid the sum demanded under protest on 23rd September 1885. On 22nd March 1886 the tenant filed a suit on the small cause side of the District Munsif's Court to recover the amount so paid: that suit was dismissed for want of jurisdiction on 2nd September 1886. On the last mentioned date the tenant filed the present suit on the same cause of action :—*Held*, (1) the suit was not barred by limitation under the six months' rule in s. 78 of the Rent Recovery Act by reason of the provisions of s 14 of the Limitation Act, 1877 ; (2) the landlord not having tendered a legal patta, was not in a condition to establish any right to recover rent directly or by way of set off. KULLAYAPPA v. LAKSHMIPATHI, 12 M. 467 675

Act III of 1869 (Revenue Summons, Madras).

(1) *Penal Code, s. 174—Disobedience to lawful order of public officer—Summons by Revenue officer to give evidence in pauperism inquiry—Standing Order of Board of Revenue (Madras), No. 48a.*—The accused, who were parties to a petition pending in a District Court, were summoned by a tahsildar to give evidence on an inquiry by him as to whether or not the petitioner was a pauper ; they omitted to attend on the summons, and were charged in respect of such non attendance under s. 174 of the Indian Penal Code and were convicted :—*Held*, the conviction was bad, the tahsildar not being authorised to issue the summons under Act III of 1869 (Madras). QUEEN-EMPRESS v. VARATHAPPA CHETTI, 12 M. 297=1 Weir 98 ... 556

(2) *Ss. 2, 3—Service of Summons.*—Where a summons to a witness, issued under Act III of 1869 (Madras), was shown to a person and taken back :—*Held* that the summons had not been served. KUPPAN, *In re*, 11 M. 137=1 Weir 100 ... 96

Act V of 1878 (City of Madras, Municipal).

(1) *S. 103—Exercise of calling—Investment of funds of society—Sch. A, class 1 (A), (B)—Benefit Society.*—The business of investing the funds of a society for interest is a calling within the meaning of s. 103 of the Madras Municipal Act, 1884. A society established to provide by the subscriptions of its members for pensions for their widows and children is a benefit society within the meaning of Sch. A, class 1 (A) of the said Act. Where the context discloses a manifest inaccuracy, the sound rule of construction is to eliminate the inaccuracy and to execute the true intention of the legislature. JENNINGS v. THE PRESIDENT, MUNICIPAL COMMISSION, MADRAS, 11 M. 253=11 Ind. Jur. 369 ... 176

(2) *S. 318—President, sole judge of necessity of cleansing tank likely to prove injurious to health.*—By s. 317 of the City of Madras Municipal Act, 1878, the President of the Municipal Commissioners was invested with a discretion as to the necessity of cleansing and filling up tanks and wells and draining off stagnant water likely to prove injurious to the health of the neighbourhood ; and by s. 318 was empowered on neglect of the owner to comply with a requisition to do the necessary work. to get the work done and to recover the costs in the manner provided for the collection of taxes. No appeal was allowed by the Act against the President's decision:—*Held*, in a suit by the Municipal Commissioners to recover from the defendants the cost of draining and cleansing a tank, that it was not open to the defendants to prove that the tank was not likely to prove injurious to the health of the neighbourhood. THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS v. PARTHASARADI, 11 M. 341 ... 237

(3) *Sch. A—Liability of Mutual Assurance Company to taxation.*—The investment for interest of the funds of a Mutual Insurance Company by its directors constitutes "carrying on business for gain" and the premia paid by insurers and the profits from investments thereof constitute the "capital" of the company within the meaning of sch. A of the City of Madras Municipal Act, 1884. MADRAS EQUITABLE ASSURANCE COMPANY v. THE PRESIDENT, MUNICIPAL COMMISSION, MADRAS, 11 M. 238=11 Ind. Jur. 373 ... 165

Act V of 1882 (Forest, Madras).

(1) *Ss. 4, 7, 16, 21.*—A claim put forward to part of certain land notified for reservation under the Madras Forest Act originally rejected, was held to be valid by the District Court, on appeal. The High Court set aside the

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decision of the District Court, and directed that the appeal be reheard. Pending the rehearing, a lessee of the claimant felled trees on the land and was charged under s. 21 (a) with the offence of making a fresh clearing prohibited by s. 7 of the Act. The Magistrate acquitted him on the ground that there was no order in writing served on him by the Forest Department prohibiting him from felling trees pending the rehearing: *Held*, that the acquittal was wrong. QUEEN-EMPRESS v. NARASIMMAYYA, 12 M. 338=1 Weir 760 ... 585

(2) S. 6—*Tree patta—Occupier of land.*—The holder of a tree patta is a known occupier of land within the meaning of s. 6 of the Madras Forest Act. REFERENCE UNDER MADRAS FOREST ACT, S. 39, 12 M. 203=1 Weir 758 492

(3) Ss. 6, 10, 16, 21—*Tree patta—Trespass.*—The holder of a patta of certain trees on land which had been declared a reserved forest was convicted of trespass under the Madras Forest Act on proof that he had continued to gather the produce of the trees: *Held*, that the conviction was bad for want of proof, that the petitioner's claim had been duly disposed of, or that he had not preferred his claim within the period required by law. QUEEN-EMPRESS v. RAMI REDDI, 12 M. 226=1 Weir 761 ... 507

(4) S. 10—*Decision as to title to land, appeal to High Court from decision of District Court on appeal—Boundary Act, 1860, s. 25—Reg. V of 1804—Representation of minor by manager of estate—Decision of Boundary Officer res judicata, if not contested by suit under s. 25.*—An appeal lies to the High Court from a decision of a District Court passed under s. 10 of the Madras Forest Act, 1882, on appeal from the decision of a Forest Settlement Officer. A Survey Officer in 1875 held an enquiry under the Boundary Act, 1860 and demarcated certain land out of a zamindari. At that time the zamindar was a minor under the Court of Wards and he was represented at the enquiry by the manager of his estate appointed under s. 8 of Reg. V of 1804. In a suit brought by the zamindar to recover the land it was contended that the decision of the Survey Officer was not binding on the zamindar because he was not properly represented by his guardian at the enquiry—*Held*, that the decision of the Survey Officer was binding on the zamindar, and that the matter in dispute was *res judicata*, no appeal by way of suit as provided by the Boundary Act, 1860, s. 25, having been brought. KAMARAJU v. THE SECRETARY OF STATE FOR INDIA, 11 M. 309 (F.B.) ... 215

(5) S. 10—*Procedure—Remedy by ordinary suit barred.*—Where by an act of legislature powers are given to any person for a public purpose from which an individual may receive injury if the mode of redressing the injury is pointed out by the statute, the ordinary jurisdiction of Civil Courts is ousted, and in the case of injury the party cannot proceed by action. Plaintiff sued in a Munsif's Court to cancel the decision of Forest Officer confirmed by a District Judge under s. 10 of the Madras Forest Act, 1882, and to recover certain lands a claim to which had been rejected under the said section. *Held*, that the Munsif had no jurisdiction to entertain the suit. RAMACHANDRA v. THE SECRETARY OF STATE, 12 M. 105=13 Ind. Jur. 50 ... 422

(6) S. 26—*Canara Forest Rules, Nos. 7, 12, 23.*—The accused, not having a permit, cut certain classified trees on the *kumaki* adjoining his land and used the wood in his still as fuel; and upon these facts he was convicted of an offence against rules 7, 12 and 23: —*Held*, that the conviction was illegal. QUEEN-EMPRESS v. SHEREGAR, 13 M. 21=1 Weir 767 ... 725

(7) S. 33—"*Jointly interested.*"—The Government having possession of a forest under a mortgage is jointly interested therein with the mortgagor within the meaning of Madras Forest Act, s. 33. ASHTAMURTHI v. SECRETARY OF STATE FOR INDIA, 13 M. 322 ... 936

(8) *Rules 7 and 12—Removal of leaves from classified trees no offence.*—The mere removal of leaves from classified trees on unreserved land does not constitute a breach of rule 12 of the Madras Forest Act, 1882. QUEEN-EMPRESS v. SIVANNA, 11 M. 139=1 Weir 765 ... 97

Act IV of 1884 (Madras District Municipalities). PAGE

(1) S. 41—See PENAL CODE (ACT XLV OF 1860), 13 M. 131.

(2) *Ss.* 49, 50, 53, 101—*Municipal tax—Wrongful assessment of profession tax—Jurisdiction of Small Cause Court—Provincial Small Cause Courts Act—Act* IX *of* 1887, *Sch.* II, *paragraph* 1—*Order of a Local Government.*—The Municipality at Tuticorin demanded Rs. 50 as profession tax from the South Indian Railway Company which had already paid profession tax to the Municipality at Negapatam. The Company complied with the demand under protest and sued the Municipality for a refund of the amount paid on the Small Cause Side of the District Munsif's Court :—*Held*, (1) the Court had jurisdiction to hear and determine the suit; (2) the Municipality at Tuticorin had no right to levy the tax on the Railway Company and the decree directing the amount levied to be refunded was correct. TUTICORIN MUNICIPALITY v. SOUTH INDIAN RAILWAY, 13 M. 78 ... 765

(3) *S.* 103—*Attachment of moveable property—Doors of a house.*—The doors of a house are not attachable as moveable property under District Municipalities Act (Madras), s. 103. QUEEN-EMPRESS v. SHAIK IBRAHIM, 13 M. 518 ... 1074

(4) *S.* 173—*Obstruction of public street.*—S. 173 of the District Municipalities Act, 1884 (Madras), provides that no person shall deposit anything so as to cause obstruction to the public in any street without the written permission of the Municipal Council :—*Held*, that the depositing by any person of an article in the street without the permission of the Municipal Council amounted to an obstruction. QUEEN-EMPRESS v. BOLAPPA, 11 M. 343 =2 Weir 389 ... 951

Act V of 1884 (Madras Local Boards).

Ss. 128, 156—*Suit for malicious prosecution against officers of panchayat union—Notice of suit.*—A suit was brought against the chairman and accountant of a panchayat union for damages for malicious prosecution more than six months after the close of the criminal proceedings :—*Held*, (1) that the defendants were liable for torts committed by them, and that notwithstanding Local Boards Act, s. 128, the plaintiff was not confined to his remedy against the Taluk Board; (2) that Local Boards Act, s. 156, was not applicable unless it were proved that the Act complained of was done by servants of the Taluk Board within the scope of their authority as such, acting or purporting to act under the Act. ANNAJI v. SUBRAMANYA, 13 M. 442 ... 1020

Act I of 1886 (Madras Abkari).

(1) *Ss.* 9, 11, 55.—Under the Madras Abkari Act, 1886, a permit is not necessary where toddy is carried from the licensee's trees to his shop within the limits of his farm, or where, the licensee having a general permit, the persons carrying the toddy are in his employment. QUEEN-EMPRESS v. SAMBOJI, 11 M. 472 (F.B.) = 1 Weir 633 ... 329

(2) *Ss.* 29, 55 (*e*)—*Rule forbidding delegation by licensee of authority to draw toddy*, ultra vires.—Under s. 29 of the Madras Abkari Act, the Governor in Council made and published a rule on 8th February 1887, whereby it was declared that no license-holder could delegate his authority to draw toddy, unless under exceptional circumstances, to any person : B, the son of a licensee drew toddy with his father's permission. He was convicted under s. 55 (*e*) of the Act :—*Held* that the rule was *ultra vires* and the conviction bad. QUEEN-EMPRESS v. BELLARA, 11 M. 250 (F.B.) = 1 Weir 638 ... 174

(3) *Ss.* 55 (*a*), 69—*Rules notified by Government under Abkari Act—Rules for "immediate" removal of toddy.*—Toddy-drawers failing to remove their toddy to a shop or distillery "within a reasonable time" after it is drawn, are punishable under s. 55 (*a*) of the Abkari Act, though their licenses do not refer to the Government notification, made under the Act, prescribing its immediate removal. QUEEN-EMPRESS v. JAMMU, 12 M. 450 = 1 Weir 635 ... 663

Act I of 1887 (Malabar Compensation for Tenants' Improvement). PAGE

(1) *Ss.* 1, 2, 4, 6—*Mode of assessing compensation for improvements.*—The sum to be allowed for compensation for a tenant's improvements under Act I of 1887 (Madras) is not to be determined by capitalizing either the annual rent or the annual increment due to the improvement, but a reasonable sum should be awarded, assessed with reference to the amount by which the market value or the letting value or both has been increased thereby ; and the Court should take into consideration the actual condition of the improvement at the time of the eviction, its probable duration, the labour and capital which the tenant has expended in effecting it and any reduction or remission of rent or other advantage which the landlord has given to the tenant in consideration of the improvement. In the absence of evidence as to the actual market value in the place where the land is situated, the reasonable mode of estimating the compensation consists in taking the cost of the improvement and interest thereon and in adjusting the compensation to be awarded with reference to the matters specified in s. 6. VALIA TAMBURATTI v. PARVATI, 13 M. 454 ... 1028

(2) *S.* 7—*General Clauses Act, s.* 6.—A suit to recover property in Malabar demised on kanom was pending when the Malabar Compensation for Tenants' Improvements Act came into force :—*Held*, on the construction of ss. 1, 5, and 7, that the tenants' right to compensation should be dealt with in accordance with the provisions of that Act. MALIKAN v. SHANKUNNI, 13 M. 502 ... 1062

Act I of 1889 (Madras Village Courts).

S. 13—Civil Procedure Code, s. 15—Jurisdiction of Small Cause Courts to hear suits cognizable by Village Munsif—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 145.

Adverse Possession.

(1) See HINDU LAW—JOINT FAMILY, 12 M. 292.

(2) See LIMITATION, 11 M. 416.

Agency.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 424.

Agreement.

See LIEN, 12 M, 69.

Aliyasantana Law.

(1) *Qualification of ejaman—Leprosy.*—The last female member of an Aliyasantana family made an adoption without the consent of her son, who was suffering from ulcerous leprosy, which was not congenital :—*Held*, the son was entitled to have the adoption set aside. CHANDU v. SUBBA, 13 M. 209 ... 857

(2) *Yajaman—The rights of the senior member of the family being a female.*—The senior member of an Aliyasantana family, if a female, is prima facie entitled to the yajamanship ; and, in the absence of a special family custom or a binding family arrangement to the contrary the management of the family affairs by another member is to be presumed to be by the sufferance of the yajaman for the time being. MAHALINGA v. MARIYAMMA, 12 M. 462 ... 671

Alluvion.

See ACCRETION, 13 M. 369.

Alteration.

In bond—Suit—Materiality of alteration—Fraud—Evidence.—Suit on a bond, the date of which had been altered from 11th September to 25th September, while it was in the possession of the plaintiff. Fraud was not proved, and the period of limitation reckoned from the 11th September had not expired :—*Held*, that the bond was void as such, and was not receivable in evidence to prove the debt. GOVINDASAMI v. KUPPUSAMI, 12 M. 239 ... 516

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Amendment.

(1) Of plaint—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 11 M. 42; 11 M. 94; 11 M. 106; 12 M. 481.

(2) See SPECIFIC RELIEF ACT (I OF 1877), 12 M. 136.

Appeal.

1.—GENERAL.

2.—CROSS APPEAL.

3.—SECOND APPEAL.

4.—TO PRIVY COUNCIL.

——— ***1.—General.***

(1) See ACT I OF 1871 (CATTLE TRESPASS), 11 M. 359.

(2) See CIVIL PROCEDURE CODE, (ACT XIV OF 1882), 11 M. 85; 11 M. 130; 12 M. 186; 12 M. 211; 12 M. 454; 12 M. 472; 12 M. 489; 12 M. 511; 13 M. 338; 13 M. 492; 13 M. 504.

(3) See JURISDICTION, 13 M. 25.

(4) See LIMITATION ACT (XV OF 1877), 12 M. 479.

——— ***2.—Cross Appeal.***

See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 255.

——— ***3.—Second Appeal.***

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 M. 116; 12 M. 125.

(2) See COURT FEES ACT (VII OF 1870), 13 M. 508.

(3) See HINDU LAW—ADOPTION, 12 M. 214.

(4) See HINDU LAW—JOINT FAMILY, 13 M. 47.

(5) See JURISDICTION, 13 M. 273.

——— ***4.—To Privy Council.***

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 349.

Apportionment.

Transfer of Property Act, ss. 130, 135, 136, 137—*Limitation Act, Sch. II, Art.* 116.—There is no foundation for the suggestion that, where two actionable bonds are bought together for Rs. 4,500 and only Rs. 950 are recovered upon one of them the assignee is precluded from recovering the difference, but that he must submit to a loss arising from an apportionment. RATHNASAMI v. SUBRAMANYA, 11 M. 56 ... 39

Arbitration.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 M. 113.

Arbitrator.

See ACT XXVIII OF 1860 (MADRAS BOUNDARY MARKS), 12 M. 1.

Army Act, 1881.

S. 144—*Sub-Conductor, Ordnance Department, is a soldier—Civil Procedure Code*, s 468.—A Sub-Conductor of Ordnance on the Madras Establishment of Her Majesty's Indian Military Forces, holding a warrant from the Government of Madras, is a soldier within the meaning of s. 144 of the Army Act, 1881. In a suit to recover Rs. 183-7-0, a summons having been sent by the Court to the Commissary of Ordnance to be served on the defendant, his subordinate, the Commissary of Ordnance returned the summons unserved and referred to s. 144 of the Army Act, 1881, as his reason for such action:—*Held*, that the Commissary of Ordnance was bound to serve the summons under s. 468 of the Code of Civil Procedure, although the defendant might be entitled to the privilege given by s. 144 of the Army Act, 1881. ABRAHAM v. HOLMES, 11 M. 475 ... 331

Attachment.

(1) See ACT XVII OF 1864 (OFFICIAL TRUSTEES), 12 M. 250.

(2) See ACT VIII OF 1865 (MADRAS RENT RECOVERY), 12 M. 465.

Bangalore.

See JURISDICTION, 12 M. 39.

Bond.

(1) See ALTERATION, 12 M. 239.
(2) See LIMITATION ACT (XV OF 1877), 12 M. 192.

Bull.

Sacred, property in—See PENAL CODE (ACT XLV OF 1860), 11 M. 145.

Burden of Proof.

(1) See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 12 M. 366.
(2) See HINDU LAW—ALIENATION, 13 M. 51.
(3) See HINDU LAW—INHERITANCE, 12 M. 442.
(4) See MUHAMMADAN LAW—PARTITION, 12 M. 380.

Canara.

(1) Evidence Act, s. 116—Estoppel—Landlord and tenant—Kumaki land—Unassessed waste reclaimed by plaintiff—Patta granted to defendant—See EVIDENCE ACT (I OF 1872), 12 M. 422.
(2) See ALIYASANTANA LAW, 12 M. 462.

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Caste.

See HINDU LAW—MARRIAGE, 12 M. 72.

Cause of Action.

See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 12 M. 134.

Champerty.

Bona fide *litigation—Absence of corrupt motive—Inadequacy of price.*—In consideration of a loan of Rs. 30 made by plaintiff to defendant to enable defendant to recover from strangers certain land, defendant sold to plaintiff a portion of the said land, the value of which was about Rs. 100. The District Court held that the transaction was champertous and dismissed a suit by plaintiff to enforce his rights.—*Held*, that the inadequacy of the price was not of itself sufficient to invalidate the transaction. GURUSAMI v. SUBBARAYA, 12 M. 118 ... 431

Charitable Endowment.

Trust property sold in execution—Rights of heirs of the creator of the trust against execution purchaser.—A trust-deed of certain property executed by a member of a Hindu family provided that neither he nor his heirs should incumber or alienate it, but that in case of necessity his heirs might maintain themselves out of the income while administering the trust of a certain charity. The provisions of the trust were not proved to have been observed by the settlor or his family, and the settlor on one occasion disclaimed the trust. The trust property was attached and sold in execution of personal decrees passed against the settlor and another member of his family. The widow of the latter, after the death of the settlor, sued to recover the land from the execution purchaser as heir to the settlor:—*Held*, the plaintiff was not entitled to recover the land. SUPPAMMAL v. THE COLLECTOR OF TANJORE, 12 M. 387 = 13 Ind. Jur. 331 ... 619

Civil Procedure Code (Act VIII of 1859).

(1) S. 246—*Limitation Act—Act* IX *of* 1871, *sch.* II, *art.* 15—*Act* XV *of* 1877, *sch.* II, *arts.* 11, 13—*Objection to execution.*—A petition under s. 246 of the Code of Civil Procedure of 1859, objecting to the execution of the decree by the attachment of certain land on the ground that the land was the property of the petitioner, was heard and dismissed in July 1875. In July 1877, within twelve years from the dispossession of the objector, he filed a suit against the decree-holder who had purchased at the execution sale, for the possession of the land held by him as purchaser at the execution sale:—*Held*, that the suit was not barred by limitation. NARASIMMA v. APPALACHARLU, 12 M. 294 ... 554

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(2) *S.* 259—*Certificate of sale—Registration Act*, 1866, *s.* 49—*Proof of title without production of certificate.*—Omnia presumuntur rite esse acta.—Assuming that s. 49 of the Registration Act, 1866, required that a certificate of the sale of the land in execution of a decree passed under the Civil Procedure Code, 1859, should be registered, a plaintiff who has purchased land at such a sale is not bound to rely on the certificate to prove his title. If it is proved *aliunde* that the sale took place and that possession was given, the Court should presume, after long lapse of time and possession by a mortgagee of the purchaser, that the sale was duly made by the Court. VELAN v. KUMARASAMI, 11 M. 296 ... 206

Civil Procedure Code (Act XIV of 1882).

(1) *S.* 2—*Rent Recovery Act (Madras)—Act VIII of* 1865, *s.* 27—*Order under—Decree.*—An order made under Rent Recovery Act (Madras), s. 27, is not a decree within the meaning of Civil Procedure Code, s. 2. PERUMAL v. RAJAGOPALA, 13 M. 248 ... 884

(2) Ss. 2, 262, 272—Official Trustees' Act (XVII of 1864)—Public Officer—Attachment by notice—See ACT XVII OF 1864 (OFFICIAL TRUSTEES), 12 M. 250.

(3) S. 11—Hindu Widow Re-marriage Act (Act XV of 1856, s. 5)—Hindu law—Widow re-marriage—Exclusion from temple—Excommunication—Jurisdiction—See ACT XV of 1856 (HINDU WIDOW RE-MARRIAGE), 13 M. 293.

(4) *S.* 11—*Right to an office in a temple.*—Plaintiffs sued for an injunction to prevent defendant from interfering with their right to present to certain persons at a certain festival in a certain temple a crown and water. The lower Courts found that plaintiffs possessed the right claimed and granted the injunction :—*Held*, that the suit was cognizable by a Civil Court under s. 11 of the Code of Civil Procedure, and that the injunction was properly granted. SRINIVASA v. TIRUVENGADA, 11 M. 450 ... 314

(5) S. 13—Regulation VI of 1831, s. 3—Suit for a declaration as to land alleged to be nattamai maniyams—Jurisdiction of Revenue Courts—*Res judicata*—See REGULATION VI OF 1831, 13 M. 41. ...

(6) *S.* 13—Res judicata.—Certain land was attached and sold in execution of a decree against the dharmakarta of a devasthanam. One claiming to be the lawful successor in office of the judgment-debtor now sued the purchaser for a declaration that the sale was invalid :—*Held*, the suit should not be dismissed on proof that the plaintiff had failed to obtain a declaration of his right to the dharmakartaship against another claimant to the office, in a suit to which the present defendant was not a party. RAMALINGAM v. THIRUGNANA SAMMANDHA, 12 M. 31 .. 567

(7) S. 13—Res judicata—*Cause of action—Limitation Act—Act XV of* 1877, *sch.* II, *art.* 91—*Suit to cancel a document.*—On 23rd March 1878, plaintiff executed to defendant a document purporting to be a deed of gift. In 1886 plaintiff sued to cancel the document alleging that defendant on 11th May 1881 had agreed to execute a release but had not done so; that suit was dismissed for non payment of duty due under the Court Fees Act. The plaintiff now sued in 1887 for a declaration that the document "was executed for nominal purposes and was not intended to take effect":—*Held*, (1) that since the cause of action in the suits of 1886 and 1887 were not the same, the claim in the latter suit was not *res judicata*; (2) that the suit was not barred by limitation. NAGATHAL v. PONNUSAMI, 13 M. 44 .. 741

(8) S. 13—Res judicata—Competent Court—Pecuniary valuation of suit—Court Fees Act, s. 13, sch. II, art. 17 (iii)—Suit for declaratory decree—See COURT FEES ACT (VII OF 1870), 12 M. 223.

(9) *S.* 13—Res judicata—*Declaratory decree—Maintenance suit, decree in—Annual payments.*—A Hindu widow obtained a decree in 1876 which provided that she should receive future maintenance annually at a certain rate, but did not specify any date on which it should become due. In 1887, she filed the present suit claiming arrears of maintenance at the rate fixed in the decree of 1876. *Held*, that the suit did not lie. VENKANNA v. ATTAMMA, 12 M. 183 ... 477

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(10) S. 13—*Res judicata*—Decree in suit by a karnam binds his successor—See KARNAM, 12 M. 235.

(11) *S.* 13—Res judicata—*Issue decided in former suit, in which parties were rival defendants claiming under different titles.*—B. sued L.N. and P. V. to recover certain property claimed under a nuncupative will of his father N. P.V. denied the will and alleged that the property was ancestral and had vested in him by survivorship. L.N. set up title to the property under a will in writing executed by N. and denied the title both of B. and of P.V. The question whether P.V. was divided or not from N. was tried. It was found that the will in writing was valid, that P.V. was divided, and that B's title was not proved. In a suit by L.N. against P.V. to recover certain land granted to her by the will executed by N.:—*Held,* that the question whether P.V. was divided from N. was *res judicata* under s. 13 of the Code of Civil Procedure by reason of the decision in the former suit, although in that suit P V. and L. N. were both defendants. VENKAYYA v. NARASAMMA, 11 M. 204 ... 142

(12) Res judicata—*Partition suit—Non-joinder—Declaratory decree.*—A suit for partition of certain land was withdrawn as against one of the defendants who was entitled to part of the land. The plaintiff and the remaining defendants entered into a compromise in the terms of which the Court passed a decree for delivery of a share of the land to the plaintiff. The decree-holder having died without executing the decree, his heir now sued for partition of the land and delivery of the above share, joining as defendants the various persons entitled to shares:—*Held,* that the decree in the former suit could only operate as a declaratory decree and did not preclude the plaintiff from bringing the present suit. BEEMABAI v. YAMUNABAI, 13 M. 313 ... 930

(13) *S.* 13—Res judicata—*Previous suit dismissed as premature.*—A suit by the assignee of a mortgaged bond against the mortgagor was dismissed on the ground that the plaintiff was not entitled to sue for want of notice to the defendant under s. 132 of the Transfer of Property Act. The plaintiff then gave express notice of the assignment to the mortgagor and sued on the bond again:—*Held,* the claim was not *res judicata,* and the second suit was accordingly not precluded by s. 13 of the Code of Civil Procedure. RAMIREDDI v. SUBBARADDI, 12 M. 500=13 Ind Jur. 376 .. 698

(14) S. 13—*Res judicata*—Rent Recovery Act (Madras)—Decision of Revenue Court as to landlord's title—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 13 M. 287.

(15) *S.* 13, *expl. V.*—Where the uraima right over a certain devasam was vested in five trustees representing different illams, and a suit was brought by one of the trustees to recover certain property alleged to have been illegally alienated by three other trustees to a stranger and dismissed:—*Held,* that the decree in such suit was a bar to a second suit brought for the same purpose by the fifth trustee, who had not been a party to the former suit, on the ground that he must be deemed to claim under the plaintiffs in the former suit within the meaning of s. 13, expl. V, of the Code of Civil Procedure. MADHAVAN v. KESHAVAN, 11 M. 191 ... 133

(16) *Ss.* 13, 102, 158—*Failure to pay Commissioner's fee*—Res judicata.—A suit for land was dismissed in 1886 on the plaintiff's failure to comply with an order to pay a fee for the appointment of a commissioner to value the land. No issues were framed in the suit, and the order directing payment of the fee prescribed no time within which it was to be made. The plaintiff now sued the defendants again for the same land:—*Held,* that the claim was not *res judicata.* SHAIK SAHEB v. MAHOMED, 13 M. 510 ... 1067

(17) *S.* 15—*Act* I *of* 1889, *s.* 13—*Jurisdiction of Small Cause Courts to hear suits cognizable by Village Munsif.*—The term "Court of lowest grade" in Civil Procedure Code, s. 15, refers only to Courts to which the Civil Procedure Code is applicable, and consequently Small Cause Courts have concurrent jurisdiction with Courts of Village Munsifs to hear suits which are cognizable by the latter. MIRKHAN v. KADARSA, 13 M 145 ... 813

(18) *S.* 25—*Order made under, without notice to the party not applying—Jurisdiction by consent—Waiver of want of jurisdiction.*—A suit for land was filed in 1883 in the Subordinate Court of Cochin. In 1884 the Government, by

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a notification under Act III of 1874, transferred the district where the land was situated from the jurisdiction of that Court to that of the Subordinate Court of Calicut, whereupon the plaintiff applied to the District Court to transfer the case to the file of the first-mentioned Court under s. 25 of the Code of Civil Procedure. The District Judge granted the application without notice to the defendants. The defendants went to trial, and also preferred an appeal against the decree, which was passed in favour of the plaintiff, without objection to the jurisdiction of the Court. In execution of the above decree (which was affirmed on appeal), the plaintiff was obstructed. He, therefore, filed the present suit against the obstructors under the provisions of s. 331 of the Code of Civil Procedure, and they pleaded that the decree sought to be executed had been passed without jurisdiction :—*Held*, (1) that the want of notice to the defendants of the application made under s. 25 of the Code of Civil Procedure was immaterial; (2) that the defect, if any, of the jurisdiction of the Court passing the decree had been waived by the defendants, and that the present defendants were precluded from availing themselves of it. SANKUMANI v. IKORAM, 13 M. 211 ... 859

(19) *Ss.* 31, 53—*Public right—Amendment of plaint.*—A sued for an injunction to restrain interference with his right to graze cattle on the bed of a certain tank. The other raiyats of the village in whom the same right vested were originally joined as plaintiffs, but the plaint was amended under s. 53 of the Code of Civil Procedure, and their names were struck off the record. A proved no special damage :—*Held* (1) that the fact that the other ryots of the village have similar rights does not make A's right a public right in the sense that no action can be brought upon it unless special damage is proved; (2) that the right claimed vests in A severally as well as jointly with the other raiyats, and the amendment of the plaint was not contrary to the provisions of s. 31 or 53 of the Code of Civil Procedure. VENKATACHALA v. KUPPUSAMI, 11 M. 42 ... 30

(20) *S.* 32—*Joinder of new defendant.*—Suit upon a bond of which the obligor was therein described as the manager of a certain mutt. The defendants, who were the sons of the obligor (since deceased), pleaded that the debt was contracted by their father for the benefit of the mutt and as manager of the mutt. The Judge ordered that the representative of the mutt be joined as defendant in the suit under s. 32, and subsequently a decree was passed against him :—*Held*, that the order under s. 32 was right, although the plaint had prayed for no relief against the mutt. THIRTHASAMI v. GOPALA, 13 M. 32 ... 732

(21) *Ss.* 32, 588 (2)—*Appeal against order that a plaintiff be made defendant.*—An appeal lies under Civil Procedure Code, s. 588 (2), against on order under s. 32 that a plaintiff be made defendant. LAKSHMANA v. PARAMASIVA, 12 M. 489 ... 690

(22) *S.* 43.—The plaintiff having obtained a decree against the defendants for the payment to her of a monthly sum for her maintenance, subsequently sued to have it constituted a charge on certain land :—*Held*, that the claim in both suits arose out of the same cause of action, and, therefore, the plaintiff was precluded by s 43 of the Code of Civil Procedure from asserting in the second suit the claim which she might have asserted in the first. RANGAMMA v. VOHALAYYA, 11 M. 127 ... 89

(23) *S.* 43.—A leased certain land to B. The lease expired in 1877, B continued to hold over and refused to accept a fresh lease from A. A sued B in 1882 for mesne profits for three years, but did not claim possession of the land. The suit was dismissed on a preliminary point. A then sued B to recover possession of the land and mesne profits. It was argued that A's claim to the land was barred by s. 43 of the Code of Civil Procedure, because he omitted to claim the land in the former suit for mesne profits :—*Held*, that the suit was not barred. TIRUPATI v. NARASIMHA, 11 M. 210 ... 146

(24) *S.* 43—*Claim for mesne profits received prior to date of former suit for land.*—Where a suit to recover land was brought and no claim was made for mesne profits received prior to date of plaint :—*Held*, that s. 43 of the Code of Civil Procedure was a bar to a subsequent suit for such mesne profits. VENKOBA v. SUBBANNA, 11 M. 151 ... 105

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(25) *S. 43—Hindu law—Maintenance—Suit to declare maintenance fixed by a decree a charge on land.*—A Hindu woman having obtained a decree for maintenance against her husband, now alleged that he had alienated part of his property with a view to defeat her claim for maintenance, and sued him for a declaration that certain land which he had not alienated was liable for her maintenance :—*Held*, that no cause of action was shown. SAMINATHA v. RANGATHAMMAL, 12 M. 285 ... 548

(26) *Ss. 43, 244—Separate suit on disallowance of objection to execution—Evidence Act, s. 44—Competent Court.*—In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected under s. 244 of the Code of Civil Procedure to the attachment of certain lands to which he set up independent title. The objection was disallowed and the land was sold. She then sued the execution purchaser to set aside the Court-sale and obtained a decree against which no appeal was preferred. She now sued for possession :—*Held*, that the suit lay notwithstanding the order under s. 244. *Per cur.*—The words "not competent" in s. 44 of the Evidence Act refer to a Court acting without jurisdiction. KETLILAMNA v. KELAPPAN, 12 M. 228 ... 509

(27) Civil Procedure Code, s. 45—Suit for declaration—Multifariousness—Suit by junior members of tarwad—See MALABAR LAW—KARNAVAN, 12 M, 234.

(28) S. 50—Inconsistent cause of action—Specific Relief Act—Act I of 1877, s. 40—Cancellation of instrument—Interest necessary to support the suit—See SPECIFIC RELIEF ACT (I of 1877), 13 M. 549.

(29) *Ss. 50, 53—Amendment of plaint—Change in form of suit, the cause of action being unchanged.*—The plaintiffs alleged that the defendants had encroached on the bed of a tank, raised embankments, and cultivated crops which interfered with the plaintiffs' supply of water; and they prayed for a decree ejecting the defendants from the land encroached on and restraining them from interfering with it :—*Held*, that the Court was not precluded by s. 53 of the Code of Civil Procedure, from passing a decree declaring the plaintiffs' right to the water of the tank, directing the defendants' embankments, and etc., to be removed and regulating the cultivation of their lands; but that the defendants' liberty of cultivation should not be restricted more than was necessary to secure the plaintiffs' supply of water. PULAMADA v. RAVUTHU, 11 M. 94 ... 66

(30) *S. 53—Rent Recovery Act (Madras)—Act* VIII *of* 1865—*Suit in Civil Court to enforce exchange of patta and muchalka—Declaratory decree—Amendment of plaint.*—A suit in the Court of a District Munsif to enforce acceptance of a patta and execution of a muchalka by defendant in respect of a holding in a village to which plaintiff claimed title, was dismissed as not being maintainable :—*Held*, that the suit should have been dismissed, but the plaint should have been amended by the addition of a prayer for a declaration of the plaintiff's title; and that the Court then would have had jurisdiction to grant by way of consequential relief the relief originally sought. NARASIMMA v. SURYANARAYANA, 12 M. 481 ... 684

(31) S. 53—Specific Relief Act, s. 42—Amendment of plaint—Suit to declare alienation by Hindu widow invalid—Death of widow pending appeal by plaintiff—Right of appellant to proceed with appeal—Plaint not to be amended by claim for possession.—See SPECIFIC RELIEF ACT (I of 1877), 12 M. 136.

(32)—*S. 54—Amendment of plaint—Multifarious suit—Malabar law—Stanom.*—A suit was brought by the junior members of a tarwad, which consisted of three stanoms and three tavaries, against the karnavan and others, including certain persons to whom he had alienated some tarwad property. The plaint, as originally framed, prayed (1) for the removal of the karnavan, (2) for a declaration that defendants Nos. 2 to 8, the senior anandravans, had forfeited their right of succession to him, (3) for the appointment of the plaintiff in his place, (4) for a declaration that his alienations were invalid as against the tarwad, and (5) for possession of the property alienated. Subsequently, the plaint was amended by the order of the Court by striking out items 2 and 5 of the prayer, and finally the plaintiffs further amended the plaint and sued only for a declaration that the alienations in question were invalid. The lower Court passed the declaratory decree prayed for :—*Held*, that the lower Court was wrong in allowing the

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plaint to be amended after the first hearing, because the case on which the decree was passed was essentially different from that disclosed in the plaint; and that the appeal must be allowed accordingly. *Per cur.*—The suit was not bad for multifariousness. The plaintiffs were competent to maintain the suit as dealt with by the lower Court if there was collusion between the senior anandravans and the alienees and the stani for the time being. Rights of members of a stanom *inter se*, considered. MAHOMED v. KRISHNAN, 11 M. 106 ... 74

(33) *S.* 57—*Return of plaint when Court has no jurisdiction.*—An appellate Court is not bound to return the plaint under all circumstances where defect of jurisdiction appears. YACOOB v. MOHAN SINGH, 11 M. 482=13 Ind. Jur. 13 ... 336

(34) *S.* 146—*Failure of plaintiff to prove unnecessary averments—Decree on admission of defendant—Unnecessary issues raised by Court.*—In a suit brought by an undivided member of a Hindu family to set a sale made by the managing member and to recover a moiety of the land sold, the plaintiff alleged that he had been adopted by his deceased uncle and claimed as adopted son. The purchaser denied the adoption, alleged that plaintiff was the natural brother of the vendor, and justified the sale under Hindu law. The lower Courts found that the adoption was not proved, and, on the plaintiff urging that if the adoption was not proved yet he was entitled to recover by virtue of the admission that he was the natural brother of the vendor, held that the latter claim was inconsistent with the claim as adopted son. The suit was therefore dismissed:—*Held*, on appeal, that the suit was improperly dismissed, and that if the purchaser could not justify the sale the plaintiff was entitled to succeed. The rule that the decree should be in accordance with what is alleged and proved, is intended to prevent surprise and is not applicable to a case in which the defendant's own admission is adopted as the ground of decision against him. APPAYYA v. RAMIREDDI, 11 M. 367=13 Ind. Jur. 12 ... 256

(35) *S.* 209—*Stipulated interest—Interest after filing plaint.*—A creditor having stipulated for interest at a certain rate is entitled to a decree for interest at that rate up to the date of decree. RAMCHANDRA v. DEVU, 12 M. 485... 687

(36) *Ss.* 223, 228, 249, 622—*Mofussil Small Cause Court Act* (*Act* XI *of* 1865), *ss.* 20, 21—*Execution proceedings—Appeal.*—The plaintiff obtained a decree in a Small Cause suit in a Subordinate Court in the Mofussil and a certificate was granted to him under s. 20 of the Mofussil Small Cause Court Act for the execution of the decree against immoveable property of the judgment-debtor in the jurisdiction of a District Munsif. He accordingly presented a petition to the District Munsif under s. 247 of the Code of Civil Procedure, but his petition was dismissed:—*Held*, that an appeal lay to the District Court. PERUMAL v. VENKATARAMA, 11 M. 130 ... 90

(37) *Ss.* 228, 239, 344, 360—*Application to be declared insolvent made to Court to which decree was transferred for execution.*—Where a decree had been transferred for execution from the Court of the District Munsif of E, to that of the District Munsif of B, and an application was made by the judgment-debtor under s. 344 of the Code of Civil Procedure to be declared an insolvent and entertained by the latter Court:—*Held*, that the District Munsif of B. had no jurisdiction to entertain the application. VENKATSAMI v. NARAYANARATNAM, 11 M. 301 ... 209

(38) *S.* 230—*Execution proceedings—Limitation.*—An application was made in 1886 for execution of a decree dated 1873. In the interval, *viz.*, in October 1879, the judgment-debtor was arrested on an application in execution by the decree-holder, but execution was not proceeded with further:—*Held*, that the application made in 1886 was time-barred under s. 230 of the Code of Civil Procedure. PATUMMA v. MUSE BEARI, 11 M. 132 ... 92

(39) *Ss.* 231, 232—*Joint decree-holder—Application for execution of decree—Limitation Act—Act* XV *of* 1877, *Sch.* II, *art.* 179.—A Hindu obtained in 1878 a decree for partition of certain property and applied in 1888 to have it executed. It appeared that the decree-holder's son, having obtained against him in 1881 a decree for a share of whatever he should acquire under the decree of 1878, had applied for execution of the last-mentioned decree; and

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reliance was now placed on that application to save the bar of limitation:—*Held*, that assuming the decree of 1881 had effected an assignment by operation of law of the decree of 1878, the father and son were not joint decree-holders within the meaning of Civil Procedure Code, s. 231, and the father's application for execution was barred by limitation. RAMASAMI v. ANDA PILLAI, 13 M. 347 ... 954

(40) Ss. 231, 258—Limitation Act—Act XV of 1877, ss. 7, 8, sch. II, art. 179—Minority—Execution of decree—See LIMITATION ACT (XV OF 1877), 13 M. 236.

(41) *S.* 232—*Order rejecting petition for execution by transferee of decree—No appeal from such order.*—A petition by one claiming to be the purchaser at a Court sale of the interest of a decree-holder under a decree, for execution of the decree was rejected:—*Held*, no appeal lay from the order rejecting the petition. SAMBASIVA v. SRINIVASA, 12 M. 511 ... 706

(42) S. 234—Hindu Law—Execution of a decree against the son of a Hindu judgment-debtor—Determination of questions as to the binding nature of the decree debt—See HINDU LAW—DEBT, 13 M. 265.

(43) *S.* 234—*Sale in execution of decree against deceased Muhammadan's estate—Representation of deceased by some only of his next of kin—Sale held to be valid.*—V, a Muhammadan woman, died, leaving her husband and several minor children as her representatives. In execution of a money decree obtained against V, the creditor attached certain land which belonged to V. and made her husband and two of her children parties to the execution proceedings. The land was sold and purchased by the decree-holder:—*Held*, in a suit brought by the children of V to set aside the sale on the ground, *inter alia*, that some of them were no parties to the proceedings in execution and that the others, being minors at the time, had not been represented by a guardian appointed by the Court, that the sale was valid. KUNHAMED v. KUTTI, 12 M. 90. ... 412

(44) *Ss.* 234, 332, 588—*Death of judgment debtor between order for possession in execution of decree and delivery of possession—Appeal against appellate order reversing an order under s.* 332.—A decree-holder in a District Munsiff's Court obtained an order for possession of land in execution of his decree on 20th August, on which day the judgment-debtor died. Possession was delivered on 28th August. The persons dispossessed presented a petition under s. 332 of the Code of Civil Procedure disputing his right to be put into possession, on the ground, *inter alia*, that the judgment-debtor was not represented on the record. On appeal against the appellate order of the District Judge:—*Held*, assuming that the order for possession was made prior to the death of the judgment-debtor, there was no necessity for the decree holder to bring any other person on to the record between the date of that order and the date on which the order was executed. BIYYAKA v. FAKIRA, 12 M. 211 ... 497

(45) *S.* 244—*Appeal against order—Nomination by a pandaram under a decree—Revocation of such nomination by the pandaram's successor.*—The pandaram of a mutt being empowered under a decree to nominate a person to be the head of a subordinate mutt, subject to the approval of the Subordinate Court, made a nomination and died before the Subordinate Court had come to a determination as to the fitness of his nominee. His successor in office was brought on to the record and revoked his nomination and made a fresh nomination. The Subordinate Court treated the fresh nomination as a nullity and made an order confirming the first. The pandaram appealed against this order:—*Held*, (1) that an appeal lay against the order complained of; (2) that the person, whose nomination had been confirmed, was a necessary party to the appeal; (3) that the nomination first made was revocable for good cause, and that the fitness of the person nominated by the appellant should be investigated by the Subordinate Judge. GNANASAMBANDA v. VISVALINGA, 13 M. 338 ... 947

(46) *S.* 244—*Execution proceedings—Limitation Act—Act* XV *of* 1877, *sch.* II, *arts.* 29, 61, 62, 97, 120.—In a suit of 1867 the present defendant obtained a decree for possession of a certain village and mesne profits for one year. Pending an appeal against that decree execution was stayed on the present plaintiff depositing a note for Rs. 15,000 as security. The decree was

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affirmed on appeal, and the present defendant had the note sold in execution and drew out of the proceeds a sum for mesne profits for subsequent years; but an appeal was preferred in the execution proceedings to the High Court which set aside the execution so far as concerned the mesne profits for the years subsequent to that to which the original decree related. The present plaintiff thereupon attached and sold the village to recover the balance; before that amount was paid to the present plaintiff the present defendant brought a suit against him in the District Court and there obtained a decree for mesne profits for the subsequent years and in execution drew the amount of the decree out of Court. In second appeal however the High Court on 26th September 1881 reversed the decree of the District Court, whereupon the present plaintiff applied for restitution under Civil Procedure Code, s. 583, which application was ultimately disallowed. The present suit was brought to recover the amount to which that application related :—*Held*, (1) that the suit was not barred by the provisions of Civil Procedure Code, s. 244; (2) that Limitation Act, sch. II, art. 120, was applicable to the suit, which having been filed on 9th August 1887 was accordingly not barred by limitation. NARAYANA v. NARAYANA, 13 M. 437 ... 1016

(47) S. 244—*Questions to be decided under—Hindu law—Obligation of son to pay debt of deceased father—Nature of obligation.*—D. obtained a decree against the father of A. and R., Hindus, on a hypothecation bond whereby certain land was pledged as security for repayment of a loan. The decree declared the land liable to be sold for repayment of the debt. The judgment-debtor having died before the decree was executed, A and R. were made parties to the proceedings in execution and the land was attached. A and R. objected to the attachment on the ground that their shares in the land were not liable to be sold in execution of the decree as they were not parties to the suit. This objection was allowed, and D. brought a suit for a declaration that the property was liable to be sold. That suit was dismissed on the ground that a suit for a declaration would not lie. D then sued to recover from A. and R. the balance due under the decree against their father after crediting the amount recovered by the sale of their father's share. It was objected that the suit was barred by s. 244 of the Code of Civil Procedure :—*Held*, that the duty of a son under Hindu law to pay his father's debt out of his own share of ancestral estate is not a matter which can be decided under s. 244 of the Code of Civil Procedure. The questions contemplated by s. 244 are those which relate to the enforcement of the obligation created by the decree. The obligation to pay the father's debts out of the son's share of the ancestral estate is not an obligation created by a decree against the father. ARIABUDRA v. DORASAMI, 11 M. 413 ... 288

(48) Ss. 244, 293, 306, 309, 588—*Court-sale—Liability of defaulting purchaser—Appeal from order under s.* 293—*Re-sale.*—At a sale in execution of a decree, a decree-holder, who had obtained leave to bid, was alleged to have made a bid through his agent of Rs. 90,000, but he shortly afterwards repudiated the bid and did not pay the deposit. The property was put up for sale again on the following day under s. 306 of the Code of Civil Procedure, and was in due course knocked down for a smaller sum. The judgment-debtor filed a petition under s. 293 to recover from the decree-holder the loss by re-sale; the petition was rejected. On appeal:—*Held* (1) that the question at issue was one arising between the parties to the suit and that an appeal lay against the order rejecting the petition; (2) that the property having been forthwith put up again and sold under s. 306 of the Code of Civil Procedure, was re-sold within the meaning of s. 293. VALLABHAN v. PANGUNNI, 12 M. 454 ... 666

(49) Ss. 244, 318, 334—*Petition by purchaser at Court-sale for possession—Obstruction—Appeal against order—Limitation Act—Act* XV *of* 1877, *sch. II, arts.* 167, 179.—On an application made in 1888 under Civil Procedure Code, s. 318, by the purchaser at a Court sale (who was the assignee of the decree which was being executed), praying for delivery of possession of the property purchased, it appeared that the sale took place in 1885, that it was confirmed in 1886, and that in January 1887 an order was made for delivery of possession to the purchaser. The judgment-debtor had resisted the purchaser's efforts to obtain possession in 1887 and set up in bar of

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the application in 1888 an oral agreement alleged to have been made between him and the purchaser. The application was rejected :—*Held*, (1) that an appeal lay against the order rejecting the application ; (2) that the application not being a complaint of obstruction, was not barred by limitation and should be heard and determined on the merits. MUTTIA v. APPASAMI, 13 M. 504 ... 1063

(50) *Ss.* 244, 462—*Execution proceedings—Decree by consent of guardian of minor defendant—Application to stay execution, &c., for want of sanction of Court under s.* 462—*No appeal lies from order rejecting such application.*—An application to stay execution of and to set aside a decree, passed with the consent of the guardian of a minor defendant, for want of sanction of the Court under s. 462, Civil Procedure Code, was rejected :—*Held*, no appeal lay against the order of rejection. ARUNACHELLAM v. MURUGAPPA, 12 M. 503 ... 700

(51) *Ss.* 244, 588, 629—*Review of judgment—No second appeal against an order under s.* 629.—When a Munsif set aside on review an order rejecting an objection to the execution of a certain decree, and the District Court on appeal refused to interfere :—*Held*, that no second appeal lay to the High Court. PAPAYYA v. CHELLAMAYYA, 12 M. 125 ... 436

(52) *Ss.* 253, 546, 586—*Surety for the due performance of appellate decree—Mode of enforcing liability of such surety—Execution proceedings.*—When security had been given on behalf of the respondent to an appeal under s. 546 of the Code of Civil Procedure for the due performance of the decree of the Appellate Court and the appeal had been successful :—*Held*, that under the provisions of ss. 253, 583, the decree of the Appellate Court could be enforced against the sureties in execution proceedings. THIRUMALAI v. RAMAYYAR, 13 M. 1 ... 711

(53) *S.* 257—*Practice—Order for payment of costs of day—Payment into Court or to party.*—Where a party to a suit was directed by the High Court to pay the costs of the day, and his solicitor paid the money into Court under s. 257 of the Code of Civil Procedure :—*Held*, that section was not applicable as the order was not a decree. SHANKS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 12 M. 120 ... 433

(54) *S.* 258.—In 1877, M. executed a mortgage to S. in consideration of a sum paid in cash and a debt due by M to S, under a decree. S. did not certify satisfaction of the decree to the Court under s. 258 of the Code of Civil Procedure, nor was this stipulated for in the instrument of mortgage : *Held*, in a suit to enforce the mortgage, that s. 258 was no bar to the plaintiff's right to recover. SELLAMAYYAN v. MUTHAN, 12 M. 61 ... 391

(55) *S.* 258—*Mortgage in satisfaction of decree—Adjustment not certified—Mortgage invalid.*—In a suit brought by a Hindu to recover certain land, defendant pleaded that he held the same under a mortgage granted to him by plaintiff's mother and guardian in satisfaction of a decree obtained against plaintiff's deceased father. Plaintiff contended that, as the mortgage was in adjustment of a decree and the adjustment had not been certified to the Court, the mortgage could not be recognized by virtue of s. 258 of the Code of Civil Procedure :—*Held*, that as there had been no certified adjustment of the decree, the mortgage could not prevail against plaintiff's claim. THIRUMALAI v. SUNDARA, 11 M. 469 ... 327

(56) *S.* 266—*Attachment—Standing crops—Immoveable property.*—Standing crops are, for the purposes of the Code of Civil Procedure, immoveable property. MADAYYA v. VENKATA, 11 M. 193 ... 134

(57) *S.* 266—*Unascertained interest in a partnership.*—The plaintiff having purchased at an execution sale the interest of the judgment-debtor in a partnership, of which the undivided father (deceased) of the judgment-debtor had been a member, now sued the other partners praying that an account be taken and that the share of the judgment-debtor be paid to him :—*Held*, that the execution sale was not bad in law and that the present suit was accordingly maintainable. PARVATHEESAM v. BAPANNA, 13 M. 447 ... 1023

(58) Ss. 268, 272—Official Trustees' Act (XVII of 1864), Public Officer—Attachment by notice—See ACT XVII OF 1864 (OFFICIAL TRUSTEES), 12 M. 250.

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(59) *S.* 272—*Post Office Act—Act XIV of* 1866, s. 5—*Attachment of letters in Post Office.*—An attachment was placed under Civil Procedure Code, s. 272, on letters in the post office addressed to certain judgment-debtors. The day before the attachment the senders of the letters had applied to have the letters returned to them :—*Held*, that the postmaster held the letters in trust for, or on behalf of, the judgment-debtors, and they were accordingly liable to attachment on the application of the decree-holder. NARASIMHULU v. ADIAPPA, 13 M. 242 ... 880

(60) *S.* 283—*Party to execution proceedings—Limitation Act—Act XV of* 1877, *sch.* II, *art.* 11.—A in execution of a decree against B attached a house. C intervened and the property was released from attachment. A then brought a suit against B and C to establish the title of B to the house and obtained a decree. B was *ex parte* throughout. In an appeal by C a decree was passed by consent of A and C reversing the decree appealed against. B now sued C and another, more than a year from the date of the order removing the attachment, to obtain a declaration of title to the house :—*Held*, that since there was nothing to show that the order releasing the attachment was an order against the plaintiff the suit was not barred by limitation. GURUVA v. SUBBARAYUDU, 13 M. 366 ... 967

(61) *Ss.* 294, 295.—M and C each obtained a decree against the same judgment-debtor and applied for execution. C., in execution of his decree, attached certain immoveable property, and, with the permission of the Court, purchased the same under s. 294 of the Code of Civil Procedure and set off his purchase-money against the decree. M claimed that the proceeds of the sale to C should be rateably distributed under s. 295 of the Code and that C should either elect to have the property resold or pay into Court the reteable proportion due to M. C objected to a resale or to pay :—*Held*, that C. might be compelled to refund the rateable amount due to M. by summary process in execution. MADDEN v. CHAPPANI, 11 M. 356 ... 248

(62) *S.* 311—*Alleged irregularity attending sale in execution—Failure to prove substantial injury resulting.*— A judgment-debtor having allowed the execution-sale of immovables to be completed without objecting on the ground afterwards alleged by him, *viz.*, insufficiency of description within the requirements of s. 287, he having been throughout aware of what the description was, the sale is not invalid on this ground alone without more. No evidence having been given in the Court executing the decree of substantial injury having resulted by reason of such irregularity *i.e.*, the alleged misdescription : *Held*, that although the Appellate Court below had assumed that the property had been sold for less than it ought to have fetched, such substantial injury as inadequacy of price should have been proved to have occurred in order to bring the case within s. 311. ARUNACHELLAM v. ARUNACHELLAM, 12 M. 19 (P.C.) = 15 I.A. 171 = 5 Sar. P.C.J. 265 = 12 Ind. Jur. 371 363

(63) *Ss.* 311, 588 (8)—An application under s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree having been dismissed for default, the petitioner applied to the Court to restore the application to the file. The Court having rejected this application, petitioner appealed against this order :—*Held*, that no appeal lay. RAJA v. STRINIVASA, 11 M. 319 ... 222

(64) *Ss.* 313, 315, 586—*Suit to recover purchase money—Suit by purchaser at Court-sale not of nature cognizable by Small Cause Court—Orders made not final.*—A suit brought, under s. 315 of the Code of Civil Procedure, by a purchaser at an execution sale to recover the purchase money, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, is not a suit of a nature cognizable by a Small Cause Court constituted under Act XI of 1865. P. bought certain land at a sale in execution of a decree. Before the purchase money was paid, P. applied to the Court by petition to set aside the sale and return the deposit money on the ground that the judgment-debtor had no saleable interest in the land. The Court rejected the petition and confirmed the sale on the 15th March 1881. The sale was subsequently set aside by a decree obtained by V. in a suit against P., and the judgment-creditor. P then sued the judgment-creditor to recover the purchase-money. The District Judge dismissed the suit on the ground that P. was debarred from suing by the

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order of 15th March, 1881:—*Held*, that the order did not conclude P from bringing this suit. PACHAYAPPAN v. NARAYANA, 11 M. 269=12 Ind. Jur. 92=12 Ind. Jur. 381 ... 187

(65) S. 316—Court Sale—Decree against Hindu father—Interest of undivided son—Certificate of sale—Grounds of second appeal—See HINDU LAW—JOINT FAMILY, 13 M. 47.

(66) S. 317—*Suit against benami purchaser at court-sale, by owner, to recover the land after ejectment.*—If after obtaining a certificate of sale in execution of a decree, the purchaser acknowledges that his purchase is benami and gives up possession, or does some act which clearly indicates an intention to waive his right, or restores the property to the real owner, such act may, by reason of the antecedent relation of the parties, operate as a valid transfer of property. Defendant acted benami in buying certain land at a court-sale for plaintiff, paid part of the purchase-money for plaintiff, and allowed plaintiff to remain in possession on the understanding that defendant was to transfer the property on repayment of the balance of purchase-money. Defendant having ejected plaintiff, plaintiff sued to recover the land:—*Held*, that s. 317 of the Code of Civil Procedure was no bar to plaintiff's suit. MONAPPA v. SURAPPA, 11 M. 234 ... 163

(67) S. 317—See EVIDENCE ACT (I OF 1872), 11 M. 213.

(68) S. 331—*Appeal—Jurisdiction—Civil Courts Act (Madras)—Act III of 1873, s. 13.*—The plaintiff being the holder of a decree of a Subordinate Court for more than Rs. 5,000 was obstructed in execution by the present defendants. He applied to the Court for the removal of the obstruction, the property which was the subject of the application being valued at less than Rs. 5,000 and the Subordinate Judge directed that the application be registered as a regular suit under Civil Procedure Code, s. 331, and ultimately passed a decree in favour of the plaintiff:—*Held*, that the appeal against this decree did not lie to the High Court. KALIMA v. NAINAN KUTTI, 13 M. 520 ... 1075

(69) S. 342—*Period of imprisonment of judgment-debtor.*—The Court cannot fix any period for the imprisonment of a judgment-debtor under Civil Procedure Code, s. 342. SUBUDHI v. SINGI, 13 M. 141 ... 810

(70) Ss. 344, 588—*Appealable order—Insolvent judgment-debtor—Notice to decree-holder.*—A debtor was arrested on civil process. He presented a petition to the court from which process issued, alleging that he was unable to pay the debt and praying to be declared insolvent and to be released. The Court passed an order on the same day, directing that he should be released and that the creditor should proceed against his property:—*Held* (1) that an appeal lay against the order; (2) the order was bad for want of notice. KOMARASAMI v. GOVINDU, 11 M. 136 ... 95

(71) Ss. 345, 352—*Insolvency—Procedure on claim made by creditor—Proof of debt.*—It is open to a creditor, at any time while the assets of an insolvent are undistributed, to produce evidence of his debt and to apply to be admitted on the schedule under s. 352 of the Code of Civil Procedure. LAKSHMANAN v. MUTTIA, 11 M. 1 ... 1

(72) Ss. 373, 622—*Leave given by District Court on appeal to withdraw suit—Material irregularity.*—A District Munsif having dismissed a suit, plaintiff appealed to the District Court, and, at the same time, applied to the Court to allow him to withdraw his suit with permission to bring a fresh suit on the same cause of action. The District Court granted the application without assigning any reasons for its order:—*Held*, under s. 622 of the Code of Civil Procedure that the District Court had acted with material irregularity. TIRUPATI v. MUTTU, 11 M. 322 ... 224

(73) S. 375—See TRANSFER OF PROPERTY ACT (IV OF 1882), 13 M. 316.

(74) S. 424—*Collector as guardian of ward not entitled to notice in suit to recover money from estate of ward.*—In a suit to recover money due on a promissory note executed by a deceased zamindar, out of the estate of the deceased and of his son, the defendant, a minor under the Court of Wards, the Collector, being appointed guardian *ad litem* of the defendant, pleaded that under s. 424 of the Code of Civil Procedure he was entitled

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to notice before suit, and the suit was dismissed on the ground of want of notice :—*Held*, on appeal, that s. 424 was not applicable to the case. ANANTHARAMAN v. RAMASAMI, 11 M. 317 ... 220

(75) *Ss.* 437, 464—*Hindu law—Impartible zamindari—Right of zamindar to alienate—Reg.* V *of* 1804 (*Madras*), *ss.* 2, 8—*Suit by a ward of the Court of Wards—Non-joinder and misjoinder of parties.*—The holder of an impartible zamindari, governed by the law of primogeniture, having a son, executed a mining lease of part of the zamindari for a period of twenty years, by which no benefit was to accrue to the grantor unless mining operations were carried on with success, and the commencement of mining operations was left optional with the lessee. On the death of the grantor, his minor son and successor, by the Collector of the district as his next friend (authorized in that behalf by the Court of Wards), now sued the assignee of the lessee to have the lease set aside The second plaintiff was the grantee from the Court of Wards (acting on behalf of the minor zamindar) of certain mining rights on the same land. The defendant had executed a declaration of trust in respect of his interest in favour of certain persons who were not joined :—*Held*, (1) *per Parker, J.*, that the first plaintiff could sue by the Collector of North Arcot as his next friend, since the Court of Wards had authorized the latter to conduct the suit; (2) *per Muttusami Ayyar* and *Wilkinson, JJ.* (*affirming the judgment of Parker, J.*) (1) that the interests of the first and second plaintiffs not being inconsistent with each other, the suit was not bad for misjoinder; (2) that the defendant's interests not having been shown to be hostile to those of the persons entitled under the declaration of trust, the suit was not bad for non-joinder; (3) that the lease was not one which a managing member of an ordinary joint family governed by Mitakshara law could providently enter into; (3) *per Muttusami Ayyar* and *Wilkinson, JJ.* (*reversing the judgment of Parker, J.*) that in the absence of evidence of any family custom rendering the zamindari inalienable by the zamindar for the time being for purposes other than those warranted by the Mitakshara law, the lease was not invalid as against the plaintiffs. BERESFORD v. RAMASUBBA, 13 M. 197 ... 850

(76) S. 462—Oaths Act—Act X of 1873, s. 9—Consent by guardian of a minor defendant to accept the oaths of the plaintiff—See ACT X OF 1873 (OATHS) 12 M. 483.

(77) *Ss.* 494, 585, 622 —*No appeal lies against an order for issue of notice made under s.* 494—*Revision by High Court of an order purporting to be made on appeal from such an order.*—A petition praying for a temporary injunction in a suit was presented by the plaintiff in a Subordinate Court. The Judge refused to pass orders on it without hearing the defendants, and ordered notice to issue to them. The plaintiff appealed to the District Judge who granted the injunction prayed for :—*Held*, that no appeal lay from the Subordinate Court, and that the District Judge had purported to exercise a jurisdiction not vested in him by law. LUIS v. LUIS, 12 M. 186 ... 479

(78) *Ss.* 514, 521, 522—*Award, appeal against decree in terms of—Extension of time for presenting award—Evidence.*—Where a decree purports to have been made in terms of an award under s. 522 of the Code of Civil Procedure, an appeal lies against it if there was no award in fact or in law. An order extending the time for the presentation of an award upon an application presented within time is not bad in law by reason of its having been made after the expiry of the term which is purports to extend. It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence. SUPPU v. GOVINDACHARYAR, 11 M. 85 ... 60

(79) *Ss.* 516, 622.—A District Munsif passed a decree in the terms of an award without giving notice of the filing of the award under s. 516 of the Code of Civil Procedure :—*Held*, that the District Munsif acted with material irregularity within the meaning of s. 622 of the Code of Civil Procedure. RANGASAMI v. MUTTUSAMI, 11 M. 144 ... 100

(80) *S.* 521—*Arbitration—Misconduct—Award set aside* :—Where a suit was referred to arbitration, and objection was taken to the award on the ground that one of the arbitrators had not attended a meeting when witnesses were

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examined by the other arbitrators :—*Held*, that the award was invalid by reason of misconduct on the part of the arbitrators within the meaning of s. 521 (a) of the Code of Civil Procedure. THAMMIRAJU v. BAPIRAJU, 12 M. 113 ... 428

(81) *S. 525—Loss of award, procedure on.*—When an award has been lost, a Court acting under s. 525 of the Code of Civil Procedure cannot take secondary evidence of its provisions and pass a decree accordingly. GOPI REDDI v. MAHANADI REDDI, 12 M. 331 ... 580

(82) *Ss. 525, 526, 646 B—Provincial Small Cause Courts Act—Act* IX *of* 1887, *sch.* II, *cl.* 24.—A suit to recover a sum of money as payable to the plaintiff under an award which was contested was filed in a Subordinate Court on the Small Cause side. The Subordinate Judge returned the plaint, being of opinion that the suit was not cognizable by a Court of Small Causes. The plaint was then presented in the Court of the District Munsif as an ordinary suit, but the District Munsif returned it on the ground that the suit was cognizable by a Court of Small Causes. The plaintiff then applied to the District Judge to submit the record for the orders of the High Court :—*Held*, (1) that the District Judge was bound to submit the record under s. 646 B of the Code of Civil Procedure on the requisition of the plaintiff, although the plaintiff might have appealed to the District Court against the order of the District Munsif; (2) that the suit was cognizable by a Court of Small Causes and accordingly that the order made by the Subordinate Judge returning the plaint was wrong. SIMSON v. MCMASTER, 13 M. 344 ... 952

(83) *S. 539—Interest necessary to support a suit under—Suit to remove a trustee.*—The plaintiffs having an interest as the managers of a temple in seeing to the due performance of the religious part of the administration of a certain charity endowed for the sustenance of Brahmans and connected with the temple, and being further interested in its administration as Brahmans entitled under certain circumstances to share in the benefit of the charity, sued under s. 539 of the Code of Civil Procedure to remove defendant from the trusteeship of the charity on the ground of fraudulent mismanagement :—*Held*, that the plaintiff's interest did not support the suit. *Quare.* —Whether a suit for the removal of a trustee will lie under the above section. NARASIMHA v. AYYAN, 12 M. 157=13 Ind. Jur. 49 ... 459

(84) S. 544, Act III OF 1873 (MADRAS CIVIL COURTS), 11 M. 197.

(85) *S. 549—No extension of period for finding security for costs of appeal after default.*—S. 549 of the Code of Civil Procedure being imperative, the time cannot be extended after the expiry of the period fixed in the order directing the appellant to find security for the costs of an appeal. SHRAJUDIN v. KRISHNA, 11 M. 190 ... 132

(86) *S. 561—Act* VII *of* 1888, *s* 48—*Time allowed for memorandum of objections.* —An appeal cannot definitely be posted until the Court has ascertained that notice of the appeal has been served on the respondent and a date must then be fixed not less then one month from the date of service. SUNDARAM v. ANNANGAR, 13 M. 492 ... 1055

(87) *S. 583—Claim for mesne profits on reversal of decree for possession of land executed.*—A decree for possession of immoveable property having been executed was reversed on appeal. The defendant applied under s. 583 of the Code of Civil Procedure for restitution of the mesne profits taken by the plaintiff. The lower courts dismissed the application on the ground that the proper remedy was by suit :—*Held*, that the defendant was entitled to the relief claimed. KALIANASUNDRAM v. EGNAVEDESWARA, 11 M 261 ... 182

(88) *S. 586—Applies to orders in execution of decrees in Small Cause suits.*—No second appeal lies from an order passed in execution of a decree in a suit of the nature cognizable by a Small Cause Court where the subject-matter of the suit does not exceed Rs. 500. AITHALA v. SUBBANNA, 12 M. 116 430

(89) *S. 586—Mofussil Small Cause Court Act* (XI *of* 1865) *s.* 6—*Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu Law—Liability of son for debt of living father.*—In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt :—*Held*, by the Full

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Bench that the suit as against the sons was not a suit of the nature cognizable in a Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure:—*Held*, further, by the Divisional Bench that the decree against the sons was bad. NARASINGA v. SUBBA, 12 M. 139 (F.B.) 446

(90) S. 586—Provincial Small Cause Court Act, sch. II, art. 41—Suit for contribution—Joint property—See ACT IX OF 1887, (PROVINCIAL SMALL CAUSE COURTS), 12 M. 349.

(91) *S.* 589—*Civil Procedure Code Amendment Acts—Act* VII *of* 1888, *s.* 56—*Act* X *of* 1888, *s.* 3—*Appeal against order of a Subordinate Court on a petition of insolvency.*—The judgment-debtor having been arrested in execution of a decree passed by the Small Cause Court at Madras which was transferred for execution to the Subordinate Court of South Malabar, applied to the District Court to be declared an insolvent. The District Court transferred the application for disposal to the Subordinate Court, and the application was granted on 25th July 1888. On 5th November 1888 one of the opposing creditors appealed to the High Court:—*Held*, that the appeal did not lie. SITHARAMA v. VYTHILINGA, 12 M. 472 ... 678

(92) *S.* 595—*Final decree—Leave to appeal to Privy Council.*—The plaintiff in a suit to recover certain property set up an adoption. The Court of First Instance held that the adoption was not proved and dismissed the suit without trying the issues framed with reference to other allegations in the pleadings. On appeal by the plaintiff the High Court passed a decree setting aside the decree of the Court of First Instance, declaring the alleged adoption to be established and remanding the suit for the trial of the remaining issues. The defendants sought to appeal to Her Majesty in Council against the decree of the High Court. The defendants' application was refused on the ground that that decree was not a final decree. TIRUNARAYANA v. GOPALASAMI, 13 M. 349 ... 956

(93) *S.* 622—*Act* XIX *of* 1841, *ss.* 2, 3, 5, 15—*Reg.* V *of* 1804 (*Madras*).—On a petition presented by the Agent of the Court of Wards, a District Court made an order which purported to have been made under Act XIX of 1841, s. 5. The conditions prescribed by ss. 3 and 4 were not shown to exist:—*Held*, the order of the District Court was illegal, and was subject to revision under s. 622 of the Code of Civil Procedure. PAPAMMA v. THE COLLETOR OF GODAVARI, 12 M. 341 ... 587

(94) *S.* 622—*Court acting without jurisdiction.*—A Small Cause Court, which had jurisdiction under Act XI of 1865 to entertain suits for rent only where the claim was founded on contract, erroneously assumed that a sub-tenant, by entering on land with notice that his lessor was bound to pay rent to the landlord, became liable by an implied contract to pay the rent to the landlord, and passed a decree against the sub-tenant for the rent in arrears:—*Held* that, under s. 622 of the Code of Civil Procedure, the High Court had power to set aside the decree. MANISHA ERADI v. SIYALI KOYA, 11 M. 220 (F.B.) = 12 Ind. Jur. 49 ... 153

(95) *S.* 622—*Error of law—Material irregularity—Personal decree against minors for debt of deceased Hindu father.*—In a suit to recover a debt incurred by the deceased father of a Hindu family, the District Judge gave a personal decree against the sons of the debtor, of whom two were minors:—*Held*, that under s. 622 of the Code of Civil Procedure, the decree against the minors should be reversed, but that the Court has no power to revise the decree against the other defendants. BASHYAM v. JAYARAM, 11 M. 303 ... 211

(96) S. 622—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 11 M. 322.

(97) *Ss.* 623, 624, 626—*Review—Provincial Small Cause Courts Act*—IX *of* 1887, *s.* 17—*Deposit of costs.*—On 23rd February 1888, the Subordinate Judge of Tinnevelly dismissed a Small Cause suit on the ground that the plaintiff had not secured the attendance of his witnesses. On 29th February the plaintiff presented a petition for review, on which notice was directed to issue, but he did not deposit in Court, the amount of the costs payable under the decree. On 17th April the petition having come on for hearing, the Judge directed that the petitioner should "first" deposit the amount of the defendant's costs under s. 17 of the Provincial Small Cause Courts Act,

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which was accordingly done on the following day. On 21st April the petition, which proceeded on grounds other than those mentioned in s. 624 of the Code of Civil Procedure, came on for hearing before the Officiating Subordinate Judge, who had assumed charge of the Court between the last-mentioned dates; he entertained the petition, but dismissed it. The plaintiff preferred a revision petition against the order dismissing his petition :—*Held by the Full Bench*, that the officiating Subordinate Judge had jurisdiction to make the order sought to be revised :—*Held by Parker and Wilkinson, JJ.*, that the provisions of s. 17 of the Provincial Small Cause Courts Act as to the deposit of costs on an application for review are not mandatory, but merely directory. RAMASAMI v. KURISU, 13 M. 178 (F.B.) ... 837

(98) *S.* 624—*Who may review judgment—Grant of application for review.*—An application for review of judgment was presented on other grounds than those specified in s. 624 to a District Munsif who had delivered the judgment, and he thereupon ordered the decree to be produced. The District Munsif having resigned, his successor heard and determined the application :—*Held*, it was not competent to the District Munsif who had not delivered the original judgment to entertain the application for review. CHERU KURUP v. CHERU KUNDA KURUP, 12 M. 509 ... 704

(99) S. 642—Insolvent Act—11 and 12 Vic. cap. 21, ss. 47, 51—Exemption from arrest on civil process *redeundo*—See INSOLVENT ACT, 1848, 13 M. 150

Compensation.

Vexatious complaint—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 11 M. 142

Contract.

To sell land—Rescission—Resale by registered deed.—A sued to recover certain land which he claimed under a registered deed of sale executed by the owner. Prior to the date of this sale to A, M had been put in possession of the land under an agreement to purchase the land for Rs. 300. The sale deed to M had not been executed because only Rs. 200 of the purchase-money had been paid to the owner :—*Held* that A could not recover as it was not open to his vendor to rescind the contract with M. MOIDIN v. AVARAN, 11 M. 263 ... 183

***Contract Act* (*IX of 1872*).**

(1). Ss. 15, 16—Hindu law—Vaisyas—Requisites of adoption—Adoption during pollution of adoptive parent—Coercion—Undue influence—See HINDU LAW—ADOPTION, 13 M. 214.

(2) *Ss.* 17, 19—*Contract induced by fraud—Right to rescind.*—If a vendor has been guilty of fraud within the meaning of s. 17 of the Indian Contract Act by actively concealing a fact which it was material for the purchaser to know, and the purchaser was induced thereby to purchase, the fact that the purchaser by exercise of ordinary diligence might have ascertained the truth affords no answer to a suit to recover the purchase-money. Such a case does not fall within the exception to s. 19 of the Contract Act. MORGAN v. THE GOVERNMENT OF HAIDARABAD, 11 M. 419=12 Ind. Jur. 298 ... 293

(3) *S.* 23—*Unlawful consideration—Marriage brokage agreement—Hindu law.*—Plaintiff agreed to give his daughter in marriage to defendant's nephew in consideration of a payment of Rs. 400. It was not alleged that the money was to be a dowry or settlement for the bride. Rs. 200 were paid and defendant executed a bond for the balance. The marriage took place in the *asura* form. The plaintiff now sued on the bond :—*Held*, the consideration for the bond was not unlawful. VISVANATHAN v. SAMINATHAN, 13 M. 83 ... 768

(4) *S.* 27—*Restraint of trade.*—One having a license for the manufacture of salt entered into a contract with a firm of merchants, whereby it was provided that he should not manufacture salt in excess of the quantity which the firm at the commencement of each manufacturing season should require him to manufacture ; and that all salt manufactured by him should be sold to the firm for a fixed price. The agreement was to be in force for a period

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of five years. In a suit by the merchants for an injunction restraining the licensee from selling his salt to others:—*Held*, that whether or not the first of these clauses was invalid under s. 27 of the Contract Act, it was separable from the second clause which was not bad as being in restraint of trade. MACKENZIE v. STRIRAMIAH, 13 M. 472 ... 1040

(5) See also RAGAVAYYA v. SUBBAYYA, 13 M. 475, Note.

(6) Ss. 49, 77, 92, 151—See SALE, 11 M. 459.

(7) *Ss.* 63, 74—*Penalty—Stipulation for enhanced interest—Interest on decree amount up to date of payment—Remission of part performance of contract—Sum accepted on account of interest.*—A hypothecation bond provided for payment of interest on the principal sum at the rate of 9 per cent, and contained a further provision that on default being made in payment of interest accruing due, interest should be paid from the date of the bond at the rate of 15 per cent. Default was made when the first and second payments of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum a little more than the arrears calculated at 9 per cent. In a suit by the creditor:—*Held* (1) that the plaintiff had not waived any right under the bond by accepting the payment on account of interest; (2) that the provision for enhanced interest calculated from the date of the bond on default was of the nature of a penalty under s. 74 of the Contract Act; (3) that the plaintiff was entitled to interest on decree amount from date of decree to date of payment at 6 per cent. NANJAPPA v. NANJAPPA, 12 M. 161 ... 462

(8) *S.* 74—*Penalty—Payment of higher rate of interest from date of bond on breach.*—Where a mortgage-deed provided for repayment of the debt in four instalments with interest at 6 per cent. and in default of payment of any instalment on the due date, for interest at 12 per cent. from the date of the bond:—*Held*, that the stipulation being reasonable, the plaintiff was entitled on default to recover the higher rate of interest from the date of the bond. BASAVAYYA v. SUBBARAZU, 11 M. 294 ... 205

(9) S. 131—See HINDU LAW—JOINT FAMILY, 11 M. 373.

(10) *S.* 135—*Negotiable Instruments Act—Act* XXVI *of* 1881, *ss.* 37, 39, 66—*Accommodation maker—Discharge of—Presentment of promissory note.*—Suit by the endorsee against the maker of a promissory note, dated 9th August 1886. The plaintiff was aware that the note was made by the defendant for the accommodation of the acceptor, Watson and Co., with whom the plaintiff had large dealings. On the 4th August 1887, Watson and Co. executed in favour of the plaintiff and another creditor a mortgage of certain property to secure the amount then due by Watson and Co., including the amount due to the plaintiff on the promissory note; the mortgage contained a personal covenant by Watson and Co., to pay the sums due, together with interest, on the 4th August 1888; and the mortgagees practically took over the whole business of the mortgagor and it was intended that they should work it for his benefit up to that date. The promissory note fell due in June 1887, but was not presented to the defendant for payment:—*Held*, that plaintiff, by accepting the mortgage, promised to give time to Watson and Co., and thus rendered it impossible for him to sue Watson and Co., had the defendant as surety called on him to do so, and that the defendant was accordingly discharged. *Semble*—The maker of a promissory note is not discharged by the holder's failure to present at due date. RAMAKISTNAYYA v. KASSIM, 13 M. 172 ... 32

Contribution.

See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 11 M. 452.

Co-proprietors.

See VILLAGE PROPERTY, 12 M. 241.

Court-Fees Act (VII of 1870).

(1) S. 6, sch. II, art. 17—See ACT III OF 1873 (MADRAS CIVIL COURTS), 11 M. 266.

(2) *S.* 7 (*c*) (5)—*Civil Courts Act (Madras). Act* III *of* 1873, *ss.* 12, 14—*Suit to enforce registration—Jurisdiction.*—Suit in the Court of a District Munsif to enforce registration of two instruments of gift. The property purported

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to be conveyed was the same in each instrument and its value was found to be less than Rs. 2,500, but the earlier instrument comprised also an assignment of the right to manage a charity. The later instrument was found to have been executed in supersession of the former, and the District Munsif passed a decree directing its registration alone :—*Held*, that the District Munsif had jurisdiction to entertain the suit. RAMAKRISHNAMMA v. BHAGAMMA, 13 M. 56 ... 749

(3) *S. 7, cl. v (c), (e)—Paramba in Malabar valuation of suit for* —On its appearing that a paramba in Malabar is not subject to land-tax, but that a tax is levied on trees of certain kinds which may grow on it :—*Held*, that a paramba must be regarded for the purposes of the Court-Fees Act as a garden or as land which pays no revenue, according to the circumstances of each case. AUDATHODAN MOIDIN v. PULLAMBATH MAMALLY, 12 M. 301 (F.B.) ... 559

(4) *S. 12, sch. ii, art. 17, iii—Civil Procedure Code, s. 13*—Res judicata—*Competent Court—Pecuniary valuation of suit—Suit for declaratory decree.*—A suit for two declarations filed in a Subordinate Court was valued by the plaintiffs at a sum in excess of the pecuniary jurisdiction of a District Munsif. It was pleaded that the matter in dispute was *res judicata* by reason of decrees passed in District Munsif's Courts. No objection was taken in the Subordinate Court to the valuation of the suit :—*Held*, that the plea of *res judicata* failed. *Per Muttusami Ayyar, J.*—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared. GANAPATI v. CHATHU, 12 M. 223 ... 505

(5) *Sch. I, art. 1, sch II, art. 17.*—In a suit upon a hypothecation bond it was found by the Court of first appeal that the bond and the debt secured thereby were binding on the first defendant, but not on the second defendant. The plaintiff preferred a second appeal against the second defendant as sole respondent :—*Held*, that the Court-fee payable on the second appeal should be calculated on the amount of the debt sought to be recovered. RAMASAMI v. SUBBUSAMI, 13 M. 508 ... 1066

(6) *Sch. II, art. 17, cl. VI—Religious Endowments Act, ss. 14, 18.*—A and B being worshippers at a Hindu temple, obtained sanction under s. 18 of the Religious Endowments Act to sue for the removal of the Managers of the temple on the ground of breach of trust and for damages. A and B sued to remove the managers, but claimed no damages in their plaint :—*Held*, that, as the suit instituted differed from the one for which sanction was given, the plaint was properly rejected. SRINIVASA v. VENKATA. 11 M. 148 ... 103

Court-Sale.

(1) See EMBLEMENTS, 13 M. 15.

(2) See HINDU LAW—JOINT FAMILY, 13 M. 47.

Criminal Procedure Code (Act X of 1882).

(1) S. 1—See ACT XIV OF 1874 (SCHEDULED DISTRICTS), 13 M. 353.

(2) *Ss. 4, 191 (a), 200, 530, and 537—Third-class Magistrate taking cognizance of case on receipt of a yadast from a Revenue officer and convicting accused without examining complainant.*—A Revenue officer sent a yadast to a Third class Magistrate, charging a certain person with having disobeyed a summons issued by the Revenue officer. The Third-class Magistrate thereupon tried and convicted the accused under s. 174 of the Penal Code. The District Magistrate referred the case on the ground that the conviction was bad under s. 530 (*k*) of the Code of Criminal Procedure :—*Held*, that as the yadast amounted to a complaint within the meaning of s. (4), although the complainant was not examined on oath as required by s. 200, the conviction was not illegal. QUEEN-EMPRESS v. MONU, 11 M. 443 = 2 Weir 238 ... 309

(3) *S. 35—Penal Code, ss. 71, 72—Separate convictions for different offences in the same transaction.*—An accused person was convicted under s. 457 of the Penal Code of house-breaking by night in order to commit an offence (mischief and assault) and also under ss. 426 and 352 for the offences of mischief and assault and punished separately for each offence. These

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offences formed parts of one transaction :—*Held*, that the sentences were legal. QUEEN-EMPRESS v. NIRICHAN, 12 M. 36 = 2 Weir 32 ... 375

(4) S. 45—*Duty to report sudden death—Owner of house distinguished from owner of land.*—Under s. 45 of the Code of Criminal Procedure, every owner or occupier of land is bound to report the occurrence therein of any sudden death. The head of a Nayar family was convicted and fined under s. 176 of the Penal Code for not reporting a sudden death in the family house:—*Held*, following former decisions of the Court, that the conviction was illegal, because s. 45 of the Code of Criminal Procedure does not apply to the owner of a house. QUEEN-EMPRESS v. ACHUTHA, 12 M. 92 = 1 Weir 102 ... 414

(5) S. 59—See PENAL CODE (ACT XLV of 1860), 11 M. 441, 11. M. 480.

(6) *Ss.* 61, 167, 170, 344—*Remand of prisoners in custody of the police.*—The right construction of s. 167 of the Code of Criminal Procedure is that in proceedings before the police under chapter XIV, the period of remand cannot exceed in all fifteen days, including one or more remands. QUEEN-EMPRESS v. ENGADU, 11 M. 98 = 2 Weir 142 ... 69

(7) *S.* 96—*Search warrant—When search warrant may issue.*—The accused was charged with the offence of criminal misappropriation of treasure belonging to a temple of which he was alleged to be the trustee. From the complaint, it appeared that some of the treasure belonging to the temple had been buried under a flagstaff in the temple, and the Magistrate was of opinion that the nature of the property so buried had an important and material bearing on the case for the prosecution :—*Held*, the Magistrate had jurisdiction to issue a warrant to search for and produce such property upon information which he considered credible, since there was a complaint before him duly affirmed as prescribed by the Criminal Procedure Code; and that it was not incumbent on him to wait until the evidence for the prosecution should have been recorded in the presence of the accused. QUEEN-EMPRESS v. MAHANT OF TIRUPATI, 13 M. 18 = 2 Weir 44 ... 722

(8) *Ss.* 133, 134, 135, 136—*Penal Code, s.* 188—*Service of notice of orders under s.* 133.—A Magistrate made an order under s. 133 of the Code of Criminal Procedure requiring N. to fence a certain well in a public street or to appear before him and move to have the order set aside; a copy of this order was affixed to the house of N, but he did not appear. The Magistrate then adopted the procedure prescribed by ss. 136, 140, and made an order requiring N. to fence the well by a certain date. N., who was personally served with notice of the above order, did not comply with it. The Magistrate then sanctioned the prosecution of N, under s. 188 of the Penal Code. N appeared and produced evidence to prove that he was not liable to fence the well:—*Held*, that the accused was guilty of the offence of disobedience to an order duly promulgated by a public servant and was not entitled to go behind the order and show that it was one which ought not to have been made. The mode of service of notice of an order under s. 133 considered. QUEEN EMPRESS v. NARAYANA, 12 M. 475 = 1 Weir 144 ... 681

(9) *S.* 145—*Dispute as to right to collect rents.*—A dispute between two persons as to the right to collect rent from the tenants of an estate is cognizable under s. 145 of the Code of Criminal Procedure. RAMASAMI v. DANAKOTI AMMAL, 12 M. 88 = 2 Weir 100 ... 411

(10) *S.* 147—*Dispute concerning right to officiate in a mosque.*—Where a dispute likely to cause a breach of the peace is shown to exist concerning the right to perform a religious ceremony in a mosque, the Magistrate may exercise the powers conferred by s. 147 of the Code of Criminal Procedure. MUHAMAD MUSALIAR v. KUNJI CHEK MUSALIAR, 11 M. 323 = 2 Weir 117 ... 225

(11) *S* 188—*Offence committed in foreign territory—Trial without certificate of the Political Agent.*—A District Magistrate instituted criminal proceedings in British India against a native Indian subject of the Queen, in respect of offences under ss. 419, 467 and 114 of the Indian Penal Code, said to have been committed by him in French territory, without a certificate under s. 188 of the Criminal Procedure Code. The accused was committed to the Sessions Court :—*Held*, although the District Magistrate was the Political Agent who might have certified under Criminal Procedure Code, s. 188, the proceedings were void for want of the certificate, and the com-

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mitment should be quashed. QUEEN-EMPRESS v. KATHA PERUMAL, 13 M. 423 = 2 Weir 147 ... 1007

(12) S. 195—*Sanction does not lapse with the death of grantee.*—A Civil Court granted sanction under s. 195 of the Code of Criminal Procedure to the defendants in a suit to prosecute certain witnesses for perjury. The defendant died without having preferred a complaint. His brother, thereupon, preferred a complaint and the Magistrate dismissed it under s. 253 of the Code of Criminal Procedure on the ground that the sanction died with the defendant. The Sessions Judge held that the sanction was alive and directed the District Magistrate to make further inquiry under s. 437:—*Held*, that the Sessions Judge was right. THATHAYYA, *In re*, 12 M. 47 = 2 Weir 164 ... 382

(13) S. 195—*Sanction to prosecute—Registration Act—Act* III *of* 1877, *ss.* 34, 35, 41—*Forged document—Registered by Sub-Registrar.*—A mortgagor was charged with making a fraudulent alteration in his mortgage-deed which was then registered by a Sub-Registrar:—*Held*, that the sanction of the Sub-Registrar was not necessary for a prosecution on a charge of forgery. QUEEN-EMPRESS v. SOBHANADRI, 12 M. 201. ... 490

(14) S. 195—Sanction to prosecute—Registration Act, 1877, S. 34—Forged document registered by Sub-Registrar—See REGISTRATION ACT (III OF 1877), 11 M. 3.

(15) S. 195—See REGULATION IV OF 1816, 11 M. 375.

(16) S. 195—See REGISTRATION ACT (III OF 1877), 11 M. 500.

(17) Ss. 195, 476.—The High Court has no power on appeal to set aside a complaint duly made by a Subordinate Court under s. 476 of the Code of Criminal Procedure. QUEEN-EMPRESS v. NARAKKA, 13 M. 144 ... 812

(18) Ss. 234, 537—Penal Code, ss. 372, 373—Obtaining a minor for prostitution—Dancing girl caste—Adoption—Misjoinder of charges—Immaterial irregularity—See PENAL CODE (ACT XLV OF 1860), 12 M. 273.

(19) S. 239—See PENAL CODE (ACT XLV OF 1860), 11 M. 441.

(20) Ss. 250, 262—*Vexatious complaint—Compensation.*—The provisions of s. 250 of the Code of Criminal Procedure may be applied in summons cases whether tried summarily or not. QUEEN-EMPRESS v. BASAVA, 11 M. 142 = 2 Weir 314 ... 99

(21) S. 261—*Police Act*—(*Act* XXIV *of* 1859), *s.* 48—"*Conservancy clauses*"—*Jurisdiction of a Bench of Magistrates.*—Offences under Police Act, s. 48, are within the cognizance of a Bench of Magistrates. QUEEN-EMPRESS v. OOLAGANADAN, 13 M. 142 = 1 Weir 910 = 2 Weir 327 ... 811

(22) S. 288—*Evidence—Confession retracted—Corroboration, deposition of witnesses before Magistrate read under, insufficient.*—Where a prisoner was convicted of murder on a confession, retracted at the trial corroborated by depositions read under s. 288 of the Code of Criminal Procedure, and also retracted at the trial:—*Held*, that the prisoner should not have been convicted on such evidence. QUEEN-EMPRESS v. BHARMAPPA, 12 M. 123 = 2 Weir 376 ... 435

(23) S. 289—*Prosecutor's right to reply.*—Where documentary evidence was put in by the accused during the case for the Crown and before examination of the accused:—*Held*, under s. 289 of the Code of Criminal Procedure, that the Crown had the right of reply. QUEEN-EMPRESS v. VENKATAPATHI, 11 M. 339 = 2 Weir 380 ... 236

(24) S. 297—*Evidence of accomplice—Corroboration—Misdirection to jury.*—A Judge should caution a Jury not to accept the evidence of an approver unless it is corroborated; the omission to do so amounts to misdirection. QUEEN-EMPRESS v. ARUMUGA, 12 M. 196 = 2 Weir 519 ... 486

(25) S. 307—*Duty of Sessions Judges as to referring cases tried with a jury.*—The discretionary power to refer cases conferred on Sessions Judges by Criminal Procedure Code, s. 307 should always be exercised when the Judge thinks that the verdict is not supported by the evidence. QUEEN-EMPRESS v. GURUVADU, 13 M. 343 = 2 Weir 389 ... 951

(26) Ss. 342, 428, 540—*Penal Code, ss.* 181, 182—*Examination on affirmation of one preferring a criminal appeal—Verification of criminal appeal*—See PENAL CODE (ACT XLV OF 1860), 12 M. 451.

Criminal Procedure Code (Act X of 1882)—(Concluded). PAGE

(27) *S. 399—Reformatory Schools Act,* 1876, *ss.* 2, 7.—The Reformatory Schools Act, 1876, provides only for male juvenile offenders being sent to reformatory schools by Magistrates of the first class, and s. 399 of the Code of Criminal Procedure. In 1882, so far as it authorizes a Magistrate not of the first class to direct that a male juvenile offender be sent to a reformatory is repealed:—*Held,* therefore, when a Second-class Magistrate directed a boy to be sent to a reformatory under s. 399 of the Code of Criminal Procedure that the order was illegal. QUEEN-EMPRESS v. MADASAMI, 12 M. 94 (F.B.) = 1 Weir 875 ... 415

(28) *Ss.* 476, 477, 480, 485—*Jurisdiction of Judges and Magistrates in respect of offences committed before themselves—Penal Code, s.* 175.—A Court other than the High Court, &c. can try persons for offences committed before itself only in cases to which ss. 477, 480 or 485 is applicable, and none of these sections is applicable when the accused is charged under s. 175 of the Penal Code. QUEEN-EMPRESS v. SESHAYYA. 13 M. 24 = 2 Weir 610. 727

(29) *S.* 488—*Liability of a Hindu not divided from his father to maintain his wife.*—A Hindu not divided from his father can be ordered to maintain his wife under s. 488 of the Code of Criminal Procedure. QUEEN-EMPRESS v. RAMASAMI. 13 M. 17 = 2 Weir 620 ... 722

(30) *S.* 488—*Maintenance order passed on report of Subordinate Magistrate, illegal.*—Under s. 488 of the Code of Criminal Procedure a Magistrate of the first class may, upon proof of neglect or refusal by a person having sufficient means to support his wife, order such person to make a monthly allowance for the maintenance of his wife: a First-class Magistrate having referred a complaint by a wife for maintenance to a Subordinate Magistrate, to take evidence and report upon the facts stated in the petition of complainant, passed an order upon such report in the absence of the husband for payment of maintenance.—*Held,* that the order was illegal. VENKATA v. PARAMMA, 11 M. 199 = 2 Weir 628 ... 139

(31) *S.* 494—*Irregular procedure—Discharge of prisoner committed to Sessions—New trial—Conviction quashed.*—A prisoner committed to Sessions on a charge cannot be discharged by the Sessions Court under s. 494 of the Code of Criminal Procedure, but must be convicted or acquitted. Where a prisoner was erroneously discharged by a Sessions Court under s. 494 (*a*).—*Held,* that as the prisoner was entitled to be acquitted, a conviction obtained in a second trial for the same offence was bad in law. QUEEN-EMPRESS v. SIVARAMA, 12 M. 35 = 2 Weir 457 = 2 Weir 654 ... 374

(32) S. 535—See PENAL CODE (ACT XLV OF 1860), 11 M. 441.

(33) S. 537—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 11 M. 443.

(34) S. 537—See PENAL CODE (ACT XLV OF 1860), 11 M. 441.

(35) *S.* 545—*Death caused by rash and negligent Act—Compensation to widow of deceased.*—An order that the amount of a fine imposed on one convicted of causing death by a rash and negligent act be paid as compensation to the widow of the deceased is illegal. LUTCHMAKA, *In re,* 12 M. 352 = 2 Weir 719 ... 195

Crops.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 11 M. 193.

(2) See EMBLEMENTS, 13 M. 15.

Dancing Girl

See HINDU LAW—ADOPTION, 11 M. 393; 12 M. 214.

Declaratory Decree.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 M. 183; 12 M. 313; 12 M. 481.

(2) See COURT FEES ACT (VII OF 1870), 12 M. 223.

(3) See EXECUTION OF DECREE, 12 M. 356.

Declaratory Suit. PAGE

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 313.

(2) See MALABAR LAW—KARNAVAN, 12 M. 234.

(3) See REGISTRATION ACT (III OF 1877), 13 M. 324.

(4) See SPECIFIC RELIEF ACT (I OF 1877), 12 M. 136.

Decree.

Execution—Assignment of interest of judgment debtor in surplus proceeds of sale—Attachment by creditor of judgment-debtor—Suit for declaration of assignee's title—Civil Procedure Code, s. 266 (k)—Contingent interest.—In execution of a decree in a District Munsif's Court, certain property having been sold, a balance, after satisfying the decree, remained in favour of the judgment-debtor X. After the date of sale, but before the whole of the purchase money had been paid into Court, X applied to the Court by petition, praying that the amount due to him might be paid to A, to whom, he alleged, he had assigned it. Before any order was made on this petition, B,C,D, and E, in execution of separate decrees against X, attached the sum in Court. The District Munsif ordered that B, C, D, and E should be paid before A. A brought a suit against B, C, D, and E in another District Munsif's Court for a declaration that he was entitled to the money and to set aside the said order. The Munsif set aside the order and declared the plaintiff to be entitled to the amount. B, C, D, and E severally appealed against this decree, and the District Court passed a decree in each appeal, dismissing A's suit. A presented one second appeal, making B, C, D, and E parties thereto, against the four decrees of the District Court :—*Held* (1) that A was bound to file a separate appeal against each of the decrees passed by the District Court; (2) that A (having by permission of the Court amended his second appeal and filed three more second appeals) was entitled to a decree, declaring his title to the amount claimed. CHATHU v. KUNHAMED, 11 M. 280 ... 195

Defamation.

(1) *Expression of suspicion—Slander by a railway guard—Suit against Railway Company*—De minimis non curat lex.—Suit for damages for defamation. A railway guard, having reason to suppose that a passenger travelling by a certain train from Madras to Chingleput had purchased his ticket at an intermediate station, called upon the plaintiff and others of the passengers to produce their tickets. As a reason for demanding the production of the plaintiff's tickets, he said to him in the presence of the other passengers "I suspect you are travelling with a wrong (or false) ticket." which was the defamation complained of. The guard was held to have spoken the above words *bona fide* :—*Held*, the plaintiff was not entitled to a decree for damages. SOUTH INDIAN RAILWAY COMPANY v. RAMAKRISHNA, 13 M. 34 = 13 Ind. Jur. 378 ... 734

(2) *Illegal declaration that one is outcasted—Observation on the use of books of history to prove local custom, and on the position as heads of their caste of the representatives of the ancient sovereigns of the West Coast.*—According to the usage of certain Nambudirs, a caste inquiry is held when a Numbudri woman is suspected of adultery, and if she is found guilty she and her paramour are put out of caste. An inquiry was held into the conduct of a certain woman so suspected, she confessed that the plaintiff had had illicit intercourse with her, and thereupon they were both declared outcastes, the plaintiff not having been charged nor having had an opportunity to cross-examine the woman or to enter on his defence and otherwise to vindicate his character. In a suit for damages for defamation by the plaintiff against these who had declared him an outcaste:—*Held*, the declaration that the plaintiff was an outcaste was illegal, and it having been found that the defendants had not acted *bona fide* in making that declaration, the plaintiff was entitled to recover damages. Observations on (1) the use of books of history to prove local customs, and (2) on the position as heads of their caste of the representatives of the ancient sovereigns of the West Coast. VALLABHA v. MADUSUDANAN, 12 M. 495 ... 694

(3) *Privilege— Petitions to Revenue officer— Presumptions as to malice.*—Certain ryots in a Zamindari village addressed a petition to the Tahsildar praying that the Village Munsif might be retained in office notwithstanding the Zemindar's application for his removal. The petition imputed

Defamation – (*Concluded*). PAGE

criminal acts to the Zamindar, who now sued the petitioners for damages on the ground that the petition contained a false and malicious libel. It was found that in fact the communication was made *bona fide*, and that there was some ground for some of the imputations ; *Held*, the petition was a privileged communication and the alleged libel was not actionable. The question when malice may be presumed, discussed. VENKATA NARASIMHA v. KOTAYYA, 12 M. 374=13 Ind. Jur. 334 ... 610

Easements Act (V of 1882).

Ss. 6, 7, 17—*Natural streams—Surface water—Rights of riparian owners.*—The owners of a tank fed by natural streams, which depended for their supply on natural rainfall and surface water, sued for an injunction to restrain superior riparian owners from damming the streams or interfering with the supply of water, over which the plaintiffs claimed a right of easement. The issue as to the ownership of the land on which the streams rose was undecided :—*Held*, (1) The Easements Act only declared the existing law as to easements over water ; (2) An easement can therefore be acquired in regard to the water of the rainfall. But surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise is not a subject of easement by prescription, though it may be the subject of an express grant or contract ; (3) It is the natural right of every owner of land to collect or dispose of all water on the surface which does not pass in a defined channel ; (4) Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to the conditions (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by inferior riparian owners in the exercise either of their natural right or their right of easement if any ; (5) It was therefore necessary to ascertain where the streams rose, and the course, source and length of their tributaries. PERUMAL v. RAMASAMY, 11 M. 16 ... 11

Ejectment.

See LANDLORD AND TENANT, 12 M. 353.

Emblements.

Court-sale—Crop standing on land sold in execution of a decree obtained by a mortgagee in possession.—A mortgagee in possession sued on his mortgage and having obtained a decree brought the land to sale in execution ; and the execution purchaser was placed in possession :—*Held*, the mortgagee was not entitled to recover from the execution purchaser the value of the then standing crop. RAMALINGA v. SAMIAPPA, 13 M. 15 ... 720

Estoppel.

(1) See ACT VIII OF 1865 (MADRAS, RENT RECOVERY).

(2) See EVIDENCE ACT (I OF 1872), 12 M. 422.

(3) See MALABAR LAW—MORTGAGE, 12 M. 320.

(4) See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 424.

Evidence.

Trial for robbery and murder – Offences constituting parts of the same transaction—Evidence of robbery considered in trial for murder.—Persons convicted of robbery by a Sessions Judge and a Jury, and of murder by the Sessions Judge with Assessors appealed to the High Court against the conviction on the charge of murder :—*Held*, that in coming to a conclusion as to whether the evidence justified the conviction appealed against, the verdict of the Jury should not be taken into consideration. But on its appearing that the two offences constituted parts of the same transaction :—*Held*, that recent and unexplained possession of the stolen property which would be presumptive evidence against the prisoners on the charge of robbery was similarly evidence against them on the charge of murder. QUEEN-EMPRESS v. SAMI, 13 M. 426=1 Weir 290 ... 1009

Evidence Act (I of 1872). PAGE

(1) Ss. 13, 35—See MALABAR LAW—ADOPTION, 11 M. 116.

(2) *Ss. 13, 42—Relevancy of judgments in suits in which right asserted to collect dues for a temple.*—In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple:—*Held*, that judgments in other suits against other persons in which claims under the same right had been decreed in favour of the trustees of the temple were relevant under S. 13 of the Evidence Act as being evidence of instances in which the right claimed had been asserted:—*Held*, also, that the said judgments were relevant under s. 42 of the said Act as relating to matters of a public nature. RAMASAMI v. APPAVU, 12 M. 9=13 Ind. Jur. 16 ... 356

(3) *Ss. 26, 27—Confessional statements made in the custody of police—Test of admissibility.*—The test of the admissibility under s. 27 of the Evidence Act of information received from an accused person in the custody of a police officer, whether amounting to a confession or not, is:—"was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact." QUEEN-EMPRESS v. COMMER SAHIB, 12 M. 153=2 Weir 738 ... 456

(4) *S. 44—Competent Court.*—The words "competent Court" in s. 44 of the Evidence Act refer to a Court acting without jurisdiction. KEPILAMMA v. KELAPPAN, 12 M. 228 ... 509

(5) *S. 92—Civil Procedure Code, s. 317.*—By an agreement in writing, A, after reciting that he bid for certain property sold in execution of a decree benami for B and paid the deposit amount into Court for B and that B paid the balance, promised to convey the property to B. In a suit by B to recover the property from A:—*Held* that, under s. 92 of the Evidence Act, B was not debarred from proving that A bought the property for himself and not benami for B. KUMARA v. SRINIVASA, 11 M. 213=12 Ind. Jur. 217=12 Ind. Jur. 384 ... 148

(6) *S. 92—Collateral evidence to show that an apparent sale-deed was a mortgage—Variance between pleading and proof.*—In a suit by an attaching creditor to set aside an order (which allowed an objection made to his attachment by one claiming under a sale-deed from the judgment-debtor), and for the declaration of the judgment-debtor's title, the sole issue framed was whether the sale-deed was *bona fide* and supported by consideration:—*Held*, that the plaintiff was entitled to show by collateral evidence that the sale deed was really a usufructuary mortgage and that the mortgage had expired. VENKATRATNAM v. REDDIAH, 13 M. 494... 1056

(7) S. 108—See ACT III OF 1873 (CIVIL COURTS, MADRAS), 11 M. 448.

(8) *S. 116—Estoppel—Landlord and tenant—Kumaki land—Unassessed waste reclaimed by plaintiff—Patta granted to defendant.*—The plaintiff, who was the holder of a *warg* in Canara, demised adjacent waste land to one who brought it into cultivation and remained in occupation for two years. The land was not assessed to revenue in the name of either of these persons. At the end of two years the tenant let into occupation a sub-tenant who subsequently assigned his right to the defendant, the holder of a neighbouring *warg*. The defendant obtained a *patta* for the land from the revenue authorities. In a suit by plaintiff to eject the defendant:—*Held*, (1) that the defendant was not estopped from setting up a title adverse to the plaintiff and that his possession became adverse when the *patta* was granted to him; that the plaintiff was not entitled to eject the defendant. SUBBARAYA v. KRISHNAPPA, 12 M. 422 ... 643

Exchange.

SALE, 11 M. 459.

Execution of Decree.

(1) *Determining rights of rival religious sects—Decree whether executory or declaratory—Limitation—How far a sect bound by decree against some of its members.*—In a suit determined in 1840, in which various members of the Vadagalai sect residing in a certain village were plaintiffs and various members of the Tengalai sect residing in the same village were defendants, it was held that an image of a priest revered by the latter sect was not

Execution of Decree—(*Concluded*). PAGE

entitled to a place in a certain temple of the village, or to public worship in a certain street, or to procession in the streets of the village; and it was directed that, if the defendants continued to make the image an object of public worship, it should be removed. In 1888 various members of the Vadagalai sect, asserting that the members of the Tengalai sect had acted in contravention of the decree in the above suit, filed an execution-petition therein, praying that various members of the Tengalai sect be arrested, and "that the image of their priest, which they attempt to worship publicly, be removed until they obey the terms of the decree." It appeared that, in 1868, the District Magistrate had granted an application to restrain the Tengalais from acting contrary to the above decree. The execution-petition was dismissed by the District Court:—*Held*, the petition was rightly dismissed, since the execution of the decree was barred by limitation, and the decree, if it was capable of execution at all, could not be executed against the parties to the present petition. SADAGOPACHARI v. KRISHNAMACHARI, 12 M. 356 ... 597

(2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 M. 90; 12 M. 211; 12 M. 216; 12 M. 312.

(3) See HINDU LAW—ADOPTION, 11 M. 408.

(4) See HINDU LAW—DEBTS, 13 M. 265.

(5) See LIMITATION ACT (XV OF 1877), 13 M. 236.

Execution Sale.

See HINDU LAW—DEBTS, 12 M. 142.

Executor de son tort.

See LIMITATION ACT (XV OF 1877), 12 M. 487.

Fishery.

Tidal river—Customary right.—Plaintiffs claimed a right to catch fish in a tidal river at a certain place by putting up stake nets across the river. This right was alleged to be based on custom which was not denied by defendants and user for thirty years was proved. The claim was decreed:—*Held*, that plaintiffs were not bound to prove sixty years' exclusive user to support their claim. NARASAYYA v. SAMI, 12 M. 43 ... 379

Gross Negligence.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 424, 429.

Hindu Law.

1.—ADOPTION.
2.—ALIENATION.
3.—DEBTS.
4.—GIFT.
5.—IMPARTIBLE ESTATES.
6.—INHERITANCE.
7.—JOINT FAMILY.
8.—MAINTENANCE.
9.—MARRIAGE.
10.—PARTITION.
11.—REVERSIONER.
12.—STRIDHANAM.
13.—SUCCESSION.
14.—WIDOW.
15.—WILL.

——— ***1.—Adoption.***

(1) *Among Brahmans—Ceremony of adoption after marriage of person to be adopted.*—Suit for partition of family property. The plaintiff sued as the adopted son of defendant, who had, after performing the usual ceremony of adoption, long treated him as his adopted son. The defendant denied that the plaintiff was his adopted son on the ground (which was established by the evidence) that the plaintiff was married at the date of the ceremony of adoption. The parties were Brahmans and members of the same gotra by birth:—*Held*, (1) the adoption set up was invalid; (2) the defendant was not estopped by his conduct from denying the validity of the adoption. PICHUVAYYAN v. SUBBAYYAN, 13 M. 128 ... 801

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(2) *Among Brahmans—Datta Homam, when it may be dispensed with.*—The ceremony of Datta Homam is not essential to a valid adoption among Brahmans Southern India, when the adoptive father and son belong to the same gotra. GOVINDAYYAR v. DORASAMI, 11 M. 5 (F.B.)=11 Ind. Jur. 409. 4

(3) *By Naikin or dancing girl—Adoption of more than one daughter at a time—Rights of adopted daughter—Custom of adopting more than one girl at a time not proved.*—Ammu, a Naikin, or dancing girl, in South Canara, affiliated prior to 1849 three girls and a boy. These four persons lived together as a joint family till 1849, when a partition of their joint property was decreed between them in equal shares. T, one of the girls, died in 1880, leaving certain property. V, claiming to be the sister by adoption of T, sued to recover T's estate from M, T's utrine brother:—*Held*, (1) that an adoption of a daughter by a Naikin or dancing girl can be recognized by the Civil Courts and does confer rights on the girl adopted—(2) that there being no warrant for a plurality of adoptions in the analogies of Hindu law, and no special custom having been proved, V could not claim T's estate. VENKU v. MAHLAINGA, 11 M. 393=12 Ind. Jur. 421 ... 274

(4) *Dancing girl caste—Adoption—Plurality of adoptions Immoral or illegal purpose of adoption.*—As a matter of private law, the class of dancing women being recognized by Hindu Law as a separate class having a legal status, the usage of that class in the absence of positive legislation to the contrary regulates rights of status and of inheritance, adoption and survivorship. A dancing woman adopted two daughters, of whom the latter was adopted in the year 1854. It was found that the custom obtaining among dancing women in Southern India permits plurality of adoptions:—*Held, in second appeal*, that the daughter subsequently adopted succeeded to the adoptive mother in preference to the son of the daughter previously adopted. MUTTUKANNU v. PARAMASAMI, 12 M. 214 ... 499

(5) *Dattaka Mimansa, s. V, slokas 16-20—Dattaka Chandrika, s. II, sloka 7—Yajnavalkya, chap. II, verse 128—Mitakshara, chap. I. s. XI, paragraph 1—Smriti Chandrika, 152.*—It is a general rule of Hindu law that there can be no valid adoption unless a legal marriage is possible between the person, for whom the adoption is made, and the mother of the boy, who is adopted, in her maiden state. MINAKSHI v. RAMANADA, 11 M. 49 (F B.) =11 Ind. Jur. 449 ... 35

(6) *Only son.*—Whether an elder widow who had purported to adopt a son to her deceased husband under his authority had received such authority orally or by will, was disputed by a junior widow, the Courts below differing as to the question of fact. Upon the evidence, the finding of the Subordinate Judge that no such authority had been given, was maintained. The Courts below also differed as to whether the adoption if authorized was validly effected, the boy adopted having been the only son of his natural father. Whether this is a disqualification invalidating an adoption, is a question that has not come before Her Majesty in Council for decision. SRI AMMI DEVI v. SRI VIKRAMA DEVU, 11 M. 486 (P.C.)=15 I.A. 176=5 Sar. P.C.J. 190=12 Ind. Jur. 250 ... 339

(7) *Only son given in adoption by widow.*—A widow is competent to give in adoption whenever the husband is legally competent to give and when there is no express prohibition from him. Three principles appear to regulate the power to give in adoption—(1) the son is the joint property of the father and the mother for the purposes of a gift in adoption, (2) when there is a competition between the father and the mother, the former has the predominant interest or a potential voice, and (3) after the father's death the property survives to the mother. The adoption of an only son is not invalid. NARAYANASAMI v. KUPPUSAMI, 11 M. 43 ... 31

(8) *Representation of estate by mother—Decree against mother when adopted son in existence, null.*—Plaintiff obtained a decree on a bond executed by S. against the mother of S. whom he believed to be the heiress of S. In attempting to execute this decree against the estate of S, plaintiff was obstructed by the defendant who was the adopted son of S. Plaintiff sued the defendant for a declaration that he was entitled to execute his decree against the estate of S, in the hands of the defendant:—*Held*, that the suit must fail, inasmuch as the estate of S. was not properly represented in the former suit. SUBBANNA v. VENKATAKRISHNAN, 11 M. 408 ... 285

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(9) *Vaisyas—Requisites of adoption—Adoption during pollution of adoptive parent —Contract Act—Act* IX *of* 1872, *ss.* 15, 16—*Coercion—Undue influence.*—The minor widow of a deceased Hindu of the Komati or Vaisya caste (who had authorized her to adopt a son) corporeally accepted a boy as in adoption from his natural father who (*semble*) belonged to a different gotram from her deceased husband There were no formal declarations of giving and taking the child, and *datta homam* was not performed. At the time when the child was handed over to the widow her husband's corpse was still in the house, and the relatives of the child and other members of the caste obstructed the removal of the corpse until the child had been accepted as above and the widow had executed a deed of adoption:—*Held*, that there was no valid adoption by the widow. *Per Cur.*—We cannot say that obstructing the removal of a corpse by the deceased's widow or her guardian, unless she made an adoption and signed a document is not an unlawful act or not an act such as is defined by s. 15 or 16 of the Indian Contract Act. *Dicta* in *Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondari Dasi* as to incidents of a formal adoption discussed. Observations on the necessity of *data homam* in a ceremonial adoption among members of a twice-born class, and on an adoption taking place during the pollution of the adoptive parent. RANGANAYAKAMMA v. ALWAR SETTI, 13 M. 214 ... 861

(10) See HINDU LAW—WILL, 12 M. 490.

(11) See PENAL CODE (ACT XLV OF 1860), 12 M. 273.

(12) See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 255.

———***2.—Alienation.***

By father when binding on son—Burden of proof.—The father of an undivided Hindu family has no power to alienate the son's co-parcenary share in land in the absence of any debt. One claiming merely as the father's vendee must therefore give evidence that the alienation was made for some purpose which would bind the son, or that it was made with his consent. CHINNAYYA v. PERUMAL, 13 M. 51 ... 746

———***3.—Debts.***

(1) *Civil Procedure Code, s.* 234—*Execution of a decree against the son of a Hindu judgment-debtor—Determination of questions as to the binding nature of the decree debt.*—In execution of a money decree passed against a Hindu, since deceased, ancestral property in the possession of his son was attached. A petition by the son objecting that the property was not liable to be attached in his hands was dismissed:— *Held*, that the order dismissing the petition, was wrong, for when a judgment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu law upon the father's death, he cannot be considered as executing the decree against the property of the deceased judgment-debtor within the meaning of s. 234 of the Code of Civil Procedure. VENKATARAMA v. SENTHIVELU, 13 M. 265 ... 896

(2) *Execution sale—Ancestral zamindari sold in execution of decree for money against the father, including the son's right of succession—Debt not immoral.*—A sale in execution of a decree against a zemindar for his debt purported to comprise the whole estate in his zamindari. In a suit brought by his son against the purchaser, making the father also a party defendant, to obtain a declaration that the sale did not operate as against the son as heir, not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose:—*Held*, that the impeachment of the debt failing, the suit failed; and that no partial interests, but the whole estate, had passed by the sale, the debt having been one which the son was bound to pay—*Hardi Narain Sahu* v. *Ruder Perkash Misser*, I.L.R., 10 Cal., 626 (where the sale was only of whatever right, title and interest the father had in property), distinguished. MINAKSHI NAYUDU v. IMMUDI KANAKA RAMAYA GOUNDAN, 12 M. 142 (P.C.) = 16 I.A 1 = 5 Sar. P.C.J. 271 = 13 Ind. Jur. 9 ... 448

———***4.—Gift.***

(1) *Construction of settlement—Successive interests— Contingent gift to a class-member of the class in existence on failure of prior interest—Rule in the Tagore case:*—A karar executed to the father of Sitarama, a minor grandson

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of the executant, after reciting that the executant had appointed Sitarama to perpetuate his family and had handed over certain property to the father, provided that the property should be delivered to Sitarama on his attaining majority, and proceeded as follows:—"If the said Sitarama shall have descendants, neither your male descendants nor any one else shall have any interest in any of the property herein mentioned. If the said Sitarama happen to be without descendants the male offspring of my daughter Kaveramma, your wife, shall enjoy the property equally, but no others shall have any interest therein; such is the *swatantra karar* executed with my free will and pleasure." Sitarama attained his majority, but died without issue. His elder brother sued for possession of the property under the above clause:—*Held*, that since the plaintiff was a person capable of taking subject to the life interest, at the time when the gift was made, he was entitled to succeed:—*Semble*,—If the gift to the plaintiff had failed the property would have reverted to the heirs of the settlor on Sitarama's death without issue. MANJAMMA v. PADMANABHAYYA, 12 M. 393 ... 623

(2) *Of ancestral property by father to stranger—Suit by minor son to recover.*—Where a Hindu made a gift of certain land, which he had purchased with the income of ancestral property, and a suit was brought to recover the land on behalf of his minor son, who was born seven months after the date of the gift:—*Held* that the gift was invalid as against the plaintiff and that he was entitled to recover the land from the donee. RAMANNA v. VENKATA, 11 M. 246 = 12 Ind. Jur. 177 = 12 Ind. Jur. 453 ... 171

(3) See HINDU LAW—WILL, 11 M. 258; 12 M. 441.

———***5.—Impartible Estates.***

(1) *Impartibility of zamindari shown by evidence—Grant by sanad in 1802 of zamindari without change of rule of succession by primogeniture—Madras Regulation XXV of 1802.*—The question whether an estate is impartible and descends by the law of primogeniture, or is subject to the ordinary Hindu law of inheritance, must be decided in each case according to the evidence given in it. The result of the evidence in this suit was to show that before, and in, the year 1802, the zamindar was in possession of the Devarakota zamindari, by right of primogeniture, as an impartible estate; and that he was so regarded by the Government. On the passing of Madras Regulation XXV of 1802, and the issue to him of a sanad-i-milkiyat-i-istimrari, in accordance with it, he acquired a permanent property in the zamindari lands at a fixed assessment, but they remained heritable as before; the estate remained entire; and there was no evidence of any intention on the part of the Government to alter the nature of the tenure. What was said in the judgment in the *Hansapur case* (12 M.I.A., 1) was applicable here. The estate continued to be impartible, and the rule of succession to it was not altered. It descended by the rule of primogeniture. MALLIKARJUNA v. DURGA, 13 M. 406 (P.C.) = 17 I. A. 134 = 5 Sar. P.C.J. 547 ... 995

(2) *Zamindari—Partition—Limitation Act, 1877, sch. II, art. 127—Limitation Act, 1859, 1 (13).*—In 1803 G. being in possession of the zamindari of M., the permanent settlement was made with him and a sanad was granted to him as prescribed by Regulation XXV of 1802. In 1827 C., the only son of G., being in possession of the zamindari, got into debt and the zamindari was sold in execution of a decree and bought by Government. In 1835 the zamindari was granted to J., the son of C., by Government and a sanad issued in the usual terms as prescribed by Regulation XXV of 1802. J. died in 1864 leaving four sons, the three plaintiffs and C., his eldest son. C. died in 1869 leaving an only son, J., the defendant. In 1869 the Court of Wards took charge of the estate on behalf of the infant defendant and allowed his uncle, plaintiff No. 1, to receive the rents of the zamindari as renter. J and his three uncles lived in the same house and participated in the joint family property until 1872, when the plaintiffs claimed to have the zamindari divided. By an agreement between the plaintiffs and the Court of Wards all the moveable and immoveable property, except the zamindari taluk, was divided into four shares and distributed in 1874 between the plaintiffs and defendants. In 1884 the plaintiffs sued for partition of the zamindari, alleging that their cause of action arose in 1872, when the Court of Wards denied their right to a partition of the zamindari taluk. The defendant pleaded (1) that

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the estate was not partible; (2) that the suit was barred by limitation;—*Held*, that the zamindari was partible; (2) that the suit was not barred by limitation. JAGANATHA v. RAMABHADRA, 11 M. 380 ... 265

(3) Right of zamindar to alienate—Civil Procedure Code, ss. 437, 464—Regulation V of 1804 (Madras), ss. 2, 8—Suit by award of the Court of Wards—Non-joinder and misjoinder of parties—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 197.

———***6.—Inheritance.***

(1) *Bhandu—Daughter's son's son.*—N., the daughter of J., inherited his property under Hindu law. N. had a son, who predeceased her, leaving a son K.:—*Held* that K., being a bhandu, was entitled to the property of J. on the death of N. in preference to the daughters of N. KRISHNAYYA v. PICHAMMA, 11 M. 287 ... 200

(2) *Bandhu—Paternal great aunt's grandson.*—According to the Hindu Law of Succession in force in the Madras Presidency, the grandson of a paternal great aunt of the deceased inherits to him as a bandhu. SETHURAMA v. PONNAMMAL, 12 M. 155=13 Ind. Jur. 52 ... 457

(3) *Devadasi.*—On the death of a prostitute dancing girl her adopted niece belonging to the same class succeeds to her property, in whatever way it was acquired, in preference to a brother remaining in the caste. NARASANNA v. GANGU, 13 M. 133 ... 804

(4) Illatam—*Burden of proof.*—N, a Hindu, who had admittedly been taken as *illatam* into the family of his father-in-law, died, leaving property which he had acquired by virtue of his *illatam* marriage. He was succeeded by his son, who died without issue, leaving only a sister surviving him. In a suit by the brother of N, who was the managing member of his family, to recover the property from the sister of the last holder:—*Held*, that the plaintiff was *prima facie* entitled to recover, notwithstanding the admission, and that it was for the defendant to establish any special circumstances to rebut his claim. RAMAKRISTNA v. SUBBAKKA, 12 M. 442 ... 658

(5) *Mother's brother—Father's sister.*—According to the Hindu law current in the Madras Presidency, the father's sister is not entitled to inherit in preference to the mother's brother:—*Semble, per Wilkinson, J.*—The father's sister is a bandhu. NARASIMMA v. MANGAMMAL, 13 M. 10 ... 717

(6) *Rule of inheritance affected by manner of life—Maravar prostitutes—Act* XXI *of* 1850.—A married Maravar woman deserted her husband and lived in adultery with another man, to whom she bore four children. Of these children, the two daughters associated together leading the life of prostitutes, and the two sons separated themselves from their sisters and observed caste usage. The elder daughter died leaving property in land:—*Held*, that the sister succeeded to the deceased in preference to the brother. SIVASANGU v. MINAL, 12 M. 277 ... 543

(7) *To stridhanam—Right of step-son to inherit.*—A Hindu widow, having stridhanam acquired from her husband, died leaving no issue. The defendant who was the son of her elder sister took possession. The stepson of the deceased now sued to recover the stridhanam property. It was found that the marriage of the deceased had been celebrated in the *Brahma* form:—*Held*, that the plaintiff was entitled to succeed. BRAHMAPPA v. PAPANNA, 13 M. 138=13 Ind. Jur. 454 ... 808

———***7.—Joint family.***

(1) *Court-sale—Decree against Hindu father—Interest of undivided son—Certificate of sale—Civil Procedure Code, s.* 316—*Grounds of second appeal.*—In execution of a decree for sale passed on a hypothecation bond, all the land comprised in the security was attached. The judgment-debtor was a member of an undivided family; his son put in no claim in execution, but, on a claim put in by his nephew, it was ordered that the right, title and interest of the judgment-debtor be sold. The decree-holder became the purchaser, and having obtained a sale certificate which recited that "all the interest of the judgment-debtor" was sold, he was put in possession of all the land, part of which he leased to the son. Subsequently the nephew obtained a decree for his share against the decree-holder and then purchased the rest of the land from him. In a suit by the son against the nephew to recover his share, the plaintiff having failed to prove that the

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judgment-debt had been incurred for purposes not binding on him:—*Held*, that the entire estate less the interest of the nephew was sold to the decree-holder and consequently the son's interest had passed to him. The question what is actually bargained and paid for at an execution sale is a mixed question of law and fact, and the High Court on second appeal is not bound by the finding of the Court of first appeal with regard to it. GNANAMMAL v. MUTHUSAMI, 13 M. 47 ... 743

(2) Civil Procedure Code, s. 586—Mofussil Small Cause Court Act, s. 6—Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu law—Liability of son for debt of living father—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 M. 139.

(3) *Decree against father—Sale of ancestral estate in execution of money decree—Son's rights and liabilities.*—A purchased the half share of the judgment-debtors in certain immoveable family property, at a Court-sale held in execution of money decrees against B and his brother, who were members of an undivided Hindu family. B's undivided son sued A—B and the remaining members of his family, being also joined as defendants—to recover a share in the land, alleging that his interest was not bound by the sale; but he did not prove that the debt for which the decrees were passed was immoral, and it appeared that A had bargained and paid for the entire estate. The plaintiff was a minor at the time of the sale, and B was not the managing member of the family:—*Held*, that the Court sale was binding on the plaintiff's share. KUNHALI BERAI v. KESHAVA SHANBAGA, 11 M. 64=12 Ind. Jur. 15 ... 45

(4) *Money decree against father—Attachment of ancestral estate.*—In execution of a money decree ancestral property of the joint family of the judgment-debtor was attached. His sons sued to release their interest from attachment, alleging that the judgment debt had been incurred for immoral purposes, which was denied by the decree-holder. It was held by the lower Courts that nothing more than the father's share was liable to be attached as the sons were not parties to the decree:—*Held*, that the nature of the debt should be determined, since the creditor's power to attach and sell depends on the father's power to sell, which again depends on the nature of the debt. RAMANADAN v. RAJAGOPALA, 12 M. 309=13 Ind. Jur. 292 ... 565

(5) Money decree against managing member of joint family not impleaded as such—Effect of sale in execution of such decree—Transfer of Property Act, s. 99—Sale of mortgage property in execution of decree on a money bond for interest due on the mortgage—See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 325.

(6) *Purchaser from one co-parcener—Adverse possession.*—Plaintiffs, being members of a joint Hindu family alleging division, and a sale to them by other members of their share in the family property more than 12 years before suit, sued to eject a more recent purchaser. The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it:—*Held*, (1) that the plaintiffs having failed to prove division as alleged were not entitled in second appeal to have their suit treated as a suit for partition; (2) that the suit was barred by limitation, since the proposition that the possession of one co-parcener is the possession of all for purposes of limitation has no application as between a purchaser from one of the coparceners and the other members of the family. MUTTUSAMI v. RAMAKRISHNA, 12 M. 292 ... 553

(7) *Release by a co-parcener of his rights in favor of another co-parcener.*—In a joint Hindu family, consisting of four brothers A, B, C, D, A and B obtained their shares by a partition suit. In the plaint they stated that they relinquished their shares of the moveable property in favor of C. In a suit by C against D to recover his share C claimed three-fourths of the moveable property. D contended that the release by A and B in favor of C could not, according to Hindu law, add to the share of C as a co-parcener:—*Held*, that C was entitled to the share claimed. PEDDAYA v. RAMALINGAM, 11 M. 406 ... 283

(8) *Sale by a coparcener of his share in specific property—Rights of the vendee—Transfer of Property Act—Act IV of 1882, s. 44.*—A purchaser from a

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member of an undivided Hindu family of that member's share in a specific portion of the ancestral family property cannot sue for a partition of that portion alone and obtain an allotment to himself by metes and bounds of his vendor's share in that portion of the property. VENKATARAMA v. MEERA LABAI, 13 M. 275 ... 903

(9) *Son's estate liable for debt of deceased father contracted as surety—Contract Act, s. 131, not applicable to case.*—In a suit brought to recover money from the estate of a deceased Hindu in the hands of his son on a surety bond executed by the father:—*Held*, that the estate of the son was liable according to the principles of Hindu law, and that the question was not affected by the provisions of the Contract Act. SITARAMAYYA v. VENKATARAMANNA, 11 M. 373 ... 260

———*8.—Maintenance.*

(1) Civil Procedure Code, s. 43—Maintenance—Suit to declare maintenance fixed by a decree, a charge on land—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 M. 285.

(2) *Limitation—Refusal of person liable to maintain—Cause of action.*—In a suit for maintenance brought in 1887 by a Hindu widow against the undivided family of her deceased husband who had died about 24 years before suit, it appeared that her maintenance had not been made a charge on specific property:—*Held*, that time began to run against the plaintiff's claim under the Limitation Act of 1859, only from the date of refusal on the defendant's part to maintain her. RAMANAMMA v. SAMBAYYA, 12 M. 347 592

(3) *Of son's widow—Self-acquired property.*—A Hindu is under no obligation to maintain his adult son or the son's widow out of his self-acquired property. Thus a daughter-in-law can enforce no claim for maintenance against the self-acquired property of her father-in-law which has passed to his grandson, unless the father-in-law showed by conduct or otherwise an unequivocal intention that it should be taken subject to the obligation of providing for his support. AMMAKANNU v. APPU, 11 M. 91=12 Ind. Jur. 13. ... 64

(4) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 11 M. 199.

(5) See HINDU LAW—WIDOW, 12 M. 334.

———*9.—Marriage.*

(1) Civil Procedure Code, s. 11—Widow re-marrriage—Exclusion from temple—Excommunication—Jurisdiction—See ACT XV OF 1856 (HINDU WIDOW'S RE-MARRIAGE), 13 M. 293.

(2) Contract Act—Act IX of 1872, s. 23—Unlawful consideration—Marriage brokage agreement—See CONTRACT ACT (IX OF 1872), 13 M. 83.

(3) *Gandharva marriage without nuptial rites invalid—Mitakshara, ch. I, s. 12—Illegitimate son—Status of illegitimate son of Kshatriya by Sudra woman.*—In order to constitute a valid marriage in Gandharva form, nuptial rites are essential. Although the illegitimate children of members of the regenerate classes are excluded from inheritance by the Mitakshara, the absence of legal marriage is no bar to the determination of their caste with reference to the law applied to Anulomajas (children born of mixed marriages). The illegitimate son of a Kshatriya by a Sudra woman is not a Sudra but of a higher caste called Ugra. BRINDAVANA v. RADHAMANI, 12 M. 72 ... 399

———*10.—Partition.*

(1) *Land dedicated to family idol—Land excluded from partition of family property and declared inalienable—Subsequent purchase from Escheat Department of Government—Sale in execution.*—By a partition deed by the six members of a Hindu family it was provided that part of the land of the family should be set apart for the maintenance of the family idol and should be inalienable and the rest of the land was divided equally. Subsequently the Government claimed the dedicated land as an escheat, and sold it to the members of the family jointly, of whom one built a house on part of it—less than one-sixth—with the consent of the others. The house and its site was sold in execution of a decree against the builder:—*Held*, that the other members of the family were not entitled to have the house removed or the sale cancelled. MALLAN v. PURUSHOTTAMA, 12 M. 287 ... 550

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(2) *Sudras—Illegitimate son—Suit for partition.*—Among Sudras an illegitimate son is entitled to maintain a suit for partition of the family property against his father's legitimate sons: and if his interest is endangered by reason of the property being left under the management of the latter, partition can be claimed during his minority. THANGAM PILLAI v. SUPPA PILLAI, 12 M. 401 ... 628

(3) See HINDU LAW—ADOPTION, 13 M. 128.

(4) See HINDU LAW—IMPARTIBLE ESTATES, 11 M. 380.

(5) See LIMITATION ACT (XIV OF 1859), 12 M. 26.

———*11.—Reversioner.*

Limitation—Act XIV of 1859, s. 1, cl. 12—Act XV of 1877, sch. II, art. 141—Suit by reversioner on expiry of widow's and daughter's estate—See LIMITATION ACT (XXV OF 1859), 13 M. 512.

———*12.—Stridhanam.*

See HINDU LAW—INHERITANCE, 13 M. 138.

———*13.—Succession.*

Succession to a jeer of a mutt—Nomination requiring assumption of the character of a sannyasi—Time fixed by decree for assumption of that character—Enlargement on appeal of that time—Evidence of custom.—The plaintiff sued for a declaration of his right as jeer of a mutt and for possession of the property of the mutt. The plaintiff alleged that the immemorial custom with reference to the succession to the office of jeer was that the jeer for the time being nominated his successor, and that, failing such nomination, the disciples assembled at the place where he died, elected his successor, and that the person so nominated became jeer by virtue of such nomination alone. The plaintiff's case was that he was nominated by the late jeer, although the nomination was not concurred in by the disciples, and that the late jeer had initiated him and directed him to become a sannyasi a day or two after his initiation, and that he was accordingly entitled to the rights and privileges of jeer. The plaintiff obtained a decree which was, however, made contingent upon his assuming the character of a sannyasi within the period of four months. The defendant preferred an appeal against this decree, and the plaintiff preferred an appeal praying for the enlargement of the period fixed, within which he was to become a sannyasi, pending the disposal of the appeal preferred by the defendant. On the plaintiff's appeal:—*Held*, the Court had power to extend the time as prayed. On the defendant's appeal:—*Held*, (1) on its appearing that the plaintiff did not repeat the presha mantram that his upadesam was insufficient; (2) that the plaintiff's right, if any, to the status of jeer ceased on his omission to become a sannyasi soon after the initiation alleged; (3) on the evidence that no similar case of succession had taken place in the history of the institution that the plaintiff had established merely an imperfect nomination which could not be upheld on the principles deducible from the known cases of succession. RANGACHARIAR v. YEGNA DIKSHATUR, 13 M. 524 ...

———*14.—Widow.*

(1) *Grant by widow for religious benefit of husband.*—Where two widows of a zamindar granted a small portion of the zamindari to a Brahman who had been brought up by them with a view that he should perform the funeral and annual ceremonies of their deceased husband:—*Held*, that the grant was not *ultra vires*, and could not be resumed by the zamindar's successor. LAKSHMINARAYANA v. DASU, 11 M. 288 ... 201

(2) *Notice by possession of, of her right to maintenance—Sale of family property to discharge previous mortgage.*—Immoveable property of a joint Hindu family was sold by a member of the family and his two sons to the plaintiff, and the purchase-money was expended in redeeming a mortgage. The character of the mortgage debt was not shown. In a suit by the plaintiff for possession it appeared that the property in question had been in the exclusive possession of another member of the family, and after his death in that of his widow, for more than 26 years, and that neither of them had concurred in the sale to the plaintiff; it was also found that the widow was entitled to possession on

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account of maintenance :—*Held*, that the separate possession of the widow was notice to the plaintiff of her interest in the land, and that he was not entitled to defeat it. IMAM v. BALAMMA, 12 M. 334=13 Ind. Jur. 293=13 Ind. Jur. 414 ... 582

(3) *Revival of a barred debt by the widow of a deceased Hindu.*—Although a managing member of a joint Hindu family cannot as such revive a barred debt as against his coparceners, it is competent to the widow of a deceased member of the family, who represents the inheritance for the time being and in whom it is a pious duty to pay her husband's debts, to bind the reversion by a mortgage executed to secure such debts though they were barred at the time of its execution. When therefore the managing members of an undivided Hindu family, after the death of the widow, sold family property for the purpose of discharging such a mortgage :—*Held*, that the sale was binding on the coparcenary. KONDAPPA v. SUBBA, 13 M. 189 ... 844

(4) *Right of, to reside in the family dwelling-house—Sale of dwelling-house in execution of a decree obtained against the managing members of family on a debt incurred for family purposes.*—A house; being ancestral property of a Hindu family, was sold in execution of a decree by which the decree amount was constituted a charge on such property. The debt sued on had been incurred for the benefit of the family by the coparceners for the time being, but since the death of such coparcener's father :—*Held*, the widow of the latter who resided in the said house during her husband's life-time was not entitled as against a purchaser for value in good faith under such decree (but with notice that she resided and during her husband's life had resided in that house, and still claimed to reside there) to continue to reside for life in such portion of the house sold as she resided in subsequent to her husband's death. RAMANADAN v. RANGAMMAL, 12 M. 260 (F.B.) ... 531

(5) *Widow's estate—Mortgage by two co-widows—Sale of equity of redemption in execution of decree against one widow—Suit to redeem by other widow—Decree for redemption of moiety on payment of moiety of mortgage amount.*—A mortgage of ancestral estate having been made by A and B, two Hindu co-widows, the equity of redemption of the said estate was sold in execution of a decree for money against B only and purchased by the mortgagee :—*Held*, that A was entitled to redeem only a moiety of the estate during the lifetime of B. ARIYAPUTRI v. ALAMELU, 11 M. 304 ... 212

(6) See ACT III OF 1873 (CIVIL COURTS, MADRAS), 11 M. 448.

(7) See SPECIFIC RELIEF ACT (I OF 1877), 12 M. 136.

———*15.—Will.*

(1) *Construction—Gift to husband and wife—Joint tenancy—Survivorship—Alienation by husband to creditor invalid.*—A Hindu, by his will, granted jointly to his brother's son and Nagammal, the wife of latter, certain land with power of alienation. The recitals in the will showed that the husband was included in the gift not because of his relationship to the testator but because he was the husband of Nagammal :—*Held* that the grantees were joint tenents and not tenants in common and that the joint tenancy was not severed by an alienation of the land by the husband to a creditor. VYDINADA v. NAGAMMAL, 11 M. 258=12 Ind. Jur. 455 ... 179

(2) *Gift to a class—Vested and contingent interest.*—A will, made by a Hindu, contained the following clause: "I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands, shall enjoy the produce, and shall transmit the *corpus* intact to her male descendants." Within a month after the testator's death his eldest daughter was delivered of a son, who died in a few months. She died subsequently, leaving the plaintiff, her husband but no male issue her surviving. The plaintiff sued as heir of his son to recover the amount of the above bequest :—*Held*, that as the daughter's son never acquired a vested interest in the bequest, the plaintiff's suit must be dismissed. SRINIVASA v. DANDAYUDAPANI, 12 M. 411 ... 636

(3) *Will of a Hindu in favour of his wife made on his taking a son in adoption—Adoption made on the understanding that the dispositions of the will be observed.*—A Hindu, on taking a son in adoption, executed a "settlement as to

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what should be done by my adopted son and my wife after my lifetime," providing that on an event, which happened, the wife should enjoy certain land for life in lieu of maintenance" In a suit by the widow of the executant against the adoptive son for possession of the land:—*Held*, that the instrument was a will. On its appearing that the defendant's natural father, when he gave him in adoption, tacitly submitted to the arrangement contained in it:—*Held*, that the adoptive son was bound by its provisions. LAKSHMI v. SUBRAMANYA, 12 M. 490 ... **691**

Improvements.

See MALABAR LAW—MORTGAGE, 12 M. 320.

Insolvency.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 11 M. 1.

Insolvent Act, 1848, 11 and 12 Vic, C. 21.

Ss. 47, 51—*Civil Procedure Code, s. 642—Exemption from arrest on civil process redeundo.*—The Commissioner in Insolvency committed an insolvent to jail by an order under s. 51 of the Insolvent Act:—*Held by the Full Bench*, that an order made under s. 51 of the Insolvent Act is a final order: and a Commissioner in Insolvency has no power under that section to commit an insolvent to jail but must leave the excepted judgment-creditors (if any) to their ordinary remedies for the time mentioned in the order. The insolvent, having been discharged from jail under the rule laid down by the Full Bench as above, was immediately arrested on a warrant obtained by a judgment-creditor:—*Held, per Shephard, J.*, that the insolvent was not privileged from arrest as being on his way back from Court. SAMARAPURI v. PARRY AND COMPANY, 13 M. 150 (F.B.) ... **816**

Judgment of Foreign Court.

Jurisdiction—Notice.—The defendants, who were British subjects, purchased goods from the plaintiff in French territory. The plaintiff sued the defendants in the French Court and obtained judgment against them, but the defendants neither resided nor owned property in French territory, and did not appear at the trial and had no actual notice of the proceedings. In a suit brought in British India on the judgment of the French Court:—*Held*, that the want of notice to the defendants was fatal to the suit. *Quœre*, whether the French Court would have had jurisdiction (apart from the question of notice) if it had been proved that it was intended that payment should be made in French territory? BANGARUSAMI v. BALASUBRAMANIAN, 13 M. 496 ... **1058**

Jurisdiction.

(1)—By consent—Waiver of want of jurisdiction—Civil Procedure Code, s. 25, order made under, without notice to the party not applying—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 211.

(2) Civil Procedure Code, s. 11—Hindu law—Widow re-marriage—Exclusion from temple—Excommunication—See ACT XV OF 1856 (HINDU WIDOW'S RE-MARRIAGE), 13 M. 293.

(3) *Objection as to, first taken in second appeal—Waiver of objection to jurisdiction—When objection cannot be waived.*—A suit of which the subject-matter was less than Rs. 2,500 was instituted in a Subordinate Court. The Subordinate Judge tried the suit and passed a decree, and an appeal against this decree was entertained and determined by the District Judge without objection taken that the Subordinate Court had no jurisdiction to hear and determine the suit. On second appeal objection was taken as above:—*Held*, that the objection must prevail and the plaint be returned for presentation in the proper Court. VELAYUDAM v. ARUNACHALA, 13 M. 273 ... **902**

(4) *Objection as to, first taken on appeal—Suit for partition.*—Plaintiff sued in the District Court for partition of an one seventh share purchased by him in an undivided agraharam, of which the total value was about Rs. 10,400, and obtained a decree. The defendants on appeal objected that the suit should have been filed in the District Munsif's Court:—*Held*, that the suit

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should have been filed in the District Munsif's Court. *Per cur.*—Though the objection was not taken in the Court below, yet it is apparent on the face of the plaint and has reference to the jurisdiction of the Court; we must therefore consider it. RAMAYYA v. SUBBARAYUDU, 13 M. 25 ... 728

(5) *Of District Courts—Karnam—Reg.* XXV *of* 1802 (*Madras*), *s.* 11—*Reg.* XXIX *of* 1802 (*Madras*), *ss.* 5, 7, 10, 16, 18—*Suit for dismissal of a zamindari Karnam—Jurisdiction.*—A suit by a zamindar for the dismissal of zamindari karnam cannot be entertained by a District Munsif. The Subordinate Court and the District Court, where there is no Subordinate Court, is the tribunal that has taken the place of the Court of Adawlut of 1802. VENKATANARASIMHA v. SURYANARAYANA, 12 M. 188 ... 481

(6) *Of High Court—Foreign Jurisdiction Act,* 1879, *ch.* II—*European British subjects in Bangalore—Justice of the Peace for Mysore.*—The Civil and Military Station of Bangalore is not British territory, but a part of the Mysore State, and the Code of Criminal Procedure is in force therein by reason of declarations made by the Governor-General in Council in exercise of powers conferred by the Foreign Jurisdiction and Extradition Act, 1879. Justices of the Peace for the State of Mysore are also Justices of the Peace for Bangalore, and both the Civil and Sessions Judge and the District Magistrate of Bangalore being such Justices of the Peace are, by virtue of s. 6 of the said Act, subordinate to the High Court at Madras. HAYES, *In re*, 12 M. 39=1 Weir 10 ... 377

(7) *Suit to cancel patta of Government waste issued by Collector—Power of Collector to cancel patta granted by him—Standing Order.*—The plaintiff having obtained from the Revenue officers of the district a patta of Government waste, sued for the cancellation of a patta for the same land subsequently granted to other persons by the Collector who considered that the issue of the plaintiff's patta was not in accordance with the darkhast rules:—*Held*, (1) it was not competent to the Collector to issue the second patta in supersession of that issued to plaintiff; (2) it was competent to a Civil Court to pass a decree declaring the second patta null and void, and the plaintiff was entitled to such a decree. COLLECTOR OF SALEM v. RANGAPPA, 12 M. 404 ... 631

(8) Withdrawal of part of claim—Canarese navoyats—Common management of family property—Muhammadan law—Sale of an undivided share—Limitation—Burden of proving validity of sale by a gosha woman—See MUHAMMADAN LAW—PARTITION, 12 M. 380.

(9) See ACT VII OF 1865 (MADRAS IRRIGATION), 12 M 407.

(10) See ACT III OF 1873 (MADRAS CIVIL COURTS), 11 M. 140, 11 M. 197.

(11) See ACT IX OF 1887 (MOFUSSIL SMALL CAUSE COURTS), 11 M. 134.

(12) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 11 M. 220.

(13) See COURT FEES ACT (VII OF 1870), 12 M. 223.

(14) See JUDGMENT OF FOREIGN COURT, 13 M. 496.

Karnam.

(1) *Civil Procedure Code, s.* 13—Res judicata—*Decree in suit by a karnam as such binds his successor.*—The karnam in a certain mitta sued to recover certain land as part of the *mirasi* property attached to his office. It appeared that the plaintiff's father and predecessor in office had sued by virtue of his office to recover the same land and that his suit had been dismissed:—*Held*, that the plaintiff's claim was *res judicata*. VENKAYYA v. SURAMMA, 12 M. 235 ... 514

(2) Regulation XXV of 1882 (Madras), s. 11—Regulation XXIX of 1802 (Madras), ss. 5, 7, 10, 16, 18—Suit for dismissal of a zamindari karnam—See JURISDICTION, 12 M. 188 ...

Kumaki Land.

See EVIDENCE ACT (I OF 1872), 12 M. 422.

Land Acquisition Act (X of 1870). PAGE

Land given as compensation—Regulation II *of* 1803 (*Madras*), *s.* 44—*Darkhast rules.*—The owner of certain land taken up under the Land Acquisition Act, after the amount of compensation had been fixed, conveyed her interest to the present defendant, who applied for the land now in dispute in lieu of compensation, it being then Government waste, and this application was granted and the deed of exchange executed. The plaintiff and another had previously applied under the darkhast rules for the land now in dispute, but the Collector ordered the land to be placed in possession of the defendant. The Board of Revenue, however, directed that the land be made over to the prior darkhastdars on terms which were complied with and they were put into possession. The plaintiff having been subsequently dispossessed by the defendant, now sued for a declaration of title and for possession.—*Held*, that the plaintiff was entitled to the land as against the defendant. NARAYANA v. RAMACHANDRA, 13 M. 485 ... 1050

Landlord and Tenant.

(1) *Ejectment—Permanent tenancy, pleaded—Notice to quit.*—Suit to eject defendants from certain land held by them from the plaintiff under a *chalgeni* (yearly) demise of 1869. The defendants pleaded that they were *kattugudi* (permanent) tenants of the land in question; they had set up their title as *kattugudi* tenants previous to the *chalgeni* demise, but it did not appear that they had re asserted it up to date of suit:—*Held*, that the issue whether the plaintiff had given a notice to quit, reasonable and in accordance with local usage, should be tried. SUBBA v. NAGAPPA, 12 M. 353 =13 Ind. Jur. 256 ... 595

(2) *Estoppel—Collusion.*—The plaintiff in an ejectment suit had established in a former suit that land formerly the property of the second defendant's father had been sold under a decree and purchased *benami* for him (the plaintiff), and that a rent agreement in respect of the same land entered into between the ostensible purchaser and the first defendant had also been entered into by the former on his behalf; and possession had been formally delivered to the plaintiff under process of Court. It now appeared that the second defendant, who contested the validity as against him of the decree under which the land was sold, having withdrawn a suit filed by him to declare the sale invalid as against him after his father's death, had colluded with the first defendant and collected rent from him—*Held*, that the second defendant, having come in by collusion with the first defendant, was precluded from denying the plaintiff's title and was liable to the plaintiff for the rent collected by him from the first defendant. PASUPATI v. NARAYANA, 13 M. 335 ... 945

(3) Estoppel—Kumaki land—Unassessed waste reclaimed by plaintiff—Patta granted to defendant—See EVIDENCE ACT (I OF 1872), 12 M. 422.

(4) Malabar kanam—Change in character of land—Passive acquiescence of landlord—Estoppel—Compensation for improvements by tenant—See MALABAR LAW—MORTGAGE, 12 M. 320.

(5) *Right of occupancy—Permanent cultivator—Paracudi—Burden of proof—Form of suit.*—The defendants' ancestors or predecessors-in-title were the cultivating tenants of the lands of a certain temple from a date not later than 1827, in which year they were so described in the paimash accounts. In 1830, they executed a muchalka to the Collector, who then managed the temple, whereby they agreed among other things to pay certain dues. They were described in the muchalka as *paracudis*. In 1857, the plaintiff's predecessors took over the management of the temple from, and executed a muchalka to, the Collector, whereby he agreed among other things not to eject the raiyats as long as they paid kist. In 1882, the dues (which were payable separately), having fallen into arrear, the manager of the temple sued to eject the defendants:—*Held*, (1) that the suit was not bad for misjoinder; (2) that the burden of proving the permanent character of the tenure set up by the defendants lay on them; (3) that there was nothing to show that the defendants were more than tenants from year to year. THIAGARAJA v. GIYANA SAMBANDHA PANDARA SANNADHI, 11 M. 77. 54

(6) Tenancy, Assignability of—Suit by zamindar to set aside a Court-sale of his raiyat's interest—Burden of proof—See TRANSFER OF PROPERTY ACT (IV OF 1882), 13 M. 60.

Lien. PAGE

On land created by agreement—Sale to stranger without notice—Purchaser bound.—D mortgaged certain land to S. to secure re-payment of a loan, and covenanted that in a certain event S. might realize the money from the house of D. D. sold this house to C., who purchased without notice of the covenant:—*Held*, that C. could not resist the claim of S. to have the house sold under the covenant. COOLING v. SARAVANA, 12 M. 69 ... 397

Limitation.

(1) *Adverse possession—Redemption of land by one of two co-mortgagors and re-mortgage thereof—Possession under second mortgage for more than 12 years.*—A and B, two brothers, being entitled to certain land, mortgaged it in 1852 to C. In 1864 A redeemed the mortgage and re-mortgaged the land to D for the same amount. In 1885 the defendants (sons of A) redeemed the mortgage to D. In 1886 the plaintiff (son of B) sued defendants and the representatives of C and D to redeem a moiety of the land on payment of a moiety of the amount due on the mortgage of 1852. The defendants pleaded, *inter alia*, that the suit was barred by limitation as the land had been held adversely since the mortgage of 1864:—*Held*, that in the absence of proof that the land was held with an assertion of adverse title the plaintiff was entitled to a decree. MOIDIN v. OOTHUMANGANNI, 11 M. 416 ... 291

(2) Adverse possession—Suit by a trustee of a devasam disaffirming the act of his predecessor—See TRUSTEE, 13 M. 402.

(3) Hindu law—Joint family—Purchaser from one co-parcener—Adverse possession—See HINDU LAW—JOINT FAMILY, 12 M. 292.

(4) Regulation II of 1882 (Madras), s. 18—Starting point of limitation—Acknowledgment—Adverse possession of partial interest in land—See LIMITATION ACT (IX OF 1871), 13 M. 467.

(5) Regulation VII of 1817 (Madras), s. 12—Suit by a dharmakarta disaffirming the acts of his predecessor—See ACT XX OF 1863 (RELIGIOUS ENDOWMENT), 13 M. 277.

(6) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 11 M. 132.

(7) See MALABAR LAW—ADOPTION, 11 M. 116.

(8) See MUHAMMADAN LAW—PARTITION, 12 M. 380.

Limitation Act (XIV of 1859).

(1) *S. 1, cls* 9. 10, 16.—The period of limitation applicable under Act XIV of 1859 to suits upon written instruments which could not have been registered under the law in force at the time of execution of such instruments is six years under cl. 16 of s. 1 of the said Act. VENKATACHALAM v. VENKATAYYA, 11 M. 207 = 12 Ind Jur. 257 ... 144

(2) *S.* 1, *cl.* 12—*Act* XV *of* 1877, *sch.* II, *art.* 141—*Hindu law—Suit by reversioner on expiry of widow's and daughter's estate.*—Plaintiff sued in 1887 to recover property as part of the estate of his maternal grandfather, who died about 1845, leaving (1) a widow, who inherited the property and died in 1846, (2) his daughter by her, who took the property on her mother's death and alienated it to the defendants about 1850 and died before suit, and (3) the plaintiff's mother, who was his daughter by another wife. The plaintiff's mother made no claim on the property and died in 1883.—*Held*, the suit was not barred by limitation. SAMBASIVA v. RAGAVA, 13 M. 512 ... 1069

(3) *S.* 1, *cl.* 13—*Partition suit for share of joint family estate—Failure to prove participation in the family coparcenary within the period.*—In a suit brought in 1881 for a share of joint family estate, the question whether the plaintiff's right to sue was barred by limitation under Act XIV of 1859, s. 1, cl. 13, depended on whether there had been any participation of profits between the plaintiff's father and the defendants, who with him were co-descendants from a common ancestor, after 1837 down to which year the family was certainly joint. If in 1871 the period of limitation had expired, the Act IX of that year and the later Acts need not be referred to; for, if they altered the law, they would not revive the right of suit. Upon the evidence it was found that whatever might have been the father's intention when he settled in another village in 1837, the effect

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of what had been since done, or omitted, on both sides, was that in due time the right of suit had become barred under the first Limitation Act. APPUSAMI ODAYAR v. SUBRAMANYA ODAYAR, 12 M. 26 (P.C.) = 15 I.A. 167 = 5 Sar. P.C.J. 255 = 12 Ind. Jur. 370 ... 368

(4) S. 1, cl. 13—Refusal of person liable to maintain—Cause of action—See HINDU LAW—MAINTENANCE, 12 M. 347.

(5) S. 1, cl. 13—See HINDU LAW—IMPARTIBLE ESTATES, 11 M. 380.

Limitation Act (IX of 1871).

(1) Sch. II, Art. 15—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 12 M. 294.

(2) *Sch.* II, *Art.* 142 *Starting point of limitation—Acknowledgment—Adverse possession of partial interest in land—Limitation—Regulation* II *of* 1802 (*Madras*), *s.* 18.—Suit by the zamindar of Shivagunga to recover certain land as part of his zamindari from the defendants who claimed title under deed of gift dated 1830 from the person then in possession of the zamindari. The istimrar zamindar died in 1829. After his death certain persons were in possession without title: but, in February 1863, his daughter, Katama Natchiar, obtained a decree in the Privy Council against the person then in possession of the zemindari in execution of which she was put into possession. In 1876 she brought a suit against the present defendants to recover the property now in question; but that suit was withdrawn on a petition presented by her vakil stating that the case had been compromised and praying that the suit be struck off the file, which was accordingly done. She died in 1877 and the plaintiff was her successor. It appeared that *poruppu* was always paid for the land now in question:—*Held*, (1) that the payment of *poruppu* did not prevent the possession of the defendants from being adverse to the plaintiff as possession of a limited interest in immoveable property may be as much adverse for the purpose of barring a suit for the determination of that limited interest as is adverse possession of a complete interest in the property to bar a suit for the whole property; (2) that the date of the Privy Council decree could not be taken as the starting point of limitation; (3) that the transactions in reference to the suit of 1876 did not amount to an acknowledgment of the zamindari's title and did not give a new cause of action to her successors; (4) that the cause of action having arisen to the then rightful owner of the zemindari in 1830, the plaintiff's suit was barred by limitation. SANKARAN v. PERIASAMI, 13 M. 467 ... 1037

Limitation Act (XV of 1877).

(1) *Adverse possession.*—In a suit in 1887 to redeem a kanom for Rs. 62 of 1835, it appeared that in 1862 the mortgagee had received a renewal of his kanom for a larger amount, and that the defendant had produced the document of renewal in 1864 to the knowledge of the plaintiff in a suit to which the plaintiff was party:—*Held*, that the suit was not barred by limitation. RAIRU NAYAR v. MOIDIN, 13 M. 39 ... 737

(2) Ss. 4, 6, 14—Proceeding *bona fide*—Prosecuted in a Court without jurisdiction—Rent claimed by landlord not having tendered legal patta—See ACT VIII OF 1865 (MADRAS RENT RECOVERY), 12 M. 467.

(3) *Ss.* 5, 14—"*Sufficient cause*" *to excuse delay—Error in law.*—Land was sold in execution of a decree which was passed against the defendant for a sum exceeding Rs. 5,000. A suit to set aside the sale was instituted in a Subordinate Court and was dismissed. The plaintiff who desired to appeal against the decree dismissing his suit was advised that the appeal lay to the High Court in which a memorandum of appeal was accordingly filed. On its appearing that the value of the property sold was less than Rs. 5,000, the High Court returned the memorandum of appeal for presentation to the District Court. The District Judge rejected it on the ground that it was barred by limitation, holding that the delay caused by the error, which the appellant committed in taking proceedings in the wrong Court, could not be excused:—*Held*, that the District Judge should have decided whether the appellant, under the special circumstances of the case in appealing to the High Court, acted on an honest belief formed with due care and attention. *Per Cur.*—"We are not prepared to

Limitation Act (XV of 1877)—(Continued). PAGE

hold that a mistake in law is under no circumstances a sufficient cause within the meaning of s. 5 of the Limitation Act." KRISHNA v. CHATHAPPAN, 13 M. 269 ... 899

(4) S. 6, Sch. II. Arts. 12, 95—Suit to set aside a sale for arrears of revenue—Fraud—Limitation—See ACT II OF 1864 (MADRAS REVENUE RECOVERY), 12 M. 168.

(5) Ss. 6, 14—Appeal from decision of Boundary officer—Limitation—Award by arbitrators—Irregular procedure—See ACT XXVIII OF 1860 (MADRAS BOUNDARY MARKS), 12 M. 1.

(6) Ss. 7, 8, *Sch. II, Art.* 179—*Minority—Execution of decree—Civil Procedure Code*, ss. 231, 258—A member of an undivided Hindu family and his two minor brothers (who sued by him as their next friend) brought a suit for partition of family property against their father, and joined as defendants certain persons who were in possession of part of the property under alienations made by the father but alleged in the plaint to be invalid as against the family. In 1875 a decree was passed in favor of the plaintiffs in the above suit. No application for the execution of the decree was made by either the first or second plaintiff; but the third plaintiff, having attained his majority in June 1881, applied for execution in April 1884: his application was opposed by two of the defendants. The District Judge made an order granting his application in respect of the one quarter share to which he was declared to be entitled under the decree:—*Held*, that the order of the District Judge was wrong, as neither s 7 nor s. 8 of the Limitation Act affected the case, and the application was accordingly barred by limitation. SESHAN v. RAJAGOPALA, 13 M. 236 ... 876

(7) *Ss.* 7, 9, 19—*Minority of plaintiff—General Clauses Act—Act* I *of* 1868, *s.* 3. *cl.* 2.—Suit to recover principal and interest due on a registered bond executed by defendants in favour of the plaintiff's father. The date of the bond was 20th June 1870; the principal sum was payable on 20th June 1872; the plaintiff's father died in 1875; the defendants made acknowledgments of their liability in June 1877; the plaintiff came of age in 1885. and this suit was brought on 11th August 1887.—*Held*, the suit was not barred by limitation. VENKATARAMAYYAR v. KOTHANDARAMAYYAR, 13 M. 135 ... 806

(8) *S.* 10—*Suit against dharmakarta of temple to recover money misappropriated.*—Plaintiff, as dharmakarta of a Hindu temple, alleging that the defendant, a former dharmakarta, who had been removed from office, had, when in office, misappropriated certain temple funds held by him, sued to recover a certain sum alleged to have been misappropriated:—*Held*, that the defendant was a person in whom the temple funds had become vested in trust for a specific purpose within the meaning of s. 10 of the Limitation Act, 1877, and that as the plaint disclosed a right to follow trust funds in his hands the suit might be treated as a suit for that purpose. SETHU v. SUBRAMANYA, 11 M. 274 ... 191

(9) *S.* 14—*Exclusion of time of proceeding with suit* bona fide—*Cause of like nature.*—Of six persons in whom was vested the obligee's interest under a hypothecation bond, three brought a suit upon it in a District Court and the other three brought a similar suit in a District Munsif's Court to recover, with interest, their respective shares of the sum secured. The former suit was dismissed as not being maintainable and the latter was withdrawn. The present suit was brought by all six:—*Held*, that in computing the time within which the plaintiffs had to sue, the time occupied by them in prosecuting the former suits should be deducted. NARASIMMA v. MUTTAYAN, 13 M. 451 ... 1026

(10) *S.* 14, *Expl* 1, *Sch.* III, *Art.* 11—*Malabar Law—Decree against Karnavan—Representative of tarwad.*—The karanavan and an anandravan of a Malabar tarwad were authorized by a karar to manage the affairs of the tarwad. A decree was obtained against them, and land belonging to the tarwad was attached and sold in execution. The plaint did not describe the defendants otherwise than by their individual names, but the plaintiff's claim was *inter alia*, in respect of the breach of a contract by the defendants to put him into possession of certain land which was expressed to be "the jenm of the defendants' tarwad." It was found in the present suit that the amount decreed in the prior suit constituted a debt due by the tarwad :—

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Held, the decree and the execution sale did not bind the tarwad—*Daulat Ram* v. *Mehr Chand* (I.L.R., 15 Cal. 70) distinguished. This suit was brought on 8th August 1884 to declare that the sale in execution was not binding on the tarwad. The present plaintiffs being members of the tarwad intervened in execution of the decree, but their claim was dismissed on 5th September 1882. On the 27th September 1882, they filed a suit in the Court of the District Munsif, praying for the relief now sought. The District Munsif dismissed the suit on the ground that he had no jurisdiction. On appeal the District Judge made an order directing him to dispose of it, which he accordingly did, and he passed a decree against which an appeal was pending on 17th August 1883 But on the last mentioned date the High Court set aside the order of the District Judge and directed him to ascertain the market-value of the land and make a fresh order, and the inquiry, directed by the High Court, did not terminate until 30th October 1883, when another order was made by the District Judge by which the original decision of the District Munsif was confirmed: —*Held*, that the prior suit terminated only on the 30th October, 1883, and that the present suit was not barred, under Limitation Act, 1877, sch. II, art. 11. SANKARAN v. PARVATHI, 12 M. 434 ... 652

(11) *S.* 15—*Period of injunction included.*—A member of a firm sued for a partnership debt and obtained a decree; he died before execution. In a suit brought by his widow an injunction was issued restraining his partner from realising the partnership assets. Subsequently, a receiver was appointed for the partnership assets, and he applied for execution of the above decree:—*Held*, that the time during which the injunction was in force was not to be excluded in computing the period of limitation. RAJARATHNAM v. SHEVALAYAMMAL, 11 M 103 ... 72

(12) *S.* 20 *Payment of interest—Prescribed period—Extension of period.*—The words "prescribed period," used in s. 20 of the Limitation Act, 1877, mean the period prescribed by the Act. The contention that only one extension of the period of limitation is given by payment of interest is unfounded. VENKATARATNAM v. KAMAYYA, 11 M. 218=12 Ind. Jur. 176 ... 152

(13) S. 28—Right of pre-emption under otti-waiver—See MALABAR LAW—MORTGAGE, 13 M. 490.

(14) Sch. II, art. 11—See CIVIL PROCEDURE CODE (ACT XIV OF 1882) 13 M. 366.

(15) Sch. II. arts. 11, 13—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 12 M. 294.

(16) Sch. II, art. 29—See MORTGAGE—GENERAL, 11 M. 345.

(17) Sch. II, arts. 29, 61, 62, 97—Execution proceedings—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 437.

(18) *Sch.* II, *arts.* 36, 49.—Plaintiff was the owner of a house mortgaged to defendants. On the 22nd August, 1885, defendants sold the house by auction under a power of sale contained in the mortgage and gave possession to the purchaser. On the 2nd September 1887 plaintiff sued the defendants to recover the value of certain timber which was stored in the house and not mortgaged and which plaintiff alleged the defendants had taken possession of and converted to their own use. It was proved that the timber was in the house when defendants took possession from the plaintiff and defendants did not account for it.—*Held*, (1) that plaintiff was entitled to recover from the defendants the value of the timber, and (2) that the suit was not barred by art. 36 of sch. II of Indian Limitation Act, 1877. PASSENHA v. MADRAS DEPOSIT AND BENEFIT SOCIETY, 11 M. 333 232

(19) *Sch* II, *art.* 75—*Bond payable by instalments — Default in payment of an instalment— Waiver of a condition of forfeiture on default in payment of one instalment — Acceptance of an instalment overdue.*—A bond, payable by instalments, provided that if default was made in paying one instalment the whole debt should become due. The amount of the third instalment was paid five days after it became due. The lower Court found that this payment was accepted by the obligee as a payment made on account or in satisfaction of the third instalment, and not as a mere part payment in reduction of the whole debt, and that the circumstances indicated an intention to waive the forfeiture though there was

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no express waiver—*Held*, that the acceptance of the amount of the third instalment constituted a waiver within the meaning of art. 75 of sch. II of the Limitation Act, 1877. NAGAPPA v. ISMAIL, 12 M. 192=13 Ind. Jur. 176 ... 483

(20) *Sch.* II, *art.* 80.—Suit on an unregistered bond, whereby certain moveable property in the debtor's possession was pledged as security for the repayment of principal and interest:—*Held*, that the suit was governed by art. 80, sch. II, of the Indian Limitation Act, 1877. VITLA KAMTI v. KALEKARA, 11 M. 153 ... 107

(21) Sch. II, art. 91—Res judicata—Cause of action—Suit to cancel a document —See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 44.

(22) *Sch.* II, *art.* 116—*Transfer of Property Act*, ss. 130, 135, 136, 137—*Apportionment.*—A sued as assignee of a bond (payable in 1872) hypothecating land in the mofussil. B, A's assignor, was a vakil practising in the High Court. B had obtained an assignment of the obligee's interest in the bond sued on, and also another bond for Rs. 3,000 between the same parties after the 1st July 1882, for Rs. 4,500. B had previously purchased the two bonds at a sale in execution of the decree of a Mofussil Court for Rs. 5 each. A's assignment from B purported to be made to A in payment of certain debts owed to him by B. No interest has been paid on the bond and no tender had been made to the plaintiff.—*Held* that the creditor's personal remedy was passed by art. 116 and on the evidence, that there was no consideration for the bond sued on or that it had failed. RATHNASAMI v. SUBRAMANYA, 11 M. 56 ... 39

(23) *Sch.* II, *art.* 120—*Suit for perpetual injunction—Claim of possession.*—In a suit for a perpetual injunction to restrain the defendant from preventing the plaintiff from entering a certain house it was alleged that the defendant had been in exclusive possession for more than six years before suit:—*Held*, that Limitation Act, sch. II, art. 120, applied to the suit which was therefore barred by limitation. *Per Cur.*—It was open to the plaintiff to sue for such possession other than exclusive possession (the right to which had already been negatived by suit) as he might be entitled to. KANAKASABAI v. MUTTU, 13 M. 445 ... 1022

(24) *Sch.* II, *arts.* 120, 123—*Executor* de son tort—*Suit for a share of Government promissory notes by an heir against one falsely professing to hold them under a will.*—Suit in 1887 by a daughter to recover her share of Government promissory notes, being stridhanam of her mother who died in 1880. The property in question had been in the possession of a son of the deceased since her death. He claimed the property under a will, but the will was set aside by the Court as false in 1884:—*Held*, that Limitation Act, sch. II, art. 123, is applicable only to cases in which the defendant lawfully represents the estate of the deceased, and that the suit was accordingly barred by limitation. SITHAMMA v. NARAYANA, 12 M. 487 ... 688

(25) Sch. II, art. 127—See HINDU LAW—IMPARTIBLE ESTATE, 11 M. 380.

(26) *Sch. II, art.* 134—*Suit to redeem by assignee of equity of redemption—Title purchased at execution sale.*—Suit, in 1885, by the assignee of the equity of redemption to redeem a mortgage of 1826. The mortgagees were put into possession under the mortgage and no interest was paid. In 1855, the mortgage premises were sold at a Court-sale in execution of a decree against the mortgages as if they formed part of their family property, and the defendant derived title from the execution purchaser who had dealt with it as absolute owner:—*Held*, that the suit was barred under Limitation Act, 1877, sch. II, art. 134. MUTHU v. KAMBALINGA, 12 M. 316=13 Ind. Jur. 255 ... 570

(27) *Sch. II, art.* 179—*Appeal against part of decree—Execution against judgment-debtors whose interests were not sought to be affected by the appeal.*—In a suit for land against several defendants plaintiff obtained on 14th June 1884, a decree against the shares of defendants Nos. 3 and 4, the shares of defendants Nos. 5 and 9 being exonerated. The decree-holder appealed against that portion of decree which exonerated the shares of defendants Nos. 5 and 9, defendants Nos. 3 and 4 being brought on to the record of the appeal as respondents. The appeal having been dismissed, the decree-holder applied on 20th October 1887 for execution against the shares

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of defendants Nos. 3 and 4 :—*Held*, the application for execution was barred by Limitation Act, 1877, sch. II, art. 179. MUTHU v. CHELLAPPA, 12 M. 479. ... 683

(28) Sch. II, art. 179—Joint decree-holder—Application for execution of decree—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 347.

(29) *Art.* 179 (4)—*Application for copy of decree not a step-in-aid of execution.*—The application by a decree-holder for a copy of a decree with intent to apply for execution is not a step-in-aid of execution within the meaning of cl. 4 of art. 179 of sch. II of the Indian Limitation Act, 1877. GOPILANDHU v. DOMBURU, 11 M. 336 ... 234

Lis Pendens.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 180 ; 12 M. 439.

Malabar Law.

1.—GENERAL.
2.—ADOPTION.
3.—CUSTOM.
4.—KARNAVAN.
5.—MAINTENANCE.
6.—MORTGAGE.
7.—STRIDHANAM
8.—WIDOW.
9.—WILL.

———***1.—General.***

Nambudris, their personal law—Power of disposing of tarwad property by an antharjanam—Sarvasvadhanam marriage.—Suit by the Secretary of State to declare a right of escheat of the property of a Nambudri illam. The last male member of the illam died about 1859, leaving defendant No. 1 and her mother the sole surviving members of the illam. Defendant No. 1 had previously been married to a member of another illam by a sarvasvadhanam marriage, but her husband died without issue. In 1872, defendant No. 1 and her mother—there being no attaladakkam heirs—appointed defendant No. 2, an adult member of a third illam, to be manager and heir of their illam and to marry and raise up issue for it. The mother and father of defendants Nos. 1 and 2, respectively, were brother and sister :—*Held*, (1) that Nambudri Brahmans are governed by Hindu law, as modified by special customs adopted by them since their settlement in Malabar ; (2) that defendant No. 2 had no right to the property of the illam independently of the appointment of 1872 ; (3) that the property of the illam was not the soudayika of defendant No. 1, and as such at her absolute disposal ; (4) that a Nambudri widow, who is the sole surviving member of her illam, is not at liberty to alienate the property of the illam at her pleasure ; (5) that there was sufficient evidence of a custom that a Nambudri widow can adopt or appoint an heir in order to perpetuate her illam in the absence of dayadies with ten or three days' pollution ; and the appointment of defendant No. 2 was valid against the Crown. *Quaere.*—Whether in such appointment of an heir, it is necessary to direct that he should marry for the illam to which he is appointed as heir. VASUDEVAN v. THE SECRETARY OF STATE FOR INDIA, 11 M. 157 = 12 Ind. Jur. 134 ... 109

———***2.—Adoption.***

Nambudris—Marumakkatayam law—Adoption of an adult male—Form of adoption—Specific Relief Act (I of 1877), s. 42—Declaratory decree—Evidence Act (I of 1872), ss. 13, 35—Limitation.—In a suit the parties to which were Nambudri Brahmans following the Marumakkatayam law, the plaintiff sued as the adoptive son of the last member of an otherwise extinct mana for a declaration of his title to certain lands as the sole uralen of a devasom. He was in possession of the greater part of the land, but one paramba was alleged to be held adversely to him by a person not joined in the suit, and the tenants of part of the remaining land had attorned to the defendant. The plaintiff was an adult at the time of his adoption

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and no female was adopted at the same time with the plaintiff. In 1875 a suit was brought by the defendant's brother and others against the plaintiff and others to set aside an alienation by the present plaintiff's predecessor-in-title but the suit was dismissed without any decision as to the co-uraima right of the then plaintiff; and the present plaintiff had no further notice of interference by the present defendant's mana :—*Held*, that the claim was not barred and that the plaintiff was entitled to the decree sued for. *The form and evidence of adoption considered. Per Cur* :—The restrictions imposed under s. 42 of the Specific Relief Act must be held to refer to the consequential relief properly obtainable by the plaintiff as against the defendants in the suit and not to be extended to the case of all third parties who may possibly support some of the contentions of the defendants. The appellants filed an application for the admission in evidence of certified copies of certain judgments and decrees rejected by the Lower Court. The appellants sought to make use of these documents not as constituting matters in dispute *res judicata*, but as containing summaries of statements made by parties concerned in the management of the plaint properties and as evidence of conduct :—*Held*, that the documents were inadmissible in evidence. SUBRAMANYAN v. PARAMASWARAN, 11 M. 116 ... 81

———***3.—Custom.***

See PRACTICE, 12 M. 512.

———***4.—Karnavan.***

(1) *Blindness a disqualification for the office of.*—Suit to remove the defendant from the office of karnavan of a Malabar tarwad. The defendant had become blind after occupying the office of karnavan for some years :—*Held*, that the defendant was not a fit person to be the karnavan of a tarwad and should be removed from his office. KARNAVAN v. KUNJAN, 12 M. 307 ... 563

(2) Decree against karnavan—Representative of tarwad—See LIMITATION ACT (XV OF 1877), 12 M. 434.

(3) *Insufficient maintenance of junior members by—Suit by junior members living in a tarwad house apart from the karnavan.*—Suit by twelve junior members of a Malabar tarwad against the karnavan for arrears of maintenance. The plaintiffs lived in a tarwad house apart from the karnavan, who did not allege that this arrangement was contrary to his wishes, but pleaded that he provided for them adequately :—*Held*, that the plaintiffs were entitled to a decree for a reasonable amount by way of maintenance, in computing which allowance should be made for the income of the tarwad property in their possession. CHEKKUTTI v. PAKKI, 12 M. 305 ... 562

(4) *Powers of karnavan—Delegation of powers of karnavan to his son—Ultra vires.* —The karnavan of a Malabar tarwad having been sentenced to a term of imprisonment delegated to his son all his powers as karnavan pending the expiry of his sentence—*Held*, that the delegation was *ultra vires* and void. CHAPPAN NAYAR v. ASSEN KUTTI, 12 M. 219 = 13 Ind. Jur. 214 ... 502

(5) *Suit for declaration—Multifariousness—Malabar law—Suit by junior members of tarwad.*—Suit by some of the junior members of a Malabar tarwad against the Karnavan and the other members of the tarwad, and certain persons to whom some of the tarwad property had been alienated by the karnavan, for a declaration that the alienations were not binding on the tarwad :—*Held*, that the suit was not bad for multifariousness. ABDUL v. AYAGA, 12 M. 234 ... 513

———***5.—Maintenance.***

(1) *Claimed by anandravans living in tarwad house against karnavan, who had left tarwad house and neglected to maintain family.*—Where a suit was brought by an anandravan of a Malabar tarwad living in the family house for maintenance against the karnavan, who had left the family house, resided elsewhere, and neglected to maintain the plaintiffs :—*Held*, that the plaintiffs were entitled to maintain the suit. KESAVA v. UNIKKANDA, 11 M. 307 ... 214

(2) *Decree for maintenance against karnavan—Execution against tarwad property.*—A member of a Malabar tarwad having obtained a decree for

***Malabar Law—5.—Maintenance*—(*Concluded*).** PAGE

maintenance against her karnavan, assigned the decree to the plaintiff, who proceeded to execute it against the tarwad property. The then karnavan objected and his claim was allowed. In a suit by a plaintiff to have it declared that he was entitled to execute the decree against tarwad property:—*Held*, that the plaintiff was entitled to execute the decree against the tarwad property. CHANDU *v.* RAMAN, 11 M. 378 ... 264

(3) See ACT IX OF 1887 (MOFUSSIL SMALL CAUSE COURTS), 11 M. 134.

———***6.—Mortgage.***

(1) *Kanam—Change in character of land—Passive acquiescence of landlord—Estoppel—Compensation for improvements by tenants.*—Land was demised on kanam for wet cultivation. The demisee changed the character of the holding by making various improvements which were held to be inconsistent with the purpose for which the land was demised. On a finding that the landlord had stood by while the character of the holding was being changed and had thereby caused a belief that the change had his approval:—*Held*, on second appeal, that the demisee was entitled to compensation for his improvements on redemption of the kanam KANHAMMED *v.* NARAYANAN MUSSAD, 12 M. 320 ... 572

(2) *Right of pre-emption under otti—waiver—Limitation Act—Act* XV *of* 1877, *s.* 28.—A jenmi having demised certain land in Malabar on otti to defendant No. 3, in 1869, sold the jenm title to the plaintiff and defendants Nos. 1 and 2 in 1886. In 1888 defendant No. 3 made a further advance to and obtained a renewed demise from defendants Nos. 1 and 2. The plaintiff now sued more than six years after the sale to recover his share (defendant No. 3 being in a possession) on payment of one-third of the otti amount:— *Held*, that (whether or not the suit was maintainable as framed) the third defendant had a right of pre-emption as *otti-dar*, which had not been waived by him and was not barred by limitation, and which constituted a good defence to the suit. KANHARANKUTTI *v.* UTHOTTI, 13 M. 490 ... 1053

(3) See LIMITATION ACT (XV OF 1877), 13 M. 39.

———***7.—Stridhanam.***

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 11 M. 339.

———***8.—Widow.***

Nambudri Widow—Power of—See MALABAR LAW, GENERAL, 11 M. 157.

———***9.—Will.***

Will—Testamentary dispositions of tarwad property by last surviving member of tarwad, valid.—The last surviving member of a Malabar tarwad can make a valid testamentary disposition of the tarwad property. ALAMI *v.* KOOMU, 12 M. 126 ...

Malicious Prosecution.

Matters in issue—Burden of proof.—In a suit for damages for malicious prosecution it was found that the charge brought by the defendant against the plaintiff was unfounded, and that it was brought without probable cause:—*Held*, that the absence of probable cause did not imply malice in law, and that on the failure of the plaintiff to prove that the defendant did not honestly believe in the charge brought by him, the suit should have been dismissed. HALL *v.* VENKATAKRISHNA, 13 M. 394 ... 987

Maxim.

"Omnia presumuntur rite esse acta"—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 11 M. 296.

Minor.

(1) *Suit against guardian of a minor—Immaterial irregularity—Minor's interest bound.*—In a suit by an adopted son, after the death of his adoptive father, to recover ancestral land sold in execution of a decree against his adoptive mother therein described as the guardian of the present plaintiff, who was then an infant, it appeared that the decree had been passed on a bond executed by the then defendant in respect of a debt due by her late husband:—*Held*, that the plaintiff should be regarded as a party to the suit

***Minor*—(*Concluded*).** PAGE

in which the decree executed against the land had been passed, and that the present suit should be dismissed. NATESAYYAN v. NARASIMMAYYAR, 13 M. 480 ... 1047

(2) See ACT X OF 1873 (OATHS), 12 M. 483.

(3) See CIVIL PROCEDURE CODE, CASES UNDER, *re*.

(4) See LIMITATION ACT (XV OF 1877), 13 M. 135, 13 M. 236.

(5) See PENAL CODE (ACT XLV OF 1860), 12 M. 273.

Misjoinder of Charges.

See PENAL CODE (ACT XLV OF 1860), 12 M. 273.

Mortgage.

1.—GENERAL.

2.—CONTRIBUTION.

3.—EQUITY OF REDEMPTION.

4.—MARSHALLING.

5.—PRIORITY.

6.—REDEMPTION.

7.—SALE.

8.—USUFRUCTUARY.

———***1.—General.***

Presumption that person paying off a mortgage intends to keep the security alive—Power of Court to order refund of money wrongfully paid out of Court in another suit—Limitation Act, sch. II, art. 29.—In 1861 B granted a lease of his zemindari to A for 30 years, A undertaking to pay off all debts then due by B. B died in 1882 and his successors sued A, and obtained a decree that on payment of Rs. 1,20,000 A should give up possession of the zemindari. This sum having been paid into Court, A lost possession of the zemindari. On January 5th, 1875, A had mortgaged the whole zemindari, which consisted of 22 villages, to M, to secure a loan of Rs. 1,00,000 borrowed by A to pay off the debts of B which A undertook to pay in 1861. On June 27th, 1879, A being indebted to M in the sum of Rs. 1,78,000 paid M Rs. 1,00,000 and undertook to pay the balance out of the income of the estate, M releasing the 22 villages from the mortgage of January 5th, 1875. On June 28th, 1879, A executed a mortgage of the 22 villages to L to secure repayment of Rs. 1,30,000. Of this sum, Rs. 1,00,000 was borrowed to pay M and Rs 30,000 was prior debt due by A to L. Of the Rs. 1,00,000 paid to M. Rs. 27,000 was specially applied to discharge so much of the charge created by the mortgage of Jan. 5th, 1875. On January 30th, 1875, A borrowed from S Rs. 43,000 and mortgaged to her 10 of the 22 villages of the zemindari. In 1885 S sued L to have her debt declared a first charge on the money paid into Court by the zemindar. The Subordinate Judge held that L, had a prior claim on the fund and dismissed the suit:—*Held*, on appeal, following the principle of decision in *Gokaldas* v. *Puranmal* (L.R., 11 I.A., 126) that L was entitled to a first charge on the fund to the extent of Rs. 27,000 which had been applied to pay off the mortgage of January 5th, 1875. In the suit brought by B's successor against A to recover the zemindari L was a party, but S was not. In that suit L obtained an order for payment of Rs. 1,00,000 of the sum paid into Court by the zemindar. It was contended by L (1) that S could have no decree for repayment of this sum, and (2) that if the money was wrongly paid under the order of the Court to L, it was wrongfully seized within the meaning of art. 29 of sch. II of the Indian Limitation Act:—*Held* that the Court had power to order a refund and that art. 29 of sch. II of the Limitation Act was not applicable. RUPABAI v. AUDIMULAM, 11 M. 345 40

———***2.—Contribution.***

See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 255.

———***3.—Equity of Redemption.***

See REGISTRATION ACT (III OF 1877), 12 M. 505.

———***4.—Marshalling.***

See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 255.

Mortgage—5.—Priority. PAGE

See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 180, 12 M. 424, 12 M. 429.

——— **_6.—Redemption._**

(1) By co-widows—Suit to redeem moiety—See HINDU LAW—WIDOW, 11 M. 304.

(2) See LIMITATION, 11 M. 416.

(3) See LIMITATION ACT (XV OF 1887), 12 M. 316, 13 M. 39.

(4) See REGISTRATION ACT (III OF 1877), 12 M. 505.

——— **_7.—Sale._**

See TRANSFER OF PROPERTY ACT (IV OF 1882), 11 M. 201.

——— **_8.—Usufructuary._**

See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 109.

Muhammadan Law.

1.—DIVORCE.

2.—GIFT.

3.—MARRIAGE.

4.—PARTITION.

5.—WAKF.

——— **_1.—Divorce_**

Under Muhammadan law no special expressions are necessary to constitute a valid divorce, nor, except when the repudiation is final, need the words be repeated thrice. If the divorce pronounced is liable to be, but is not, revoked within the period of iddut, it becomes final. IBRAHIM v. SYED BIBI, 12 M. 63 ... 393

——— **_2.—Gift._**

By a father—Undivided share—Delivery of possession.—A Muhammadan made a gift in writing to his daughter on her marriage of an undivided moiety of his share in certain buildings, which were the property of the donor's wife. On the death of the donee, her husband married her sister, and the donor thereupon similarly made a gift to her of the remaining undivided moiety. The donees were minors at the dates of their respective gifts. The husband now sued to recover the share of his first wife, of which delivery had not been made: —*Held*, that the gift was not invalid, either for indefiniteness or for want of delivery of possession. HUSSAIN v. SHAIK MIRA, 13 M. 46 742

——— **_3.—Marriage._**

Suit by husband for restitution of conjugal rights—Duty of wife to cohabit with husband—Plea of non-payment of dower bad.—Suit by a Muhammadan to recover possession of his wife, the defendant. Defendant pleaded that she was not bound to return to plaintiff until plaintiff paid Rs. 42, prompt for dower, which plaintiff promised to pay by the marriage contract and had not paid. The lower Courts following *Eidan* v. *Mazhar Husain* (I.L.R., 1 All., 483) dismissed the suit:—*Held*, on appeal that defendant could not refuse cohabitation on the plea that her dower had not been paid. KUNHI v. MOIDIN, 11 M. 327 ... 228

——— **_4.—Partition._**

Sale of undivided share—Burden of proving validity of sale by a gosha woman.—Suit for partition and possession of an undivided share of property sold to plaintiff by an aged gosha lady of the class of Canarese Muhammadans called Nevavats. The property sold was the vendor's share as heiress of her father, brother, and sister, who died in 1856, 1866, and 1871, respectively; but it appeared that the property of the family had been in the possession of one managing member since 1856. The plaintiff, during the suit, withdrew his claim against that part of the immoveable property in suit which was within the local limits of the jurisdiction of the Court, having compromised with the defendants who had it in their possession, and pursued his claim against the other immoveable property and obtained a decree. On appeal:—*Held*, (1) that the suit was not barred by limitation; (2) that the withdrawal of the claim with regard to the property situated within the local limits of the jurisdiction of the Court (the

Muhammadan Law—4.—Partition—(*Concluded*). PAGE

compromise not having been shown to be otherwise than *bona fide*) did not operate to take away the jurisdiction of the Court to adjudicate on the plaintiff's suit; (3) that the plaintiff having discharged the burden of proving that the conveyance to him was voluntarily executed and that the transaction evidenced by it was real and *bona fide*, the conveyance was operative. KHATJIA v. ISMAIL, 12 M. 380 ... 614

———***5.—Wakf.***

Wakf—Conditional and revocable dedication—Conditions of a valid dedication.—A Muhammadan by an instrument revoking a previous trust deed conveyed her property to her husband on trust as follows:—(1) to maintain the settlor and her children out of the income; (2) to hand over the property to the children on their attaining majority; (3) in the event of the settlor's death without leaving children, with the income of the property to have *Katham* recited in a mosque, give food to the Mollahs who come there for reciting the same and get the *moilu* performed. The settlor reserved to herself and her representatives an option of dealing with the property as a special fund for the maintenance of her children, if any. The settlor died leaving no children. In a suit by her half-sister against her husband and others to recover her share of the property:—*Held*, *per Muttusami Ayyar and Parker, JJ.*, that the plaintiff was entitled to recover her proportionate share of the property, notwithstanding the provisions of the above instrument. *Per Shephard, J.*—There has been no complete dedication of the property, and, except so far as regards the income required for three specific objects named by the donor, her property is undisposed of. Conditions of a valid *wakf* considered. PATHUKUTTI v. AVATHALAKUTTI, 13 M. 66 ... 756

Mysore.

See JURISDICTION, 12 M. 39.

Naikin

See HINDU LAW—ADOPTION, 11 M. 393.

Negotiable Instruments Act (XXVI of 1881).

(1) *Ss.* 8, 9—*Suit to recover money due on a promissory note by assignee of rights of payee not being endorsee.*—K executed a promissory note on demand for Rs. 6,000 in favour of S in 1882. In 1884 S, by an agreement in writing assigned all her property, including the promissory note, to M, but did not endorse over the promissory note to M. M assigned his rights in the promissory note to a bank in payment of a debt. In a suit by M, and the bank against K and S to recover the principal and interest due under the note:—*Held*, that the plaintiffs could not maintain the suit. PATTAT AMBADI MARAR v. KRISHNAN, 11 M. 290 ... 202

(2) Ss. 37, 39, 66—Accommodation maker—Discharge of—Presentment of promissory notes—See CONTRACT ACT (IX OF 1872), 13 M. 172.

Nomination.

Nomination by a pandaram under a decree—Revocation of such nomination by the pandaram's successor—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 338.

Notice.

(1) *Bona fide* purchaser without—Lien on land created by agreement—Sale to stranger—Purchaser bound—See LIEN, 12 M. 69.

(2) Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement—See REGISTRATION ACT (III OF 1877), 12 M. 505.

(3) See ACT II OF 1864 (MADRAS REVENUE RECOVERY), 12 M. 445.

Notice to quit.

See LANDLORD AND TENANT, 12 M. 353.

Occupancy Right.

Permanent cultivator—Paracudi—Form of suit—See LANDLORD AND TENANT, 11 M. 77.

Parent and Child.

Interference with natural rights for the benefit of the child—Equity and good conscience.—Plaintiff, a Brahman widow, sued to recover her illegitimate infant child from defendant to whom she had entrusted it since its birth for nurture :—*Held*, that it being proved that the plaintiff was leading an immoral life, the suit was rightly dismissed. VENKAMMA v. SAVITRI-AMMA, 12 M. 67 ... 396

Parties.

(1) See EXECUTION OF DECREE, 12 M. 356.

(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 255.

Partnership.

Unascertained interest in a partnership—See CI IL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 447.

Penal Code (Act XLV of 1860).

(1) Ss. 1, 2—See ACT XIV OF 1874 (SCHEDULED DISTRICTS), 13 M. 353.

(2) Ss. 71, 72—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 M. 36.

(3) *S. 84—Plea of insanity in criminal cases—Legal test of responsibility in cases of alleged unsoundness of mind.*—The accused stabbed a child (his brother's wife) with a sword and killed her. He was charged with murder, and a plea of insanity was set up at the trial. No motive could be assigned for his attack on the child, in which he persisted in the presence of other persons: and it appeared that he had been in the habit of treating the child kindly and affectionately. He was suffering from fever and want of food at the time and the medical evidence showed it was possible that the act was committed under a sudden attack of homicidal mania. It was in evidence that he had abused some of his relations a short time before,—the abuse being probably due to irritability of mind caused by fever. He confessed the same to the Village Magistrate and answered questions put to him rationally, but before the committing Magistrate and the Sessions Judge he denied that he had killed the child. He was convicted of murder:—*Held*, that as the accused was not proved to have been by reason of unsoundness of mind incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law, the conviction was right. QUEEN-EMPRESS v. VENKATASAMI, 12 M. 459=1 Weir 42 ... 669

(4) *Ss. 95, 477—Destruction of a valuable security—Unstamped document purporting to be a valuable security—Act causing slight harm.*—A, having had certain transaction with B, wrote out a rough account showing his indebtedness to B and signed the total. The paper was not stamped. B afterwards presented it to A and demanded payment of the total amount. A paid part only and after an altercation tore up the paper :—*Held*, that the act of tearing up the paper constituted the offence of destroying a valuable security and the harm caused was such that a person of ordinary sense and temper would complain of it. QUEEN-EMPRESS v. RAMASAMI, 12 M. 148=1 Weir 533 ... 452

(5) *Ss. 97, 146 — Self-defence—Rioting—Unlawful distraint.*—A landlord, who had not tendered to his tenant such a patta as the latter was bound to accept under the Madras Rent Recovery Act, distrained his cattle for arrears of rent, the assistance of the Police having been procured for the purpose. The tenant, with the assistance of eleven other persons, forcibly obstructed the removal of the cattle which had already been actually seized and driven for some yards. They were charged with the offence of rioting and convicted :—*Held*, that the conviction was right. QUEEN-EMPRESS v. RAMAYYA, 13 M. 148=1 Weir 67 ... 815

(6) S. 174—Disobedience to lawful order of public officer—Summons by Revenue Officer to give evidence in pauperism inquiry—Standing Order of Board of Revenue (Madras), No. 48-*a*—See ACT III OF 1869 (REVENUE SUMMONS, MADRAS), 12 M. 297.

(7) S. 175—Jurisdiction of Judges and Magistrates in respect of offences committed before themselves—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 13 M. 24.

(8) *Ss. 181, 182—Examination on affirmation of one preferring a criminal appeal—Verification of petition of appeal—Criminal Procedure Code,*

Penal Code (Act XLV of 1860)—(*Continued*). PAGE

Ss. 342, 428, 540.—In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witnesses. The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegations in the petition of appeal on solemn affirmation, and he did so:—*Held*, that the appellant had not committed an offence under s. 181 or 182 of the Penal Code. QUEEN-EMPRESS v. SUBBAYYA, 12 M. 451 ... 426

(9) S. 188—Notice of orders under s. 133—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 M. 475.

(10) *S*. 224—*Criminal Procedure Code, s*. 59—*Escape from legal custody*.—The accused was arrested in the act of stealing and was handed over to the Village Magistrate, who forwarded him in custody of the village servants to a police station. The accused escaped on the way. He was convicted under s. 224 of the Penal Code. On appeal the conviction was reversed on the ground that the custody was not legal:—*Held*, that the conviction was right. Section 59 of the Code of Criminal Procedure which requires a private person who arrests a thief in the act to take the thief to the nearest police station, is sufficiently complied by sending the offender in custody of a servant. QUEEN-EMPRESS v. POTADU, 11 M. 480=1 Weir 200 ... 334

(11) *S*. 225—*Criminal Procedure Code, ss*. 59, 239, 535, *and* 537—*Arrest of thief*—*Rescue from custody of private person*—*Irregular procedure*.—To support a conviction under s. 225 of the Indian Penal Code, it is not necessary that the custody from which the offender is rescued should be that of a police man; it is enough that the custody is one which is authorised by law:—*Held*, therefore, that rescue from the custody of a private person who had arrested a thief in the act of stealing was an offence. A Magistrate tried A for theft and B and C for rescuing A from lawful custody and convicted A, B and C in one trial. A appealed, and B and C appealed separately. No objection was taken in the petitions of appeal to the procedure of the Magistrate:—*Held*, on revision, that the convictions might stand. QUEEN-EMPRESS v. KUTTI, 11 M. 441=1 Weir 210 ... 308

(12) *S*. 304 (*a*)—*Causing death by criminal act*.—Where death is caused by an act being in its nature criminal, 304 (*a*) of the Indian Penal Code has no application. QUEEN-EMPRESS v. DAMODARAN, 12 M. 56=1 Weir 326. 388

(13) *S*. 330—*Causing hurt to constrain a person to satisfy a demand*.—E. B., in order to constrain his wife to satisfy his demand that she should return to his house, voluntarily caused hurt to her. He was convicted under s. 330 of the Indian Penal Code:—*Held*, on appeal, that the conviction under that section was bad. QUEEN-EMPRESS v. ELLA BOYAN, 11 M. 257=1 Weir 336 ... 179

(14) *S*. 353—*Public servant*—*District Municipalities Act (Madras Act* IV *of* 1884), *s*. 41.—A Municipal Inspector is a public servant within the meaning of s. 41 of the Madras District Municipalities Act. QUEEN-EMPRESS v. RAMASAMI, 13 M. 131=1 Weir 345 ... 803

(15) S. 372—See HINDU LAW—ADOPTION, 11 M. 393.

(16) *Ss*. 372, 373—*Code of Criminal Procedure, ss*. 234 *and* 537—*Obtaining a minor for prostitution*—*Dancing girl caste*—*Adoption*—*Misjoinder of charges*—*Immaterial irregularity*.—A woman, being a member of the dancing girl caste, obtained possession of a minor girl and employed her for the purpose of prostitution; she subsequently obtained in adoption another minor girl from her parents, who belong to the same caste. She and the parents of the second girl were charged together under ss. 372, 373 of the Penal Code. The charges related to both girls:—*Held*, (1) that the two charges should not have been tried together, but the irregularity committed in so trying them had caused no failure of justice; (2) that ss. 372, 373 of the Penal Code may be applicable in a case where the minor concerned is a member of the dancing girl caste *Per Muttusami Ayyar, J*.—It would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age she should be allowed to elect either to marry or follow the profession of her prostitute mother. QUEEN-EMPRESS v. RAMANNA, 12 M. 273=1 Weir 375 ... 540

(17) *S*. 403—*Criminal misappropriation*—*Intention, proof*.—R was a Government servant, whose duty it was to receive certain monies and to pay

***Penal Code** (Act XLV of 1860)—(Continued).* PAGE

them into the treasury on receipt. He admitted that he had retained two sums of money in his possession for several months, when fearing detection he paid them into the treasury making a false entry at the time in his books with a view to avert suspicion. His explanation as to his reason for retaining the money was not credited by the Magistrate who convicted him of criminal misappropriation under s. 403 of the Indian Penal Code: —*Held*, that the conviction was right. QUEEN-EMPRESS v. RAMKRISHNA, 12 M. 49=1 Weir 457 ... 383

(18) *Ss.* 403, 429—*Bull dedicated to an idol.*—A bull dedicated to an idol and allowed to roam at large is not *fera bestia* and therefore *res nullius*, but *prima facie*, the trustee of the temple, where the idol is worshipped, has the rights and liabilities attaching to its ownership. QUEEN-EMPRESS v. NALLA, 11 M. 145=1 Wier 498 ... 101

(19) *Ss.* 415, 419, 463—*Cheating by personation—Forgery.*—A falsely represented himself to be B at a university examination, got a hall ticket under B's name, and headed and signed answer papers to questions with B's name:—*Held*, that A committed the offences of forgery and cheating by personation. QUEEN-EMPRESS v. APPASAMI, 12 M. 151=13 Ind. Jur. 53=1 Weir 480 ... 454

(20) *Ss.* 417, 463, 464, 465, 511—*Forgery—False document—Fraudulent entry in a book of account.*—Prisoner was requested to make an entry in a book of account belonging to the complainant to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts: instead of making this entry as requested prisoner entered in a language not known to complainant that this sum had been paid to complainant. He was convicted of forgery under s. 465 of the Penal Code:—*Held*, that the offence was not forgery but an attempt to cheat. QUEEN-EMPRESS v. KUNJU NAYAR, 12 M. 114=1 Weir 539 ... 429

(21) *Ss.* 419, 420, 467 *and* 468—*Cheating—Forgery—Use of a false name with intent to defraud.*—The accused was alleged by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was Rs. 2 4-0, and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta; to have then requested the Postal authorities at Calcutta by a letter signed Robert S. Wilson, to have the money orders re-directed to him as above at Rajam; to have similarly requested the Postmaster at Rajam to pay the money orders to his clerk Seshagiri Rau; to have subsequently received the value of money orders made out in favour of Robert S. Wilson from the Postmaster at Rajam, signing receipts as Seshagiri Rau: Robert S. Wilson and Seshagiri Rau were alleged to be fictitious persons, and it was also alleged that the accused had no book on English idioms ready to be despatched to purchasers:—*Held*, that the above allegations supported charges of cheating and forgery. QUEEN-EMPRESS v. PERA RAJU, 13 M. 27=1 Weir 545 ... 729

(22) *Ss.* 426, 477—*Destruction of promissory note—Offence not triable by Magistrate but by Sessions Court only.*—P.M. was convicted by a Magistrate under s. 426 of the Indian Penal Code on a charge of mischief by tearing up a promissory note for Rs. 20: *Held*, that the offence charged fell under s. 477 of the Penal Code and was therefore triable by a Sessions Court only. *In re* MADURAI, 12 M. 54=2 Weir 22 ... 387

(23) *S.* 471—*Using a forged document—Fabrication of a receipt as a voucher to cover a contemporaneous embezzlement.*—A Postmaster misappropriated a certain sum of money, and at the same time made a false document purporting to be a receipt signed by the person to whom the money was payable. He was convicted of using a forged document under s. 471 of the Indian Penal Code. It was contended that no forgery had been committed, because the receipt was made merely to cover the embezzlement:—*Held*, that the conviction was right. A debtor, who fabricates a release to screen himself from liability to pay the debt, cannot be said not to be guilty of forgery, because he intended by the fabrication to cover a dishonest purpose. QUEEN-EMPRESS v. SABAPATI, 11 M. 411=1 Weir 549 ... 287

(24) *S.* 500—*Statement by witness—Privilege absolute.*—M.S. was convicted under s. 500 of the Indian Penal Code of defaming S.S. by making a certain

Penal Code (Act XLV of 1860)—(Concluded). PAGE

statement when under cross-examination as a witness before a Court of criminal jurisdiction :—*Held*, that the conviction was bad. The statements of witnesses are privileged ; if false, the remedy is by indictment for perjury and not for defamation. MANJAYA v. SESHA SHETTI, 11 M. 477=1 Weir 586 ... 332

Penalty.

See CONTRACT ACT (IX OF 1872), 11 M. 294.

Plaint.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), CASES UNDER.

(2) See PUBLIC RIGHT, 11 M. 42.

(3) See SPECIFIC RELIEF ACT (I OF 1877), 12 M. 136.

Pleading and Proof.

Variance between Collateral evidence to show that an apparent sale-deed was a mortgage —See EVIDENCE ACT (I OF 1872), 13 M. 494.

Practice.

(1) *Concurrence of Lower Courts in findings upon questions of fact.—Agreement for division of family property in equal shares—Malabar custom.*—Two Courts in concurrence found that there had been an agreement between two parties, interested in a family fund, that it should be divided into equal fourth parts among the four branches of the family, but that an unequal division, made under a decree, had resulted from unfair dealing. To contest, upon this appeal those findings of fact, nothing was stated to make it appear, to the committee that, if they went through the whole of the evidence they would differ from the Courts below on anything but questions of pure fact. Accordingly, their Lordships were of opinion that the case fell within the rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below. KRISHNAN v. SRIDEVI, 12 M. 512 (P.C.)=13 Ind. Jur. 409=5 Sar. P.C.J. 455 ... 707

(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 255.

Pre-emption.

See MALABAR LAW—MORTGAGE, 13 M. 490.

Promissory Note.

See PENAL CODE (ACT XLV OF 1860), 12 M. 54.

Public Right.

Civil Procedure Code, ss. 31, 53—*Amendment of plaint.*—The fact that the other raiyats of the village have similar rights does not make A's right a public right in the sense that no action can be brought upon it unless special damage is proved. VENKATACHALA v. KUPPUSAMI, 11 M. 42 ... 30

Receiver.

Discretionary refusal to remove a Receiver and Manager of the estate of Hindu widows.—Rights and proceedings rendering a Court's order, refusing to remove an appointed Receiver and Manager of the estate, of which the widowed Ranis of the late Maharajah of Tanjore had become possessed by grant from the Government, entirely a matter for the discretion of the Court, which had exercised its discretion soundly. *Ex parte* JIJAI AMBA, 13 M. 390 (P.C.)=5 Sar. P.C.J. 584 ... 984

Registration.

See TRANSFER OF PROPERTY ACT (IV.OF 1882), 12 M. 429.

Registration Act (III of 1877).

(1) *S.* 17 (*b*), (*h*).—Where a deed of partition between a mother and her son declared certain existing rights in her over moveable and immoveable property above the value of Rs. 100 :—*Held*, that, although the deed showed that the execution of another deed with reference to those rights was in contemplation, yet the deed was not admissible in evidence of the mother's title to either the moveable or immoveable property. LAKSHMAMMA v. KAMESWARA, 13 M. 281 ... 908

Registration Act (III of 1877)—(Continued). PAGE

(2) *S.* 17 (*c*)—*Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement.*—In a suit for redemption filed by an assignee for value of the equity of redemption against the mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgage-premises to him, that part of the purchase-money had been acknowledged as paid and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. The agreement was in writing, but not registered :—*Held*, that though the agreement was not admissible in evidence as creating an interest in land, still it might be used for the purpose of obtaining specific performance, and the plaintiff having purchased the equity of redemption with notice as above was not entitled to redeem. *Per cur.*—The plaintiff having knowledge of the agreement was put upon inquiry to ascertain whether the tender had been made and whether there was any objection to his purchase on that ground. ADAKKALAM v. THEETHAN, 12 M. 505 ... 702

(3) *Ss.* 17 (*d*), 48—*Transfer of Property Act—Act* IV *of* 1882, *ss.* 78, 101—*Priority of mortgages—Gross negligence—Extinguishment of charges—Notice by registration.*—In a suit for declaration of priorities of mortgages and for foreclosure, it appeared that the mortgage premises were mortgaged to defendant No. 2 in 1879 and to the plaintiff in 1883 and again in 1884, and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but plaintiff and defendant No. 2 had no actual notice at the date of their mortgage and conveyance, respectively, of the previous incumbrances. The plaintiff received the title-deeds to the estate from the mortgagor on the execution of the mortgage of 1883; defendant No. 2 alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that previous to the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody :—*Held*, (apart from the question whether the mortgage of 1879 had been extinguished by the conveyance of 1886), that the conduct of defendant No. 2 in permitting the title-deeds to remain in the possession of the mortgagor amounted to gross negligence within the meaning of Transfer of Property Act, s. 78, and that the registration of the mortgage to defendant No. 2 did not affect the plaintiff with constructive notice of its existence, and that accordingly the subsequent mortgages to the plaintiff were entitled to priority. MADRAS BUILDING COMPANY v. ROWLANDSON, 13 M. 383 ... 979

(4) *Ss.* 17 (*d*). 49—*Covenant in unregistered lease—Specific performance.*—The plaintiff leased a house to the defendant for three years by an unregistered instrument which contained a covenant by the lessee that he would purchase the house at a certain price on an event which took place. The plaintiff now sued for specific performance of this covenant :—*Held*, that the unregistered instrument was not admissible in evidence and the suit should be dismissed. SAMBAYYA v. GANGAYYA, 13 M. 308 .. 926

(5) *S.* 34—*Criminal Procedure Code, s.* 195—*Sanction to prosecute — Forged document registered by Sub-Registrar.*—A Sub-Registrar acting under s. 34 of the Registration Act, 1877, is not a "Court" within the meaning of s. 195 of the Code of Criminal Procedure. QUEEN-EMPRESS v. SUBBA, 11 M. 3 ... 2

(6) Ss. 34, 35, 41—Sanction to prosecute—Forged document—Registered by Sub-Registrar—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 M. 201.

(7) *S.* 48—*Transfer of Property Act—Act* IV *of* 1882, *s.* 54 — *Oral agreement for sale of land—Subsequent conveyance with notice—Delivery of possession—Priority—Specific Relief Act—Act* I *of* 1877, *ss.* 27, 42 — *Specific performance—Declaratory suit—Consequential relief.*— Plaintiff being in possession of certain land as an incumbrancer under a registered instrument agreed orally with the mortgagor in 1885 to purchase it. The mortgagor subsequently sold the land to others who took the conveyance which

Registration Act (III of 1877)—(Concluded). **PAGE**

was registered with notice of the plaintiff's mortgage and of the oral agreement with him. Plaintiff now sued for a declaration that the conveyance was not binding on him and for specific performance of the oral agreement:—*Held*, (1) that the suit was not bad for want of a prayer for delivery up, and cancellation of the conveyance; (2) that the plaintiff's possession under his incumbrance together with the agreement to sell was equivalent to delivery of possession within the meaning of Registration Act, s. 48; (3) that the plaintiff was entitled to have the oral contract specifically enforced notwithstanding the subsequent registered sale. KANNAN v. KRISHNAN, 13 M. 324 ... 938

(8) S. 78—Priority of mortgages—Gross negligence—See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 M. 429.

(9) *Ss.* 82, 83—*Criminal Procedure Code s.* 195—*Sanction.*—Certain persons were charged with offences falling under s. 82 of the Indian Registration Act, 1877, and also with forgery of a document presented to, and registered by, a Sub Registrar; the Sub-Registrar having granted sanction to prosecute the persons concerned without holding any enquiry, the Sessions Judge referred the case to the High Court under s. 215 of the Code of Criminal Procedure, in order that the commitment might be quashed on the ground that there was no legal sanction:—*Held*, that no sanction was necessary as to the charge of forgery, and that the provisions of s. 195 of the Code of Criminal Procedure were not applicable. QUEEN-EMPRESS v. VYTHILINGA, 11 M. 500 ... 348

Regulation II of 1802 (Madras).

S. 18—See LIMITATION ACT (IX OF 1871), 13 M. 467.

Regulation XXV of 1802 (Madras).

(1) Ss. 5, 7, 10, 16, 28—See JURISDICTION, 12 M. 188.

(2) S. 12—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 13 M. 479.

(3) S. 12—See HINDU LAW—IMPARTIBLE ESTATES, 13 M. 406.

Regulation XXIX of 1802 (Madras).

(1) Ss. 5, 7, 10, 16, 28—See JURISDICTION, 12 M. 188.

(2) *S.* 7—*Karnam in zamindari village—Title to office.*—The holder of a karnam's office in a zamindari village being incapacitated resigned the office in 1863, leaving a minor son, the plaintiff. The brother of the late holder was then appointed to the office, and held it till 1877, when he died. Plaintiff was then nominated by the zemindar, but did not enter on the office. In 1879 the zamindar being dead, defendant No. 2 was appointed by the zemindar's widow and entered on the office:—*Held*, that under Regulation XXIX of 1802, s. 7, defendant No. 2 being the heir of the last holder was the lawful holder of the office. SUBBARAYUDU v. GANGARAJU, 11 M. 196 ... 136

Regulation II of 1803 (Madras).

S. 44—See LAND ACQUISITION ACT (X OF 1870), 13 M. 485.

Regulation V of 1804 (Madras).

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 M. 341.

(2) S. 8—See ACT V OF 1882 (FOREST, MADRAS), 11 M. 309.

(3) S. 20—See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 12 M. 445.

Regulation IV of 1816 (Madras).

Power of Village Munsif to administer oath to witness—Criminal Procedure Code, s. 195—*Sanction for prosecution of witness for perjury by Village Munsif.*—V was tried and convicted under s. 193 of the Penal Code for giving false evidence before the Court of a Village Munsif in a suit in which V was defendant. The Village Munsif sanctioned the prosecution of V under s. 195 of the Code of Criminal Procedure. On appeal the Sessions Judge acquitted V. on the grounds that a Village Munsif had no power to administer oath to V. (the case not being one in which either party was willing to allow the cause to be settled by the oath of the other) and because s. 195 of the Code of Criminal Procedure did not apply:—*Held*, that both objections to the conviction were bad in law. QUEEN-EMPRESS v. VENKAYYA, 11 M. 375=2 Weir 163 ... 261

Regulation VII of 1817. PAGE

See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 13 M. 277.

Regulation V of 1831.

S. 3—*Suit for a declaration as to land alleged to be nattamai* maniyams—*Jurisdiction of Revenue Courts*—Res judicata—*Civil Procedure Code, s.* 13.—Suit to establish plaintiffs' title to certain land alleged by the defendants, who were the Secretary of State for India in Council and the nattamaigar of a certain village, to be *maniyam* land attached to the office of the second defendant, and previously held to be such by a Revenue Court:—*Held*, the Court was not precluded either by Reg. VI of 1831, s. 3, or by the decision of the Revenue Court from granting the declaration prayed for. RAVUTHA KOUNDAN v. MUTHU KOUNDAN, 13 M. 41 ... 739

Representation.

See EXECUTION OF DECREE, 12 M. 356.

Representative.

See HINDU LAW—ADOPTION, 11 M. 408.

Rescission.

See CONTRACT, 11 M. 263.

Res Judicata.

(1) Civil Procedure Code, s. 13—Decision of Revenue Court as to landlord's title—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 13 M. 287.

(2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 11 M. 204; 12 M. 312; 12 M. 500; 13 M. 44.

Right of Ferry.

See SPECIFIC RELIEF ACT (I OF 1877), 13 M. 54.

Sale.

Exchange—Trade usage—Proof of—Contract Act, ss. 49, 77, 92, 151.—According to mercantile usage in the cotton trade in Tuticorin, where a dealer delivers cotton to the owner of a cotton press, not in pursuance of any special contract, the property in the cotton vests in the owner of the cotton press who is bound to give the merchant in exchange cotton of like quantity and quality. The transaction is not a sale but an agreement for exchange. Where therefore cotton thus delivered was accidentally destroyed by fire:—*Held*, that the loss fell on the owner of the press. VOLKART BROTHERS v VETTIVELU NADAN, 11 M. 459 = 12 Ind. Jur. 335... 320

Sanction to Prosecution.

(1) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 M. 201.

(2) See REGISTRATION ACT (III OF 1877), 11 M. 3; 11 M. 500.

(3) See REGULATION IV OF 1816 (MADRAS), 11 M. 375.

Specific Relief Act (I of 1877).

(1) *S.* 9—*Immoveable property—Right of ferry.*—A right of ferry is immoveable property or an interest therein within the meaning of Specific Relief Act, s. 9. KRISHNA v. AKILANDA, 13 M. 54 ... 748

(2) Ss. 27, 42—Transfer of Property Act—Act IV of 1882, s. 54—Oral agreement for sale of land—Subsequent conveyance with notice—Delivery of possession—Priority—Specific performance—Declaratory suit—Consequential relief.—See REGISTRATION ACT (III OF 1877), 13 M. 324.

(3) *S.* 40—*Civil Procedure Code, s.* 50—*Inconsistent causes of action—Cancellation of instrument—Interests necessary to support the suit.*—In a suit for cancellation of a sale-deed by the person whose name appeared on it as executant, it was alleged in the plaint that it was a forgery, and that if it was not a forgery, its execution had been obtained by fraud and that it was, moreover, void for want of consideration. The plaintiff's interest in the property to which the instrument related had been assigned by her to another by a conveyance which contained certain covenants by her with regard to the land:—*Held*, that the plaintiff was not entitled to maintain the suit. *Per cur.*—The gist of the plaintiff's charge against the defendant was that she had never executed a sale-deed in his favor, and that the document set up by him was a forgery. It was not competent to

***Specific Relief Act* (*I of 1877*)—(*Concluded*).** PAGE

the plaintiff to combine with this charge as an alternative the wholly inconsistent charge that if she did execute the document no consideration was received by her or that fraud had been practised upon her. IYYAPPA v. RAMALAKSHMAMMA, 13 M. 549 ... 1095

(4) *S.* 42—*Civil Procedure Code, s.* 53—*Amendment of plaint—Suit to declare alienation by Hindu widow invalid—Death of widow pending appeal by plaintiff—Right of appellant to proceed with appeal—Plaint not to be amended by claim for possession.*—The proviso to s. 42 of the Specific Relief Act that "no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so" refers to the position of plaintiff at the date of suit: where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were not binding on plaintiff, her reversionary heir, and pending appeal by the plaintiff, the widow died:—*Held* (1) that the plaintiff was entitled to proceed with his appeal; (2) that plaintiff could not be permitted to amend his plaint and claim possession. GOVINDA v. PERUMDEVI, 12 M. 136 ... 444

(5) *S.* 42—*Declaratory decree—Suit by reversioner.*—The intervention of two life estates does not preclude the reversioner from obtaining a declaration of his interest as to land under Specific Relief Act, s. 42. KANDASAMI v. AKKAMMAL, 13 M. 195 ... 848

(6) *S.* 42—*Suit for declaration of title as holder of a stanom to which a malikana allowance is attached—Pensions Act—Act* XXIII *of* 1871, *s.* 6—Suit to declare plaintiff's title to the stanom of fifth Raja of Palghat; the first Raja (defendant No. 1) received a malikana allowance from Government payable to the various stanomdars, but had refused to pay to plaintiff the fifth Raja's share:—*Held*, the plaintiff being entitled to sue for further relief than the declaration of his title and having omitted to do so, the suit must be dismissed under Specific Relief Act, s. 42. *Per cur.*—Pensions Act, s. 6, was not applicable to this case. KOMBI v. AUNDI, 13 M. 75 ... 762

(7) S. 42—See MALABAR LAW—ADOPTION, 11 M. 116.

***Stamp Act* (*I of 1879*).**

(1) *S.* 2 (13)—*Specified property—Sch.* I, *art.* 25—*Declaration of trust—Sch.* I, *art.* 5 (*c*)—*Agreement.*—An agreement was made between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement:—*Held* that the agreement was liable to stamp duty as a declaration of trust under the Indian Stamp Act, 1879, sch. I, art. 25, and as an agreement under art. 5 (*c*):—*Held*, also, that the fund intended to be created under the agreement was not "specified property" within the meaning of s. 2 (13) of the said Act. REFERENCE UNDER STAMP ACT, S. 46, 11 M. 216 (**F.B.**) ... 150

(2) *S.* 3—*Bond.*—R executed a document, by which he promised to pay on demand Rs. 10-12-0 with interest to S.R. The writer of the document and some others signed the document as witnesses:—*Held*, that the document was a bond and liable to stamp duty as such. REFERENCE UNDER STAMP ACT, S. 49, 13 M. 147 (**F.B.**) ... 814

(3) *Ss.* 3 (10), 55, 57—*Duly stamped—Document issued without endorsement required by rules passed and published under ss.* 55 *and* 57.—The omission of a stamp-vendor to endorse on a stamped paper the particulars required by rule (9) of the revised rules published under ss. 55 and 57 of the Indian Stamp Act, 1879, by the Government of Madras, with the approval of the Governor-General in Council, does not render a document "not duly stamped" within the meaning of S. 3 (10) of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, S. 46, 11 M. 377 (F B.) ... 263

(4) *S.* 3 (11)—*Instrument professing to effect a partition* ultra vires *of the executants—Instrument of partition.*—Persons incorrectly purporting to be co-owners of certain property agreed to divide it in severalty by written documents:—*Held*, that the arrangement fell within the definition of "instrument of partition" in the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, S, 46, 12 M. 198 (**F.B.**) ... 488

Stamp Act (I of 1879)—(Concluded). PAGE

(5) *S.* 3, *cl.* 13—*Mortgage—Indemnity bond.*—An agreement entered into by the Secretary of State and a salt contractor recited that the contractor has deposited certain promissory notes to secure the due fulfilment of the contract and provided that the promissory notes should be returned on the due fulfilment of the contract:—*Held* that the agreement was a mortgage as defined by the Stamp Act. REFERENCE UNDER STAMP ACT, S. 46, 11 M. 39 (F.B.) ... 27

(6) *Ss.* 3, 31, 51.—Allowance for spoiled stamps may be made under s. 51 of the Stamp Act when a stamped instrument has been endorsed by the Collector under s. 31. REFERENCE UNDER STAMP ACT, S. 46, 11 M. 37 (F.B.)... 26

(7) *Ss.* 5, 14, 35, 37, 39.—A deed of release was endorsed on a deed of conveyance for Rs. 100. The conveyance bore an impressed stamp for one rupee, but the endorsement was unstamped :—*Held* that the conveyance was valid and that the release could be validated on payment of the deficient stamp duty and the penalty under s. 39 of the Stamp Act. REFERENCE UNDER STAMP ACT, S. 46, 11 M. 40 (F.B.) ... 28

(8) *Ss.* 37 (*b*), 40, 61, 63—*Prosecution for attempt to defraud Government by understating the value of property in a partition deed.*—A District Judge impounded a partition deed produced before him and forwarded it to the Collector under s. 35 of the Stamp Act, 1879, being of opinion that the executant of the deed had committed an offence under s. 63. The Collector under s. 69 sanctioned the prosecution of the executant who was convicted by the Magistrate of an offence under s. 63 of the Act. On appeal the Sessions Court acquitted him on the ground that the Collector had not complied with s. 37 (*b*) or s. 40 of the Act :—*Held*, that the acquittal was wrong. QUEEN-EMPRESS v. VENKATRAYADU, 12 M. 231 =1 Weir 903 ... 511

(10) *S.* 49—A bail-bond was executed to a District Munsif, who expressed no doubt as to the amount of duty to be paid and made no application to have the case referred. The District Judge referred the case to the High Court :—*Held* that the District Judge was not authorized to make the reference. REFERENCE UNDER STAMP ACT, S. 49, 11 M. 38 (F.B.) ... 27

(11) *S.* 61—*Acknowledgment of receipt of cheque by letter, not stamped, an offence.*—M acknowledged receipt of a cheque for Rs. 100 by letter. The letter was not stamped :—*Held*, that M was properly convicted under s. 61 of the Indian Stamp Act, 1879. QUEEN-EMPRESS v. MUTTIRULANDI, 11 M. 329=1Weir 903 ... 229

(12) *Sch.* I, *art.* 5 (*a*)—*Agreement or memorandum of agreement relating to the sale of shares—Agreement by correspondence.*—Correspondence having passed between the plaintiff and defendant relating to the sale of shares in a certain company by the plaintiff to the defendant, and the sale not having been carried out, the plaintiff in a suit for damages against the defendant sought to prove an agreement for sale from the letters, none of which were stamped :—*Held*, the letters, though unstamped, were admissible as evidence of an agreement, since they did not constitute an agreement or memorandum of agreement. RAINIER v. GOULD, 13 M. 255 ... 889

(13) *Sch.* I, *arts.* 25, 36—*Declaration of trust—Gift.*—Where a donee was directed in an instrument of gift of certain land to maintain the donor out of the profits of the land :—*Held*, that the instrument was liable to stamp duty as a gift and not as a declaration of trust. REFERENCE UNDER STAMP ACT, S. 46, 12 M. 89 (F.B.) ... 412

Statutes 11 and 12. Vic., Cap. 21.

See INSOLVENT ACT, 1848, 11 AND 12, VIC. C. 21, 13 M. 150.

Summons.

See ACT III OF 1869 (MADRAS REVENUE SUMMONS), 11 M. 137.

Temple Management.

Dismissal of dharmakarta, grounds for—Dharmakarta guilty of misfeasance retained in office on terms.—A suit to remove a dharmakarta, though he is held to have been guilty of misconduct in the discharge of his duties as such may, in the absence of any proved and deliberate dishonesty on the defendants' part, be dismissed on conditions to be complied with by him. SIVASANKARA v. VADAGIRI, 13 M. 6 ... 714

Transfer of Property Act (IV of 1882). PAGE

(1) *Ss.* 1, 67, 86, 89—*Usufructuary mortgage, dated 20th April 1882, sued on in 1884—Form of decree*—In a suit filed in 1884 on a usufructuary mortgage, dated 20th April 1882, a decree was passed for the payment of the mortgage money, or in default for the sale of the mortgage property:—*Held*, (*semble* under the Transfer of Property Act) that the decree for sale was the right decree. VENKATASAMI v. SUBRAMANYA, 11 M. 88... 61

(2) S. 44—Hindu law—Sale by a co-parcener of his share in specific property—Rights of the vendee—See HINDU LAW—JOINT FAMILY, 13 M. 275.

(3) *S.* 52—Lis pendens—*Partition suit—Decree by consent.*—Pending a suit for partition of land, &c., two of the parties to the suit sold part of the land in question to a stranger who was not brought on to the record. After the execution of the sale-deed, the parties to the suit entered into a compromise and a decree was passed by consent accordingly. In a suit by the purchaser for possession of the land sold to him:—*Held*, the purchaser was not bound by the decree passed by consent. VYTHINADAYYAN v. SUBRAMANYA, 12 M. 439 ... 655

(4) *S.* 52—Lis pendens—*When a suit becomes contentious—Priority of registered mortgage.*—As soon as the filing of the plaint is brought to the notice of the defendant, the proceeding becomes contentious and any alienation subsequent to that is subject to the doctrine of *lis pendens*. A mortgage was executed on 25th June and was registered. On the same day, prior mortgagees filed a suit against the mortgagors on an unregistered mortgage of the same land: they obtained a decree and attached the mortgaged property:—*Held*, that the registered mortgagee was entitled to priority and his mortgage was not affected by the rule of *lis pendens*. ABBOY v. ANNAMALAI, 12 M. 180 ... 475

(5) S. 54—Oral agreement for sale of land—Subsequent conveyance with notice—Delivery of possession—Priority—Specific Relief Act—Act I of 1877, ss. 27, 42—Specific performance—Declaratory suit—Consequential relief—See REGISTRATION ACT (III OF 1877), 13 M. 324.

(6) *S.* 55—*Vendor and purchaser—Implied covenant for title—Acts amounting to waiver of covenant—Possession taken under contract.*—On 16th August 1885 the defendant, having agreed to purchase a house belonging to the plaintiff, executed an agreement, in which it was stated "that that he had this day purchased the house belonging to Ghousiah Begum Sahiba (plaintiff) for Rs. 16,000, that he had paid Rs. 1,000 as an advance and taken possession, that he would pay the balance with interest at the rate of Re. 1 per cent. *per mensem* within fifteen days, and obtain a sale-deed from the said Begum." The plaintiff at the time of the agreement had not obtained a conveyance of the house to her, and was not able to tender a conveyance to the defendant until January 1887, when she did so. Meanwhile the defendant took possession under the agreement, paying only a portion of the balance of the purchase-money; he also executed certain repairs on the house and let it to a tenant and enjoyed the rent. It further appeared that shortly after the above agreement he sought to obtain a sale-deed from the plaintiff and attempted to raise a sum of money on a mortgage of the house. On 22nd December 1885 the defendant wrote to the plaintiff demanding a conveyance and giving notice that if the sale be not completed in the following month, the interest on the balance of the purchase-money should cease; but no evidence was given as to any appropriation of the purchase-money by the defendant. In 1887 the plaintiff filed the present suit to recover the unpaid purchase-money with interest at 12 per cent.:—*Held*, that the acts of the defendant amounted to a waiver of the implied covenant for title, and that the plaintiff was entitled to recover the unpaid purchase-money with interest at the agreed rate up to the date of payment, and that he was further entitled to a lien on the property for that amount. GHOUSIAH BEGUM v. RUSTUMJAH, 13 M. 158 ... 823

(7) *S.* 60.—The breach of a condition in a mortgage deed to the effect that on default of payment on a certain date, the mortgage shall be deemed an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of the proviso to s. 60 of the Transfer of Property Act, 1882. PERAYYA v. VENKATA, 11 M. 403... 281

(8) *Ss.* 65, 68—*Mortgagor and mortgagee—Construction of mortgage—Sale of premises at suit of a prior mortgagee—Right of a second mortgagee to sue*

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the mortgagor personally.—The defendants, having already mortgaged certain land to another executed a hypothecation bond comprising the same land in favour of the plaintiff to secure a debt due by them to the plaintiff and covenanted therein to pay to him daily the proceeds of certain sales of firewood, of which the plaintiff was to credit part towards the secured debt. The defendants having failed to pay the amount due on first mortgage, the first mortgagee obtained a decree and brought the land to sale. The plaintiff now brought a suit in the Small Cause Court to recover the amount due on footing of his hypothecation bond :—*Held* that the hypothecation bond contained no personal covenant by the obligors, but that on the construction of ss. 65 and 68 of the Transfer of Property Act the obligors had committed default so as to entitle the obligee to sue them personally under the former section. SINGJEE v. TIRUVENGADAM, 13 M. 192 ... 846

(9) *S. 67 (a)—Usufructuary mortgage—Remedy of mortgagee.*—A usurfuctuary mortgagee is not entitled, in the absence of a contract to that effect, to sue for sale of the mortgaged property. *Semble.*—The construction placed on s. 67 (*a*) of the Transfer of Property Act, 1882, in *Venkatasami* v. *Subramanya* (I.L.R., 11 Mad. 88) that a usufructuary mortgagee can sue either for foreclosure or for sale but not for one or other in the alternative is wrong. CHATHU v. KUNJAN, 12 M. 109 ... 425

(10) *Ss. 67, 83, 84—Suit by mortgagee instituted before payment into Court—Right of mortgagee to a decree and to full costs.*—In a suit to recover money due on a mortgage, defendant paid the money into Court and a notice was issued to the mortgagee under s. 83 of the Transfer of Property Act. The mortgagee filed his suit before notice was served on him, and it was not proved that the mortgagee was aware of the fact of the payment into Court when he filed his suit :—*Held*, that the plaintiff was not debarred by s. 67 of the Transfer of Property Act from obtaining a decree, and that under the rules of Court the pleader's fee was properly assessed as in a contested suit and not as in a case where there is a confession of judgment. SITARAMAYYA v. VENKATRAMANNA, 11 M. 371 ... 258

(11) *S. 68—Sale of mortgaged premises under Land Acquisition Act — Personal suit by mortgagee.*—The sale of mortgaged premises under the Land Acquisition Act is not a destruction of the security within the meaning of s. 68 of the Transfer of Property Act and does not enable the mortgagee to sue the mortgagor personally. ARUMUGUM v. SIVAGNANA, 13 M. 321 ... 935

(12) *S. 69 (1)—Mortgage—Invalid condition as to notice of sale—Sale valid.*—In a deed of mortgage of property, situate within the town of Madras, it was provided that a power of sale might be exercised after fifteen days' notice. The property was sold :—*Held* that, (s. 69 of the Transfer of Property Act, 1882, requiring three months' notice before such a power of sale shall be exercised), the condition as to notice was invalid, but that the sale was nevertheless valid. THE MADRAS DEPOSIT AND BENEFIT SOCIETY v. PASSANHA, 11 M. 201 ... 140

(13) *S. 78—Priority of mortgages—Gross negligence—Estoppel—Agency.*—On the 20th of February 1888, defendant No 1 executed a mortgage in favour of the plaintiff Company. Defendants Nos. 2 and 3 bound themselves as sureties for the due payment of the mortgage amount on default by the mortgagor. This mortgage had not been registered at the date of the execution of the mortgages next referred to. On the 27th of April 1888, the Secretary of the plaintiff Company handed over to defendant No. 1 most of the title-deeds which had been delivered to the plaintiff Company on the execution of the mortgage, and defendants Nos. 1 and 3 undertook that they would raise a loan thereon and discharge the debt due to the plaintiff, or return the title-deeds if they failed in raising the loan. On the 20th April 1888, defendant No. 1 deposited the title-deeds with defendant No. 4 and executed a mortgage to her for Rs 4,000; and on the 7th May 1888, he executed an instrument creating a further charge in her favour for Rs. 1,000. These two sums were applied by defendant No. 1 to his own use, and not in discharge of the prior mortgage. The mortgages to defendant No. 4 described the mortgage premises as being then free from incumbrances :—*Held*, that the plaintiff Company had been guilty of gross negligence in letting the title-deeds out of their possession and that the mortgages of defendant No. 4

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had accordingly priority over the mortgage to the plaintiff Company. MADRAS HINDU UNION BANK v. C. VENKATRANGIAH, 12 M. 424 ... 644

(14) *S.* 78—*Priority of mortgages—Gross negligence—Registration.*—A mortgagee at the request of the mortgagors returned to them their certificate of title to the mortgage premises to enable them to raise money to pay off his mortgage. This mortgage was duly registered. The mortgagors, who remained in possession of the mortgage premises throughout, having shown the certificate to a third person whom they informed of the existence of the first mortgage, and borrowed Rs. 400 from him, subsequently informed him that the first mortgage was paid off, delivered the certificate to him, and executed to him a mortgage of the same premises to secure the sum of Rs. 400 and a further sum of Rs. 800 :—*Held*, that though the second mortgagee had been wanting in caution, yet since he had been thrown off his guard by the conduct of the first mortgagee in returning to the mortgagors their certificate of title, the second mortgagee was entitled to priority in respect of his security over the first mortgagee. DAMODARA v. SOMASUNDARA, 12 M. 429 ... 648

(15) Ss. 78, 101—Priority of mortgages—Gross negligence—Extinguishment of charges—Notice by registration—See REGISTRATION ACT (III OF 1877), 13 M. 383.

(16) *S.* 81—*Marshalling—Contribution—Creditors of co-parcenary and separate creditors—Act* XXVII *of* 1860—*Adoptive son of deceased creditor—Practice —Parties to cross appeals.*—Suit by the adoptive son of the obligee (deceased) of a hypothecation bond to recover principal and interest due on the bond against the land comprised in the hypothecation. Defendant No. 1, the obligor of the bond, had executed it as manager of a joint Hindu family of which defendant No. 2 was a member, and for the rightful purposes of the family. The family subsequently became divided, and the hypothecated property was divided between defendants Nos. 1 and 2. Defendant No. 1 afterwards hypothecated part of his share for a private debt to defendant No. 3, who, having sued on his hypothecation and brought the land to sale in execution, became the purchaser. The District Munsif passed a decree for the plaintiff, against which defendants Nos. 2 and 3 preferred separate appeals, the plaintiff being the sole respondent to each appeal. The District Judge on appeal passed a decree directing that the plaintiff should first proceed against all the property which was not subject to the hypothecation to defendant No. 3, including the share of defendant No. 2. Defendant No. 2 preferred a second appeal joining all the other parties:—(1) *Held*, that the plaintiff was under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit; (2) that as the plaintiff and defendant No. 3 were not creditors of the same person having demands against the property of that person, no case for marshalling arose, and consequently that the direction of the District Judge was wrong. *Per cur.*—Though both defendants Nos. 2 and 3 preferred separate appeals from the original decree, they only made the plaintiff respondent, and defendant No. 3 omitted to make the appellant before us (defendant No. 2) party to his appeal, but the relief prayed for in each appeal was that the original decree might be set aside so far as it was in plaintiff's favour and against each appellant.........Having regard to the relief claimed.........we see no reason to hold that the appellant before us was a necessary party to the appeal preferred by defendant No. 3. GOPALA v. SAMINADAYAN, 12 M. 255 ... 528

(17) *S.* 83—*Civil Procedure Code, s.* 375.—A sum of money having been deposited in Court under Transfer of Property Act, s. 83, by a vendee of the mortgagor, the mortgagee refused to accept it in discharge of his mortgage except on the terms that the depositor should convey to him part of the mortgage premises, which he consented to do. This agreement was not communicated to the Court and the depositor refused to carry it out when the mortgagee had withdrawn the money as above :—*Held*, that the mortgagee was entitled to a decree for specific performance of the agreement to convey. TATAYYA v. PICHAYYA, 13 M. 316 ... 932

(18) *Ss.* 92, 93—*Time fixed for redemption—Application to execute the decree.*—In a suit to redeem a kanom a redemption decree was passed which provided

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that the kanom amount and the value of improvements be paid in three months. The decree amount was not paid within that period, but the decree-holder applied to execute the decree at a later date:—*Held*, that the decree-holder was not then entitled to have the decree executed. ELAYADATH v. KRISHNA, 13 M. 267 ... 898

(19) S. 99—*Hindu law—Personal decree against managing member of joint family not impleaded as such—Effect of sale in execution of such decree—Sale of mortgage property in execution of decree on a money bond for interest due on the mortgage.*—The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family, to secure a debt incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money bond, and having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person:—*Held*, that the sale did not convey the interest of another undivided brother who was not a party to the decree:—*Held, further, per Kernan, J.*, that the sale in execution was invalid under Transfer of Property Act, s. 99. SATHUVAYYAN v. MUTTHUSAMI, 12 M. 325 ... 576

(20) Ss. 106, 108—*Landlord and tenant—Assignability of tenancy—Suit by zamindar to set aside a Court-sale of his raiyat's interest—Burden of proof.*—A zamindari raiyat mortgaged the land comprised in his holding, and the mortgagee, having sued and obtained a decree on his mortgage, attached the mortgagor's interest in the land and purchased it at the Court-sale held in execution of his decree. The zamindar, who had intervened unsuccessfully in execution, now sued to set aside the sale and to eject the decree-holder and the judgment-debtor from the land. Neither party adduced evidence:—*Held*, that as the burden of proof lay on the plaintiff, and had not been discharged, the suit must be dismissed. APPA RAU v. SUBBANNA, 13 M. 60 ... 752

(21) Ss. 130, 135, 136, 137—*Limitation Act—Act* XV *of* 1877, *sch.* II, *art.* 116—*Apportionment.*—A sued as assignee of a bond (payable in 1872), by hypothecating land in the mofussil. B, A's assignor, was a vakil practising in the High Court. B had obtained an assignment of the obligee's interest in the bond sued on, and also another bond for Rs. 3,000 between the same parties after the 1st July 1882, for Rs. 4,500. B had previously purchased the two bonds at a sale in execution of the decree of a Mofussil Court for Rs. 5 each. A's assignment from B purported to be made to A in payment of certain debts owed to him by B. No interest has been paid on the bond and no tender had been made to the plaintiff.—*Held* that the creditor's personal remedy was passed by art. 116 and on the evidence, that there was no consideration for the bond sued on or that it had failed.—*Per Cur.*—The true construction of s. 136 of the Transfer of Property Act appears to us to be that the officer mentioned in it habitually exercising their functions in a particular Court are precluded from buying any actionable claim cognizable by that Court ...... We are referred to no evidence on the record as showing that B practised as a pleader regularly in the Subordinate Court at Negapatam, and we must, therefore, overrule the contention that the assignment to him is inoperative altogether. There is, however, no doubt that the assignments to him and by him are governed by s. 135, and that under s. 137 the person to whom a debt is transferred takes it subject to the liabilities to which the transfer was subject at the date of the transfer. Upon the facts of the case B was clearly not entitled to recover more than Rs. 4,500, whatever might be due on the document. As he was the purchaser of an actionable claim, s. 135 of the Transfer of Property Act applied to him, and he could not recover more than the price, he paid and the interest due thereon. There is no foundation for the suggestion that, where two actionable bonds are brought together for Rs. 4, 500 and only Rs. 950 are recovered upon one of them, the assignee is precluded from recovering the difference, but that he must submit to a loss arising from an apportionment. RATHNASAMI v. SUBRAMANYA, 11 M. 56 ... 39

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(22) S. 135—*Assignment for value of a debt—Decree to which the assignee is entitled.*—In a suit against a debtor an assignee for value of the debt is precluded by Transfer of Property Act, s. 135, from recovering more than the price paid by him for the assignment with interest thereon and the incidental expenses of the sale. NILAKANTA v. KRISHNASAMI, 13 M. 225 (F.B.) ... 868

(23) S. 135 (*d*)—*Adjudication on claim.*—In a suit upon a hypothecation bond brought by an assignee for value from the obligee, it appeared that the obligee had previously to the assignment obtained a decree by consent against the obligors for an instalment of the money due upon it, and had also made good his claim to the land comprised in it as against an attaching creditor of the obligors :—*Held*, that there had been no adjudication on the claim to exclude the rule in Transfer of Property Act, s. 135, and accordingly the plaintiff was entitled to recover only the sum paid by him for the assignment with interest from the date of payment to the date of the decree. RAMACHANDRA v. VENKATARAMA, 13 M. 516 ... 1072

(24) S 136—*Purchase of actionable claim by officer of Court—Jurisdiction, meaning of term.*—Section 136 of Transfer of Property Act, 1882, provides that no officer connected with a Court of Justice can buy an actionable claim falling under the jurisdiction of the Court in which such officer exercises his functions. The plaintiff, an officer in a District Court, having purchased the rights of the mortgagee in a bond sued to recover Rs. 2,225 due upon it in the Court of the District Munsif :—*Held*, that as the claim did not fall under the immediate jurisdiction of the District Court, s. 136 was not applicable. SINGARACHARLU v. SIVABAI, 11 M. 498 ... 347

(25) S. 136—*Purchase of elephant with authority to recover the same from a stranger* :—The owner of certain land in consideration of a sum of money transferred to the plaintiff, a pleader, the right to elephants caught in pits in the owner's land, and the right to sue for the recovery of such elephants from any person in possession of them. The plaintiff sued the defendants to recover possession of an elephant which had been trapped and was in defendant's possession at the time of the transfer to plaintiff. The suit was dismissed on the ground that the plaintiff had bought an actionable claim within the meaning of s. 136 of the Transfer of Property Act, 1882 :—*Held*, that the section was not applicable. RAMAKRISHNA v. KURIKAL 11 M. 445 ... 310

Trust.

(1) *Improvements of estate—Rights of tenant for life and remainderman as to sums expended.*—A testator conveyed his property which consisted of extensive coffee estates to trustees upon trust as to part thereof for certain persons for life and then upon trusts for their children absolutely. A suit having been filed for the administration of the trusts of the will a receiver was appointed. On the application of the receiver, and with the consent of all parties, the Court sanctioned the extension of the estate. This was done by raising a loan on pledge of the profits of the estate, out of which, when realised, the loan was paid off. By the will, the trustees were empowered to raise money for the purpose of managing the estate at their absolute discretion, either by using the profits, or by pledging or selling the corpus. The tenants for life claimed that the loan might be declared a charge on the estate :—*Held*, that the extension was within the powers of the trustees, but that as between the lifetenants and the remaindermen, the former were entitled to have the sums expended on the improvements charged on the corpus, they keeping down the interest. OUCHTERLONY v. OUCHTERLONY, 11 M. 360 ... 251

(2) See STAMP ACT (I OF 1879), 12 M. 89.

Trustee.

Limitation—Adverse possession—Suit by a trustee of a devasom disaffirming the act of his predecessor.—The trustee of a Malabar devasom, who had succeeded to his office in June 1883, sued in 1887 to recover for the devasom possession of land which had been demised on kanom by his predecessor in February 1881, on the ground that the demise was invalid as against the devasom. The defendant had been in possession of the land for more

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than twelve years, falsely asserting the title of kanomdar with the permission of the plaintiff's predecessor in office:—*Held*, (1) the suit was not barred by limitation; (2) the plaintiff was entitled to maintain the suit for the purpose of recovering for the trusts of the devasom property improperly alienated by his predecessor. VEDAPURATTI v. VALLABHA, 13 M. 402 ... 992

Usage.

Trade—See SALE, 11 M. 459.

Vendor and Purchaser.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 13 M. 158.

Village Property.

As to what was the common property of a village, viz., a tank—Inability of any of the co-proprietors to exclude the rest from contributing to repair it.—A village tank, on the site of an ancient one, was the common property of and used by, all the inhabitants of whom one family, on the ground of improvements and additions made by their ancestor with the general acquiescence of the village, claimed, against the rest, the exclusive right of repairing the tank at their own cost. But no corresponding obligation on the plaintiffs to repair was shown; and from the evidence, including that afforded by a compromise made in 1842, it appeared that the repairs were to be effected by a common collection made through the person in management, who was to account for his receipts and expenses:—*Held*, that it was equally at the option of the rest of the villagers either to permit the repairs to be done by the plaintiffs, or to insist on the work being done at the common cost, the tank remaining the common possession of the village, and no class of the villagers having any right to exclude the rest from contributing to the repairs. SIVARAMAN CHETTI v. MUTHAYA CHETTI, 12 M. 241 (P.C.) = 16 I.A. 48 = 5 Sar P.C.J. 331 ... 518

Waiver.

(1) See LIMITATION ACT (XV OF 1877), 12 M. 192.

(2) See MALABAR LAW—MORTGAGE, 13 M. 490.

Will.

(1) *Construction of—Absolute gift—Repugnant gift over—Indefiniteness of gift—Reputed wife.*—On the construction of a will which was as follows:—"I hereby declare all former wills cancelled. I desire that my wife should obtain possession of all my property and enjoy the benefit of all monies that may accrue until her death, when I wish that whatever may remain shall be used for the education of the children of the Eurasian and Anglo-Indian community. I desire that this will be administered by the Official Trustee of Madras:" —*Held*, (1) that the reputed wife should take under the will without strict proof of the marriage, no fraud being imputed to her in the matter of the marriage; (2) that the gift to the wife was absolute and the gift over bad for repugnancy. ADMINISTRATOR-GENERAL OF MADRAS v. WHITE, 13 M. 379 ... 976

(2) Construction—See HINDU LAW—WILL, 11 M. 258.

Words and Phrases.

(1) "Capital"—See ACT V OF 1878 (CITY OF MADRAS, MUNICIPAL), 11 M. 238.

(2) "Carrying on business for gain"—See ACT V OF 1878 (CITY OF MADRAS, MUNICIPAL), 11 M. 238.

(3) "Conservancy clauses"—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 13 M. 142.

(4) "Court"—See REGISTRATION ACT (III OF 1877), 11 M. 3.

(5) "Court of lowest grade"—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 M. 145.

Words and Phrases—(*Concluded*).

(6) "Duly stamped"—See STAMP ACT (I OF 1879), 11 M. 377.

(7) "Instrument of partition"—See STAMP ACT (I OF 1879), 12 M. 133.

(8) "No Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so"—See SPECIFIC RELIEF ACT (I OF 1877), 12 M. 136.

(9) "Not competent"—See EVIDENCE ACT (I OF 1872), 12 M. 223.

(10) "Occupier of land"—See ACT V OF 1882 (MADRAS FORESTS), 12 M. 203.

(11) "Prescribed period"—See LIMITATION ACT (XV OF 1877), 11 M. 218.

(12) "Specified Property"—See STAMP ACT (I OF 1879), 11 M. 216.

(13) "Standing Crops"—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 11 M. 193.

(14) "Sufficient cause"—See LIMITATION ACT (XV OF 1877), 13 M. 269.

(15) "Yaumia allowance"—See ACT XXIII OF 1871 (PENSIONS), 11 M. 283.

Zamindars.

Impartibility—See HINDU LAW—IMPARTIBLE ESTATES, 11 M. 380; 13 M. 197; 13 M. 406.

PRINTED AT THE LAW PRINTING HOUSE. MOUNT ROAD, MADRAS.